

# Hate Crimes, Terrorism, and the Framing of White Supremacist Violence

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*Even before the assault on the Capitol on January 6, 2021, a rising chorus of policymakers and pundits had called for treating White supremacist violence as “terrorism.” After multiple mass shootings motivated by White supremacist ideology, commentators argued that the “hate crime” label failed to convey the political nature of the violence or assign it the stigma and attention it deserved. This Article unpacks the historical roots and contemporary implications of the hate crimes and terrorism frames. First, it explains how the “hate crimes” and “terrorism” frames took hold in our law and culture, such that they now provide alternative frames for interpreting and responding to White supremacist violence. It draws on “frame analysis” from a variety of disciplines and the work of sociologists, historians, and legal scholars to explain the historical evolution of the hate crimes and terrorism frames. Second, the Article contends that the decision to frame violence as hate crimes or terrorism matters because these frames diverge starkly in their conceptualization and legal treatment of five issues: the nature and severity of the threat; the reactive versus preventative nature of the law enforcement response; the perceived redeemability of perpetrators; the identity of victims and perpetrators; and the role of individual rights and courts. Calls to treat White supremacist violence as terrorism push responses closer towards features of the terrorism frame, though legal, cultural, and political constraints would prevent a complete adoption of that frame. Third, the Article argues that neither the hate crimes nor terrorism frame is consistent with evolving notions of racial justice. The move to reframe White supremacist violence as terrorism comes with grave risks: it shifts institutional power towards a national security apparatus and experts detached from affected communities; it entrenches preemptive law enforcement practices that investigate and imprison people on suspicion of future threats; and it risks the greater targeting of subordinated communities and groups appearing to challenge the dominant racial and socioeconomic order. The response to White supremacist violence should begin with a critical reexamination of both frames.*

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DOI: <https://doi.org/10.15779/Z38XS5JH96>

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## INTRODUCTION

When a crowd of Trump loyalists stormed the Capitol on January 6, 2021, seeking to disrupt the certification of President Biden’s victory, commentators struggled to describe what had transpired. Was it an insurrection? An autogolpe, or self-coup? A seditious conspiracy? As security agencies warned of more violence to come, many turned to the label of “domestic terrorism” to characterize the threat. And in June 2021, President Biden released what was billed as the first-ever national strategy for countering domestic terrorism, which included plans to increase surveillance, add suspects to terrorist watchlists, and otherwise preempt and punish racially motivated, anti-government, and other forms of ideological violence.<sup>1</sup>

For several years before the invasion of the Capitol, some security officials, political leaders, and commentators had advocated framing White supremacist violence as terrorism. Many such calls originated in 2015, after a White supremacist massacred nine Black worshippers at a Charleston church. Some argued that the label of “hate crime” did not adequately stigmatize the violence unleashed, and that “terrorism” better conveyed the systemic nature of White supremacist violence and the prioritization it deserved.<sup>2</sup> Many condemned the racially disparate nature of public and government responses to political violence, contrasting the castigation of Muslims and people of color as terrorists with the willingness to dismiss White supremacists as “whacked out kids.”<sup>3</sup> In the years since Charleston, further acts of violence targeted racial or religious minorities and their allies in Charlottesville, Pittsburgh, and El Paso, with perpetrators acting out of a perceived threat of White “replacement.”<sup>4</sup> After such incidents, when commentators asked, “Was this a hate crime or was this terrorism?,” public officials increasingly answered that such acts should be branded and charged as terrorism.

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1. NAT’L SEC. COUNCIL, EXEC. OFF. OF THE PRESIDENT, NATIONAL STRATEGY FOR COUNTERING DOMESTIC TERRORISM (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf> [<https://perma.cc/UT3F-QQ6V>].

2. See, e.g., Jelani Cobb, *Terrorism in Charleston*, NEW YORKER (June 20, 2015), <https://www.newyorker.com/magazine/2015/06/29/terrorism-in-charleston> [<https://perma.cc/86W7-KBPW>].

3. Maeve Reston, *Lindsey Graham: Niece Went to School with Shooting Suspect*, CNN (June 18, 2015), <https://www.cnn.com/2015/06/18/politics/lindsey-graham-charleston-shooting/index.html> [<https://perma.cc/WR33-P4MW>] (describing Sen. Lindsey Graham’s characterization of Charleston shooter Dylann Roof as “one of these whacked out kids”); see *infra* Part IV.A.

4. See, e.g., John Eligon, *The El Paso Scream, and the Racist Doctrine Behind It*, N.Y. TIMES (Aug. 7, 2019), <https://www.nytimes.com/2019/08/07/us/el-paso-shooting-racism.html> [<https://perma.cc/CNM9-9UW6>] (discussing racist “great replacement” theory that motivated White supremacist killings); Zack Beauchamp, *The El Paso Shooting Isn’t an Anomaly. It’s American History Repeating Itself.*, VOX (Aug. 6, 2019), <https://www.vox.com/policy-and-politics/2019/8/6/20754828/el-paso-shooting-white-supremacy-rise> [<https://perma.cc/B8TW-7XNL>] (same).

The ubiquity of the question with respect to racist violence—was it a hate crime or was it terrorism?—reflects the predominance that both of these *frames* have acquired in our law and culture. By “frame,” I mean an organizing concept through which a particular set of laws, policies, government practices, and cultural understandings defines and responds to a social problem. A substantial amount of violence by White supremacists, though not all, fits common legal and academic definitions of both “hate crimes” and “terrorism”: such violence often targets victims on the basis of their race, religion, ethnicity, or other legally defined characteristics, and it often does so with the intent to affect government policy through intimidation or coercion.<sup>5</sup> But the categorization of that violence as either hate crimes or terrorism is not inevitable. Indeed, despite the fact that White supremacist violence has existed for centuries in the United States, it was not primarily described as either hate crimes or terrorism until recent decades, even when it was condemned. This Article explains how the hate crimes and terrorism frames took hold in our law and culture, such that they now supply the most natural categories for interpreting and responding to White supremacist violence. I draw on “frame analysis” from a variety of disciplines and the work of sociologists, historians, and legal scholars to explain the historical evolution of the hate crimes and terrorism frames.

Yet the question of framing is not one merely of historical interest. Adopting a hate crimes or terrorism frame generates important legal and political consequences today. These frames differ markedly from one another in how they conceptualize five issues: the nature and severity of the threat; the type of law enforcement response; the nature of perpetrators; the identity of victims and perpetrators; and the role of individual rights and courts. First, while hate crimes are construed as a civil rights and criminal law problem, terrorism is seen as a far more serious problem, with dimensions of both crime and war, to be addressed with national security strategies. Second, law enforcement agencies take a reactive approach to hate crimes that focuses on after-the-fact investigation and prosecution, while they apply a preventative approach to terrorism. Third, the law treats hate crime perpetrators as deserving of greater punishment than other defendants, but as ultimately redeemable; meanwhile, the law treats those affiliated with terrorism as perpetually dangerous criminals, if not enemy combatants. Fourth, the hate crimes frame casts identity groups as the primary victims, whereby prototypical victims are minority-group members and prototypical perpetrators are majority-group members; the terrorism frame considers the nation as the primary victim, often represented as a White or multiracial entity, and it casts perpetrators as foreigners who are prototypically Muslim and non-White. Fifth, hate crime law embodies strong First Amendment protection for defendants and weak judicial deference to the executive branch, while terrorism cases reflect weak First Amendment protection and strong judicial deference, even when individual rights are implicated.

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5. See *infra* Part II.A.

Given these stark differences, the push to reframe White supremacist violence as terrorism invites profound consequences. To be clear, the current legal architecture for terrorism differentiates between “international” and “domestic” terrorism in ways that constrain the legal treatment of domestic terrorism—a subject of my earlier work.<sup>6</sup> In addition, the racial and political identity of White supremacists provides that group a measure of protection that other non-White groups do not enjoy. For both those reasons, the terrorism reframing of White supremacist violence will not be complete, in that the conceptualization of, and response to, such violence will not fully take on the characteristics of the terrorism frame. Yet the move to label, regulate, investigate, and prosecute White supremacist violence as terrorism—including through the proposed enactment of new laws—pushes it further towards the existing terrorism frame.

The problem is that *neither* the hate crimes nor terrorism frame addresses White supremacist violence in a way consistent with evolving ideas of racial justice. While hate crime laws arose from the efforts of civil rights advocates and marginalized communities to address real violence targeting their communities, they took shape against a backdrop of law-and-order politics and conservative backlash to civil rights. As a result, these laws responded to hate crimes as a problem of biased individuals, unconnected to ideology or social structures, to be addressed primarily through lengthening incarceration.

Some imagine that reframing White supremacist violence as terrorism will thereby recognize the ideological and systemic nature of the threat, assign it the preeminent stigma of terrorism, and shift state resources and prioritization towards the threat. But the move comes with grave risks: it shifts institutional power towards a national security apparatus and an industry of “terrorism experts” far removed from affected communities; it entrenches preemptive law enforcement practices that surveil and prosecute people on suspicion of future threats; and it ignores the U.S. tendency to respond most severely to security threats appearing to challenge the dominant racial and socioeconomic order. A racial justice approach to White supremacist violence must begin with critical attention to state violence and repression. This does not mean that every law in place for responding to hate crimes or terrorism is unjust. Questions about individual laws or programs, existing or proposed, must be addressed with greater nuance than has characterized the debate to date. But those questions cannot be answered without deeper consideration of the fraught histories and contemporary effects of the hate crimes and terrorism frames.

This Article proceeds as follows. Part I describes the threat of violence by White supremacists, including its scope, level of organization, and complicated relationship with the state. Part II explains how a substantial amount of White supremacist violence fits within common definitions of both hate crimes and

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6. See Shirin Sinnar, *Separate and Unequal: The Law of “Domestic” and “International” Terrorism*, 117 MICH. L. REV. 1333 (2019) [hereinafter Sinnar, *Separate and Unequal*].

terrorism and how these two frames developed in the last decades of the twentieth century. It also describes how “domestic terrorism” developed as a legal and rhetorical category, especially after 9/11, to distinguish it from counterterrorism applied to Muslims. Part III analyzes how the hate crimes and terrorism frames diverge with respect to the five issues identified above: the nature and severity of the threat; the type of law enforcement response; the characterization of perpetrators; the identity of victims and perpetrators; and the role of individual rights and courts. Part IV highlights the limits of the hate crimes frame, warns against the expansion of counterterrorism, and sketches preliminary ideas for an approach to White supremacist violence more aligned with ideas of racial justice.

## I.

### CONTEMPORARY WHITE SUPREMACIST VIOLENCE

In the last several years, criminologists, terrorism researchers, and government agencies have converged on the view that violence by White supremacists presents an urgent threat. This Section explores threat assessments of White supremacist violence, the relationship between such violence and organized groups, and the complex and shifting relationship of White supremacist violence to state institutions. For purposes of this Article, I define White supremacist violence as the use or threat of force by non-state actors motivated by a belief in the superiority of the White race.<sup>7</sup>

#### A. *The Scale of White Supremacist Violence*

Recent studies quantifying political violence within the United States have highlighted the threat posed by White supremacist violence. One study found that “right-wing attacks and plots,” including by White supremacists, constituted a majority of terrorist incidents in the United States from 1994 to 2020 and a majority of deaths in fourteen of the twenty-one years in which fatalities occurred.<sup>8</sup> Studies also noted that right-wing attacks had escalated in recent years

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7. As Parts I.C. and IV.D make clear, this focus on non-state actors does not mean that the state does not also perpetrate similar violence or that non-state violence is unrelated to state institutions. In other work, I have explored government policies, such as the Trump administration’s immigration policy, as a manifestation of White nationalism. See, e.g., Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197 (2019).

8. SETH G. JONES, CATRINA DOXSEE & NICHOLAS HARRINGTON, CTR. FOR STRATEGIC & INT’L STUD., THE ESCALATING TERRORISM PROBLEM IN THE UNITED STATES 1, 3 (2020), [https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/200612\\_Jones\\_DomesticTerrorism\\_v6.pdf](https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/200612_Jones_DomesticTerrorism_v6.pdf) [<https://perma.cc/4E98-ERC6>]. The CSIS study defines terrorism as the “deliberate use—or threat—of violence by non-state actors in order to achieve political goals and create a broad psychological impact,” and right-wing terrorism as “the use or threat of violence by sub-national or non-state entities whose goals may include racial or ethnic supremacy; opposition to government authority; anger at women, including from the incel (‘involuntarily celibate’) movement; and outrage against certain policies, such as abortion.” *Id.* at 2; see also Joshua D. Freilich, Steven M. Chermak, Jeff Gruenewald, William S. Parkin & Brent R. Klein, *Patterns of Fatal Extreme-Right Crime in the United States*, 12 PERSPS. ON TERRORISM 38, 38–39 (2018) (describing the U.S. “extreme-right” as “consistently . . . one of the top

and had victimized more people than had attacks by Islamist extremists.<sup>9</sup> Despite the overwhelming focus by national security agencies on terrorism by Muslims, “far-right terrorism has significantly outpaced terrorism from other types of perpetrators, including from far-left networks and individuals inspired by the Islamic State and al-Qaeda.”<sup>10</sup> Since 9/11, another report found, the death toll from right-wing violence in the United States had exceeded that of “jihadist” violence and far outnumbered deaths from attacks inspired by Black separatist or far-left ideologies.<sup>11</sup> And within the category of far-right violence, White supremacists were especially lethal; one study noted that extreme-right individuals who committed homicides between 1990 and 2008 were “overwhelmingly [W]hite males who adhere to beliefs of [W]hite supremacism.”<sup>12</sup>

Spectacular incidents of violence by avowed White supremacists made the threat difficult to ignore, including the 2015 massacre of Black congregants in a Charleston church, the 2017 Charlottesville neo-Nazi march that culminated in the killing of an anti-racist protestor, the 2018 massacre of worshippers at a Pittsburgh synagogue, and the 2019 mass shooting of Latinx people in an El Paso Walmart. While lone individuals committed these incidents, a new set of racist and neo-Nazi extremist groups—such as Atomwaffen, the Rise Above Movement, and The Base—organized in service of a race war.<sup>13</sup>

Security agencies recognized the threat, if belatedly, even during the Trump administration. In late 2020, the Department of Homeland Security declared White supremacists the most significant threat among “domestic violent extremists.”<sup>14</sup> The FBI elevated the threat of “racially motivated violent

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threats to public safety over the last 50 years,” based on numbers of attacks and assessments of law enforcement agencies, in contrast to fluctuating activity levels of far-left and Islamist threats).

9. JONES ET AL., *supra* note 8, at 1 (noting that “the total number of right-wing attacks and plots has grown significantly during the past six years”).

10. *Id.*

11. See PETER BERGEN & DAVID STERMAN, NEW AM. FOUND., *What is the Threat to United States Today?*, in TERRORISM IN AMERICA YEARS AFTER 9/11 (2021), <https://www.newamerica.org/in-depth/terrorism-in-america/what-threat-united-states-today/> [<https://perma.cc/V7G6-JXTQ>] (reporting 114 far-right deaths, 107 from “jihadist” motivations, twelve from “Black Separatist/Nationalist/Supremacist” ideology and one from “Far Left Wing” sources).

12. Freilich et al., *supra* note 8, at 43.

13. See, e.g., A.C. Thompson, Ali Winston & Darwin BondGraham, *Racist, Violent, Unpunished: A White Hate Group’s Campaign of Menace*, PROPUBLICA (Oct. 19, 2017), <https://www.propublica.org/article/white-hate-group-campaign-of-menace-rise-above-movement> [<https://perma.cc/FT6J-WWSL>]; Jonah Engel Bromwich, *What Is Atomwaffen? A Neo-Nazi Group, Linked to Multiple Murders*, N.Y. TIMES (Feb. 12, 2018), <https://www.nytimes.com/2018/02/12/us/what-is-atomwaffen.html> [<https://perma.cc/BN4K-GHYE>]; Neil MacFarquhar & Adam Goldman, *A New Face of White Supremacy: Plots Expose Danger of the ‘Base,’* N.Y. TIMES (Jan. 22, 2020), <https://www.nytimes.com/2020/01/22/us/white-supremacy-the-base.html> [<https://perma.cc/8AYZ-U9L9>].

14. See U.S. DEP’T OF HOMELAND SEC., HOMELAND THREAT ASSESSMENT OCTOBER 2020 17, 18 (2020) [hereinafter HOMELAND THREAT ASSESSMENT OCTOBER 2020], [https://www.dhs.gov/sites/default/files/publications/2020\\_10\\_06\\_homeland-threat-assessment.pdf](https://www.dhs.gov/sites/default/files/publications/2020_10_06_homeland-threat-assessment.pdf) [<https://perma.cc/L68V-5U8X>] (“Among DVEs, racially and ethnically motivated extremists—

extremism” to a national priority in 2020, placing it “on the same footing as ISIS.”<sup>15</sup> The acting director of the National Counterterrorism Center observed that, since 2018, individuals “unconnected to the radical Islamist terrorism” had committed “the vast majority of lethal homeland terrorist attacks,” most by “lone actors adhering to a racially- or ethnically-motivated violent extremist ideology.”<sup>16</sup> More such attacks occurred in 2019 than any other year since 1995, the year that the Oklahoma City bombing killed 168 people.<sup>17</sup>

But the assault on the Capitol on January 6, 2021, drove home the urgency of the threat to democracy from political violence. Encouraged by President Trump and Republican members of Congress who supported President Trump’s baseless claims of election fraud, hundreds of people stormed the Capitol in an attempt to subvert Congress’s traditionally ceremonial certification of the election results.<sup>18</sup>

### B. *Separating White Supremacist Violence from Other Far-Right Threats*

As with the Capitol insurrection itself, scholars have disagreed over which violent acts or far-right groups should be characterized as White supremacist. The crowd that entered the Capitol on January 6 was overwhelmingly White, displayed White supremacist symbols, and included members of far-right groups that espouse White supremacist ideas.<sup>19</sup> One study concluded that those arrested disproportionately came from counties with the greatest declines in White populations, supporting the idea that racial resentment contributed to

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specifically [W]hite supremacist extremists (WSEs)—will remain the most persistent and lethal threat in the Homeland.”).

15. *Oversight of the Federal Bureau of Investigation: Hearing Before the H. Comm. on Judiciary*, 116th Cong. (2021) (statement of Christopher A. Wray, Dir., Fed. Bureau of Investigation).

16. *Global Terrorism: Threats to the Homeland, Part II: Hearing Before the H. Comm. on Homeland Sec.*, 116th Cong. 3 (2019) [hereinafter *Global Terrorism Hearing*] (statement of Russell Travers, Acting Dir., Nat’l Counterterrorism Ctr.).

17. *Id.*

18. Dan Barry, Mike McIntire & Matthew Rosenberg, ‘Our President Wants Us Here’: The Mob That Stormed the Capitol, N.Y. TIMES (Nov. 10, 2021), <https://www.nytimes.com/2021/01/09/us/capitol-rioters.html> [https://perma.cc/6FC5-R3XP] (originally published Jan. 9, 2021); Cameron Peters, *Hawley and Cruz Face Mounting Calls to Resign over Push to Overturn Election*, VOX (Jan. 10, 2021), <https://www.vox.com/2021/1/9/22222134/hawley-and-cruz-calls-to-resign-overturm-election> [https://perma.cc/97EW-QJ2E].

19. See Robert A. Pape, *What an Analysis of 377 Americans Arrested or Charged in the Capitol Insurrection Tells Us*, WASH. POST (Apr. 6, 2021), <https://www.washingtonpost.com/opinions/2021/04/06/capitol-insurrection-arrests-cpost-analysis/> [https://perma.cc/D46H-UCGZ] (finding that 95 percent of people arrested or charged were White); Devlin Barrett, Abigail Hauslohner, Spencer S. Hsu & Ashlyn Still, *A Sprawling Investigation: What We Know So Far About the Capitol Riot Suspects*, WASH. POST (May 13, 2021), <https://www.washingtonpost.com/nation/interactive/2021/capitol-riot-arrests-investigation/> [https://perma.cc/UP8M-7YEK] (noting arrests of twenty-nine members of Proud Boys). The Proud Boys has described itself as a “Western chauvinist” group. Will Carless, *Proud Boys Splintering After Capitol Riot, Revelations About Leader. Will More Radical Factions Emerge?*, USA TODAY (Feb. 12, 2021), <https://www.usatoday.com/story/news/nation/2021/02/12/proud-boys-splintering-after-capitol-riot-revelations-leader/6709017002/> [https://perma.cc/2C6Z-93MH].



participation.<sup>20</sup> But those who took part, including people of color, expressed a range of anti-government, conspiratorial, and pro-Trump motives, and mostly did not belong to organized political groups.<sup>21</sup>

Some researchers have classified a range of far-right organizations as part of a “White power movement.” Criminologists Pete Simi and Robert Futrell, who interviewed and studied activists in the White Aryan Resistance, Ku Klux Klan, Hammerskin Nation, and National Alliance between 1996 and 2006, considered these groups part of a social movement that subscribed to the “ideology that the [W]hite race is genetically and culturally superior to all [non-White] races and deserves to rule over them.”<sup>22</sup> Historian Kathleen Belew described an even wider White power social movement that unified “members of the Klan, militias, radical tax resisters, [W]hite separatists, neo-Nazis, and proponents of [W]hite theologies such as Christian Identity, Odinism and Dualism between 1975 and 1995.”<sup>23</sup>

Others have disputed the extent to which far-right movements, especially anti-government militias, are White supremacist. A report from George Washington University’s Program on Extremism contended that White supremacy remains a staple of far-right ideologies—and the ideology linked to a plurality of U.S. right-wing terrorist attacks and plots—but cannot be conflated with the far-right as a whole or ascribed to most participants in the anti-government “Patriot” movement.<sup>24</sup> In a similar vein, historian Robert Churchill argued that prevailing accounts overstate the significance of White supremacy and nativism in the post-Cold War militia movement and fail to distinguish between the militias’ (more multi-racial) “constitutionalist” wing and its (more nativist) “millennialist” wing.<sup>25</sup>

Ideological emphases also change over time. For instance, criminologists Joshua Freilich and colleagues noted that, while beliefs in nationalism,

20. See Pape, *supra* note 19.

21. See Barrett et al., *supra* note 19; Hannah Allam & Razzan Nakhlawi, *Black, Brown and Extremist: Across the Far-Right Spectrum, People of Color Play a More Visible Role*, WASH. POST (May 16, 2021), [https://www.washingtonpost.com/national-security/minorities-far-right-visible-role/2021/05/16/e7ba8338-a915-11eb-8c1a-56f0cb4ff3b5\\_story.html](https://www.washingtonpost.com/national-security/minorities-far-right-visible-role/2021/05/16/e7ba8338-a915-11eb-8c1a-56f0cb4ff3b5_story.html) [https://perma.cc/M7CW-CBBY].

22. PETE SIMI & ROBERT FUTRELL, *AMERICAN SWASTIKA: INSIDE THE WHITE POWER MOVEMENT’S HIDDEN SPACES OF HATE 2* (2010). Simi and Futrell identified the movement as having four branches: the Ku Klux Klan; Christian Identity sects (that espouse White supremacy based on interpretations of the Bible) and racist neo-Pagans; neo-Nazis; and racist skinheads (the “youngest branch” of the movement). *Id.* at 10–16.

23. KATHLEEN BELEW, *BRING THE WAR HOME: THE WHITE POWER MOVEMENT AND PARAMILITARY AMERICA*, at ix (2018).

24. See MARK PITCAVAGE, *GEORGE WASH. U. PROGRAM ON EXTREMISM, SURVEYING THE LANDSCAPE OF THE AMERICAN FAR RIGHT 2*, 6–7 (2019).

25. ROBERT H. CHURCHILL, *TO SHAKE THEIR GUNS IN THE TYRANT’S FACE: LIBERTARIAN POLITICAL VIOLENCE AND THE ORIGINS OF THE MILITIA MOVEMENT 7–10*, 265 (2009); see also *id.* at 16 (“But to sum up either the militia movement or earlier insurgencies as expressions of racial anxiety and identity runs the risk of effacing the complex influences of religion, rural culture, localism, and libertarianism. It would also bury the voices of many militia members who have denounced the doctrines of [W]hite supremacy as un-Christian, unpatriotic, and un-American.”).

individual liberty, and the defense of one's "way of life" characterize the U.S. "extreme right," it is possible that "a more globalist preoccupation with race" may be displacing the U.S. movement's nationalistic orientation.<sup>26</sup> Furthermore, some researchers have observed that shared ideas are now linking White supremacists and other far-right activists. For example, many share a belief in "accelerationism," the promotion of acts of violence to accelerate the destabilization of current political systems in favor of fascist or ethnonationalist states.<sup>27</sup> The spread of accelerationism has created an "incendiary mix of [W]hite supremacists, militia members, and new formations like the Boogaloo Bois, increasingly interested in bringing about the collapse of society through violence."<sup>28</sup>

### C. Level of Organization

White supremacist violence consists of less and more organized forms of violence, with scholars disagreeing on the precise mix. Some scholars have emphasized the contemporary prevalence of "lone wolf" violence. For instance, one study declared an "age of lone wolf terrorism" arising out of multiple ideologies, including White supremacy, and contended that lone wolf terrorists since 9/11 are less likely to exhibit affinity with extremist organizations than lone actors of the past, and more likely to find support from online networks.<sup>29</sup> Security agencies have also presented the threat of White supremacists as primarily one of lone actors, often inspired online.<sup>30</sup>

Others have challenged the characterization of such incidents as isolated acts by lone individuals.<sup>31</sup> Simi argued that White supremacist terrorism is decentralized but not disorganized, and that individual incidents of violence should be seen as part of a movement's "larger strategy of violence" rather than acts of "deranged gunmen."<sup>32</sup> Belew contended that government actors and the media have long understated the connections between white supremacist acts. She highlighted the 1996 Oklahoma City bombing as a key example: despite the popular understanding of that attack as the work of a single individual, Timothy

26. Freilich et al., *supra* note 8, at 38, 39–40.

27. See *Assessing the Threat from Accelerationists and Far-Right Militia Extremists: Hearing Before Subcomm. on Intel. and Counterterrorism, H. Comm. on Homeland Sec.*, 116th Cong. 1–2 (2020) (written statement of Heidi L. Beirich, Co-Founder, Glob. Project Against Hate and Extremism).

28. *Id.* at 3.

29. MARK S. HAMM & RAMÓN SPAAN, *THE AGE OF LONE WOLF TERRORISM* 1–5, 74 (2017).

30. See *Global Terrorism Hearing*, *supra* note 16, at 3 (statement of Russell Travers, Acting Dir., Nat'l Counterterrorism Ctr.) (pointing to the threat of "lone actors adhering to a racially- or ethnically-motivated violent extremist ideology who have been radicalized, in part on-line"); *Worldwide Threats to the Homeland: Hearing Before the H. Comm. on Homeland Sec.*, 116th Cong. (2019) [hereinafter *Worldwide Threats to the Homeland Hearing*] (statement of Christopher Wray, Dir., Fed. Bureau of Investigation) (stating that "the FBI is most concerned about lone offender attacks, primarily shootings, as they have served as the dominant lethal mode for domestic violent extremist attacks").

31. See Pete Simi, *Why Study White Supremacist Terror? A Research Note*, 31 *DEVIANT BEHAV.* 251, 252, 254 (2010); BELEW, *supra* note 23, at 237.

32. Simi, *supra* note 31, at 258–60.

McVeigh acted in line with White power objectives, took his plot from *The Turner Diaries* (the notorious racist novel depicting the overthrow of the government and the annihilation of non-White people), chose his target from an earlier White power incident, and had support from resistance cells.<sup>33</sup>

Another literature has aimed to ascertain empirically the relationship between “hate groups” and acts of bias-motivated or ideological violence. Researchers agree that most people who commit hate crimes—generally defined as crimes targeting individuals on the basis of race, ethnicity, religion, or other legally specified categories—do not belong to hate groups.<sup>34</sup> But they disagree over the influence these groups have over the commission of hate crimes.<sup>35</sup> Several studies have asked whether the geographic presence of “hate groups” correlates with higher rates of hate crimes.<sup>36</sup> While one study based on state-level data found no such association,<sup>37</sup> later studies linked the presence of hate groups in a county to a higher rate of hate crimes<sup>38</sup> or a greater number of far-right ideologically motivated homicides.<sup>39</sup> The latter studies contended that either hate groups’ direct advocacy of racial violence or their implicit endorsement of it lead their members or supporters in an area to commit hate crimes.<sup>40</sup>

But these studies may not capture the effect of organized forms of White supremacist activity for more fundamental reasons. Simi argued that a focus on hate group membership misunderstands the decentralization of White supremacist networks, which are more likely to influence people through propaganda in the form of websites, online videos, or music rather than through enlistment.<sup>41</sup> Moreover, a focus on the geographic location of hate groups

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33. See BELEW, *supra* note 23, at 205, 210–11. Belew argued that the FBI treated McVeigh as a lone actor in part for political reasons: the agency’s interventions with far-right militants in the early 1990s had ended in civilian deaths and widespread controversy, while attempts to try White power activists warring against the state had ended in embarrassing acquittals. *Id.* at 187–88, 211.

34. See, e.g., PHYLLIS GERSTENFELD, *HATE CRIMES: CAUSES, CONTROLS, AND CONTROVERSIES* 99 (4th ed. 2018); JEANNINE BELL, *HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICAN HOUSING* 5 (2013).

35. See, e.g., Simi, *supra* note 31, at 256.

36. See, e.g., Matt E. Ryan & Peter T. Leeson, *Hate Groups and Hate Crime*, 31 INT’L REV. L. & ECON. 256 (2011); Sean E. Mulholland, *White Supremacist Groups and Hate Crime*, 157 PUB. CHOICE 91 (2013); Amy Adamczyk, Jeff Gruenewald, Steven M. Chermak & Joshua D. Freilich, *The Relationship Between Hate Groups and Far-Right Ideological Violence*, 30 J. CONTEMP. CRIM. JUST. 310 (2014). All three of these studies used data from the Southern Poverty Law Center (SPLC), a nonprofit organization, to determine the number of hate groups in a locality. The SPLC defined hate groups as organizations whose “beliefs or practices . . . attack or malign an entire class of people, typically for their immutable characteristics.” Ryan & Leeson, *supra* at 256. For debates over the SPLC’s methodology in labeling hate groups, see David Montgomery, *The State of Hate*, WASH. POST MAG. (Nov. 8, 2018), <https://www.washingtonpost.com/news/magazine/wp/2018/11/08/feature/is-the-southern-poverty-law-center-judging-hate-fairly/> [<https://perma.cc/E4BM-HFBT>].

37. See Ryan & Leeson, *supra* note 36, at 257 (using state-level data on hate crimes from the FBI and state-level data from the SPLC on hate groups).

38. See Mulholland, *supra* note 36, at 93, 109.

39. See Adamczyk et al., *supra* note 36, at 325.

40. See Mulholland, *supra* note 36, at 110; Adamczyk et al., *supra* note 36, at 316.

41. See Simi, *supra* note 31, at 256.

disregards the ever-increasing centrality of the Internet in White supremacist organizing and community-building. While individuals may act alone and claim no formal group membership, online networks play a key role in popularizing ideas and legitimizing violence. Common ideas appear behind many acts of violence, especially the notion that the White race is in danger of “replacement” and “genocide.”<sup>42</sup>

#### D. Relationship to the State

White supremacist violence has a complicated and historically shifting relationship to the state and state institutions. The state, of course, has purveyed such violence directly and continues to do so through official acts—whether in the expulsion and conquest of Native peoples and the protection of slavery, the participation of state officials in lynchings, or police violence against people of color. With respect to White supremacist violence not directly perpetrated by the state, alignment with the state fluctuates over time and across contexts. Affiliation with the state varies based on factors including the level of government, who is in power, whether those in power support certain policies, and strategic decisions on the part of groups or movements. Even when White supremacists oppose particular governments, however, people, resources, and ideas often flow between military and law enforcement institutions and the White supremacist movement.

Belew argued that the White power movement made a “tectonic shift” to targeting the state in the early 1980s. Groups like the Ku Klux Klan and other White supremacists had often engaged in vigilante violence in service of the state, but in 1983, following an Aryan Nations World Congress gathering of White power leaders, the movement “declared war on the state” in an effort to establish a White homeland.<sup>43</sup> That war on the state consisted of attacks on federal officials and public infrastructure, paramilitary preparation for a race war, and a “leaderless resistance” strategy of cell-based organizing to evade detection.<sup>44</sup> Belew viewed the shift as part of a periodic, historical shift by violent White supremacists from supporting the state to challenging it. “Because [W]hite supremacy undergirded state power throughout U.S. history,” she contended, “vigilantes most often served the [W]hite power structure.”<sup>45</sup> But, occasionally, violent White supremacists fought against federal power, as when the first Klan fought the federal government’s efforts to protect freed slaves during Reconstruction or when the third Klan fought desegregation in the civil rights era.<sup>46</sup> The White power movement of the 1980s and 1990s took such

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42. For more on the growing invocation of the “great replacement” theory postulating the extinction of the White race and their replacement by non-White people, see, for example, Eligon, *supra* note 4; Beauchamp, *supra* note 4.

43. BELEW, *supra* note 23, at 2, 7, 104–05.

44. *Id.* at 104–13. For more on this notion of “leaderless resistance,” see *id.* at 105–06, 234.

45. *Id.* at 106.

46. *Id.* at 107.

revolutionary challenges even further in seeking to overthrow the federal government entirely.<sup>47</sup>

The opposite shift occurred after the election of President Donald Trump. Seeing an ally in the White House, far-right militant groups like the 25,000-member Oath Keepers recast themselves from revolutionaries to defenders of the presidency and the country against perceived threats (immigrants, leftist protestors, fraudulent voters, etc.).<sup>48</sup> Trump's anti-immigration policies, law-and-order rhetoric against racial justice protestors, and tacit support for White supremacists—as in his comments excusing the Charlottesville “Unite the Right” gathering and supporting the Proud Boys, a self-described “western chauvinist” group—solidified the alliance between White supremacist groups and the President, at least while he remained in office.<sup>49</sup>

In recent decades, White supremacist violence has regularly targeted both members of minority groups and government officials and institutions thought to be betraying White people. Several criminologists observed that the “extreme-right” often targets law enforcement and government officials, as in the murders of fifty police officers since 1990, but that the extreme right has mostly killed people of color, “typically African Americans and Latinos.”<sup>50</sup> In the late 1980s, neo-Nazi skinheads targeted what they saw as a “Zionist Occupied Government” through killing and attacking Black, LGBTQ+, Latinx, and other minorities “for the specific purpose of instilling fear in innocent people.”<sup>51</sup>

Even when White supremacists do not formally identify with the state, people and resources often flow between force-deploying state institutions and external racist organizing. To some extent, the prominence of veterans and law enforcement personnel in paramilitary organizations may cut across ideology, whether because similar people are attracted to these kinds of organizations or because those with military or law enforcement training ascend to leadership in

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47. *Id.*

48. See Mike Giglio, *A Pro-Trump Militant Group Has Recruited Thousands of Police, Soldiers, and Veterans*, ATLANTIC (Nov. 2020), <https://www.theatlantic.com/magazine/archive/2020/11/right-wing-militias-civil-war/616473/> [<https://perma.cc/D4G7-V2MQ>] (describing the Oath Keepers's ideology and recruitment); see also PITCAVAGE, *supra* note 24, at 7 (noting militias' redirection of anger from the federal government to “Muslims, immigrants, and antifa” following Trump's election).

49. See Neil MacFarquhar, Alan Feuer, Mike Baker & Sheera Frenkel, *Far-Right Group That Trades in Political Violence Gets a Boost*, N.Y. TIMES (Mar. 5, 2021), <https://www.nytimes.com/2020/09/30/us/proud-boys-trump.html> [<https://perma.cc/KDW4-7V54>] (describing Trump's “Proud Boys, stand back and stand by” comment in presidential debate and group's reactions); Jennifer Steinhauer, *Veterans Fortify the Ranks of Militias Aligned with Trump's Views*, N.Y. TIMES (June 10, 2021), <https://www.nytimes.com/2020/09/11/us/politics/veterans-trump-protests-militias.html> [<https://perma.cc/79UQ-DDSP>] (noting militia members' support for Trump despite historic opposition to the federal government). Now that Trump is no longer president, these groups may return to opposing the federal government, and some may part with Trump himself given his failure to pardon those who stormed the Capitol, which some perceived as a betrayal.

50. Freilich et al., *supra* note 8, at 39.

51. MARK S. HAMM, AMERICAN SKINHEADS: THE CRIMINOLOGY AND CONTROL OF HATE CRIME 73, 62 (1993).

private groups. But the relationship between wartime combat and domestic paramilitary organizing is especially strong on the political right.<sup>52</sup> For instance, Klan membership surges “have aligned more neatly with the aftermath of war than with poverty, anti-immigration sentiment, or populism, to name a few common explanations.”<sup>53</sup> The White power movement of the 1970s drew explicitly on a Vietnam War narrative of government betrayal to propel its paramilitary organizing against the government.<sup>54</sup> Beyond furnishing rhetorical resources, the U.S. armed forces provided a ready supply of personnel trained in combat and a repository of weapons—sometimes stolen from military bases—to the White power movement.<sup>55</sup>

White supremacist groups and right-wing militias continue to draw heavily on active-duty military personnel and veterans, with some experts having estimated that such personnel represent a quarter of the 15,000–20,000 militia members in the country.<sup>56</sup> Two-thirds of the 25,000 members of the Oath Keepers—a right-wing group that takes its name from the oath to “defend the Constitution against all enemies, foreign and domestic”—have a military or law enforcement background.<sup>57</sup>

U.S. government sources and independent researchers have likewise identified significant ties between law enforcement officials and organized White supremacist groups. FBI reports in 2006 and 2015 cautioned against the infiltration of law enforcement agencies by White supremacists.<sup>58</sup> In 2020, a Brennan Center for Justice report documented the participation of police and other law enforcement agents in racist or far-right groups in numerous states, as well as hundreds of instances of participation in racist exchanges on social media

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52. See BELEW, *supra* note 23, at 20; see also *id.* at 63 (contending that, despite the Vietnam War’s impact on the left, “the militarization of the left never matched that of the paramilitary right, in part because of the right’s cultural embrace of weapons and in part because of the matériel and active-duty personnel that the white power movement continued to draw from the U.S. Armed Forces.”).

53. *Id.* at 20.

54. *Id.* at 23–26, 34.

55. *Id.* at 136–37.

56. Steinhauer, *supra* note 49; see also Simi, *supra* note 31, at 264 (describing disproportionate representation of people with military experience in White supremacist terrorist waves during the 1980s and 1990s and more recent efforts to recruit military members).

57. Giglio, *supra* note 48; see also A.C. Thompson, Ali Winston & Jake Hanrahan, *Ranks of Notorious Hate Group Include Active-Duty Military*, PROPUBLICA (May 3, 2018), <https://www.propublica.org/article/atomwaffen-division-hate-group-active-duty-military> [<https://perma.cc/K4HM-LDYV>] (identifying former and current military members in ranks of Atomwaffen, a neo-Nazi hate group).

58. FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., WHITE SUPREMACIST INFILTRATION OF LAW ENFORCEMENT 3 (2006), [https://oversight.house.gov/sites/democrats.oversight.house.gov/files/White\\_Supremacist\\_Infiltration\\_of\\_Law\\_Enforcement.pdf](https://oversight.house.gov/sites/democrats.oversight.house.gov/files/White_Supremacist_Infiltration_of_Law_Enforcement.pdf) [<https://perma.cc/R2BP-UZ8H>] (warning of “self-initiated” efforts by law enforcement personnel to volunteer for various White supremacist causes); FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., COUNTERTERRORISM POLICY DIRECTIVE AND POLICY GUIDE 89 (2015), <https://s3.documentcloud.org/documents/3423189/CT-Excerpt.pdf> [<https://perma.cc/WV2C-UPNS>] (noting that investigations of “militia extremists, white supremacist extremists, and sovereign citizen extremists often have identified active links to law enforcement officers”).

or other law enforcement communication channels.<sup>59</sup> The founder of the Base, a far-right group whose members have been implicated in numerous violent plots, previously worked at the Department of Homeland Security and reportedly assisted the Marines in killing insurgents abroad.<sup>60</sup> About seventy people charged in connection with the Capitol assault were current or former police officers, military personnel, or government officials.<sup>61</sup>

Apart from these direct linkages between state institutions and White supremacist violence, government laws and policies influence the scope of racist violence through numerous other mechanisms. Citizens' arrest laws, "stand your ground" laws, and similar criminal law doctrines can serve to license or excuse violence against Black men and youth, as in the racially charged killings of Trayvon Martin and Ahmaud Arbery.<sup>62</sup> Government policies also have communicative effects. For instance, post-9/11 detentions and immigration measures broadly targeting people from Muslim countries may have "projected violence against Arabs, Muslims, and South Asians as a social norm" and legitimized "private" hate violence.<sup>63</sup> These relationships are not unidimensional, however; studies have suggested both that governmental rhetoric and policies against racial minority groups can embolden hate violence against those groups *and* that policies benefiting racial minorities can generate backlash violence from groups whose dominance is threatened.<sup>64</sup>

In sum, while scholarly debates surround a host of issues related to the scope of White supremacist violence, there is little disagreement that it presents a serious threat, stemming both from individuals and groups, and that it retains a relationship to state violence, institutions, and laws.

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59. MICHAEL GERMAN, BRENNAN CTR. FOR JUST., HIDDEN IN PLAIN SIGHT: RACISM, WHITE SUPREMACY, AND FAR-RIGHT MILITANCY IN LAW ENFORCEMENT (2020), <https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law> [<https://perma.cc/R8PC-PH56>]; see also Geoff Ward, *Living Histories of White Supremacist Policing*, 15 DU BOIS REV. 167, 172 (2018) ("The comingling of governmental and nongovernmental authority in White supremacist violence has been evident throughout the history of policing, from its origins to today, and has often been explicit.").

60. See Ben Makuch, *Department of Homeland Security Confirms Neo-Nazi Leader Used to Work for It*, VICE (Feb. 17, 2021), <https://www.vice.com/en/article/epd7wa/department-of-homeland-security-confirms-neo-nazi-leader-used-to-work-for-it> [<https://perma.cc/C82D-UBS5>].

61. Barrett et al., *supra* note 19.

62. See Richard Fausset, *Georgia to Weaken Citizen's Arrest Law Cited in Ahmaud Arbery's Death*, N.Y. TIMES (Oct. 18, 2021), <https://www.nytimes.com/2021/03/31/us/georgia-citizens-arrest-law.html> [<https://perma.cc/7SBZ-PTCQ>]; Greg Allen, *Florida Lawmakers Debate to Repeal Infamous Stand Your Ground Law*, NPR (Feb. 4, 2021), <https://www.npr.org/2021/02/04/964172326/florida-lawmakers-debate-to-repeal-infamous-stand-your-ground-law> [<https://perma.cc/6TZJ-PCWC>].

63. Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1323–24 (2004).

64. See Laura Dugan & Erica Chenoweth, *Threat, Emboldenment, or Both? The Effects of Political Power on Violent Hate Crimes*, 58 CRIMINOLOGY 714, 716 (2020) (finding support for both the "emboldenment hypothesis," which predicts increases in hate crimes "triggered by government elites who signal supremacy over those groups," and the "political threat hypothesis," which "predicts that violent backlash against specific groups is triggered by political gains made by those groups").

## II.

THE HISTORICAL DEVELOPMENT OF THE HATE CRIMES AND TERRORISM  
FRAMES

White supremacist violence in the United States is often understood today through two sociolegal frames: “hate crimes,” the more established frame, and now, increasingly, a competing “terrorism” frame. A good deal of White supremacist violence fits within common legal definitions of both phenomena. Yet until fairly recently, these terms seemed to many to represent entirely different problems. “Hate crimes” and “terrorism”—as ideas and corresponding legal practices—evolved from distinct origins and in response to differently conceived problems. The hate crimes frame originated in the 1980s as the product of civil rights advocacy against bias-motivated violence constrained by law-and-order politics; the terrorism frame acquired prominence a decade earlier in response to transnational conflicts between the United States or its geopolitical allies against foreign adversaries, often Middle Eastern or Muslim. Over time, each of these frames acquired a dominant place in our cultural understanding and law, such that they defined how society perceived problems and how government actors responded to them. This Section defines the underlying legal terms and describes how racist violence frequently qualifies as both hate crimes and terrorism, presents the concept of “framing” from a variety of disciplines, and explains the development of these two frames in the last decades of the twentieth century.

*A. Defining Hate Crimes and Terrorism*

White supremacist violence can often qualify as both a “hate crime” and “terrorism” under common definitions of these phenomena. Numerous definitions of “hate crimes” and “terrorism” appear in the law and academic texts. One widely cited definition of hate crimes, used by the FBI to collect national hate crime statistics, defines a hate crime as a “criminal offense against a person or property motivated in whole or in part by an offender’s bias against a race, religion, disability, sexual orientation, ethnicity, gender, or gender identity.”<sup>65</sup> While that definition focuses on the defendant’s motive, other definitions focus on the intentional selection of victims on account of their identity. For instance, many state law definitions of hate crimes require the targeting of a person or group because of their membership in a legally protected group, while varying as to the range of status groups protected.<sup>66</sup>

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65. *What We Investigate: Hate Crimes*, FED. BUREAU OF INVESTIGATION (Jan. 3, 2022), <https://www.fbi.gov/investigate/civil-rights/hate-crimes> [<https://perma.cc/4VF8-2J4Z>]. The FBI issues an annual report on hate crime statistics reported by state and local law enforcement agencies through the Uniform Crime Reporting program. See FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., *HATE CRIME STATISTICS, 2019 (2020)* [hereinafter *FBI HATE CRIME STATISTICS*], <https://ucr.fbi.gov/hate-crime/2019/resource-pages/methodology.pdf> [<https://perma.cc/7WNV-5SNK>].

66. See Avlana Eisenberg, *Expressive Enforcement*, 61 *UCLA L. REV.* 858, 861, 868, 870–71 (2014). Note that the FBI’s hate crime definition used for statistical collection does not specify that a



Meanwhile, legal and academic definitions of terrorism typically require the use or threat of violence<sup>67</sup> with a political or ideological motive.<sup>68</sup> A leading definition of terrorism, found in the U.S. criminal code, refers to activities that “involve violent acts or acts dangerous to human life” that violate the criminal law 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>69</sup> Other definitions of terrorism in U.S. law offer additional criteria, such as specifying that the targets must be noncombatants or that the violence must be premeditated.<sup>70</sup>

While a large number of hate crimes do not involve violence,<sup>71</sup> these definitions suggest a substantial conceptual overlap between hate crimes and terrorism at least with respect to crimes using or threatening violence. White supremacist violence, in particular, qualifies as both a hate crime and terrorism where it targets victims of a defined identity group for the purpose of influencing the state or society. Mass shootings targeting racial minorities to instigate a race war and preserve White power (the Charleston church shooting) or stop an “invasion” of immigrants (the El Paso Walmart shooting) easily fit both definitions. So too do smaller-scale, but far more frequent, acts of violence aiming to drive racial minorities out of White neighborhoods.<sup>72</sup>

To be clear, some racist violence might fit only one or the other definition. For instance, under hate crime definitions requiring the selection of victims based on their identity, an indiscriminate attack on a government building to start a race war may constitute terrorism but not a hate crime. Similarly, an act

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victim must be targeted because of a protected characteristic, instead requiring only that such a bias must influence the defendant’s actions (against any target, including “society”). Thus, the statistics include certain “drug or narcotic offenses, gambling offenses, [and] weapon law violations” classified as “crimes against society” with a bias motive. See FBI HATE CRIME STATISTICS, *supra* note 65, at 3–4.

67. See Ryan D. King, Laura M. DeMarco & Robert J. VandenBerg, *Similar from a Distance: A Comparison of Terrorism and Hate Crime*, in THE HANDBOOK OF THE CRIMINOLOGY OF TERRORISM 385, 387 (Gary LaFree & Joshua D. Freilich eds., 2017) (noting a “consensus that an act of terrorism must—by definition—entail violence or the threat of violence, but the same standard does not apply to hate crimes”).

68. See BRUCE HOFFMAN, *INSIDE TERRORISM* 2–3 (3d ed. 2017) (noting that terrorism is political under most standard conceptions). The Global Terrorism Database, a collection of international and domestic terrorist incidents used in many academic studies, defines terrorism as “the threatened or actual use of illegal force and violence by a non-state actor to attain a political, economic, religious, or social goal through fear, coercion, or intimidation.” King et al., *supra* note 67, at 387.

69. 18 U.S.C. § 2331(1) (defining international terrorism); *id.* § 2331(5) (defining domestic terrorism).

70. HOFFMAN, *supra* note 68, at 30–33 (surveying definitions used by various federal agencies).

71. See King et al., *supra* note 67, at 387.

72. See BELL, *supra* note 34, at 1–6 (describing persistence and political nature of anti-integrationist violence targeting racial minorities in majority-White neighborhoods); see also King et al., *supra* note 67, at 392–93 (describing studies linking high rate of hate crimes to geographic areas experiencing an in-migration of racial minorities).

targeting minorities to seek a thrill,<sup>73</sup> without a broader political agenda, may qualify as a hate crime but not terrorism. Many hate crimes involve slurs or other expressions of bias, but do not necessarily show an intent to produce a political result—for example, schoolyard fights between members of different racial groups or a spontaneous act by a mentally ill or intoxicated person reflecting bias but no ideological goal.

While some view the distinction in motive as the key difference between hate crimes and terrorism,<sup>74</sup> the gap between the bias motive required for a hate crime and the political or ideological objective thought necessary for an act of terrorism may not be large. Both terrorism and hate crimes are thought to send a message to a larger group beyond the immediate victims; in fact, justifications for hate crime laws rely on the idea that hate crimes send a message of exclusion to a victim's identity group.<sup>75</sup> Even if an *intent* to produce such an effect is viewed as a criterion for terrorism, and not for hate crimes, such an intent can often exist alongside more “personal” motivations for an act of violence. As criminologists have pointed out, even hate crimes committed for a thrill “may be motivated by quasi-political motives,” such as “send[ing] a message that reflects both [the perpetrators'] personal biases and what they believe to be their society's cultural norms.”<sup>76</sup>

Moreover, in practice, assessments of motive quickly run into the influence of race and identity, including the “outgroup homogeneity effect.” Social psychology studies have shown that people view members of groups other than their own as more homogenous than their own group, more often ascribing the misconduct of members of outgroups to systemic factors rather than individual

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73. See Jack McDevitt, Jack Levin & Susan Bennett, *Hate Crime Offenders: An Expanded Typology*, 58 J. SOC. ISSUES 303 (2002). These researchers identified four categories of hate crime offenders, including those who are “thrill-motivated” and acting out of peer pressure. See *id.* at 307. Their other three categories seem difficult to distinguish: “defensive” offenders acting against those who appear to threaten their way of life, “retaliatory” offenders seeking revenge for perceived past harm, and “mission-offenders” driven by supremacist beliefs. See *id.* at 305–06. Some white supremacists who commit hate crimes would clearly seem to fit all three categories, as they claim to be acting defensively against minority groups threatening them, perhaps because of perceived past violations, and because they have a mission to preserve the supremacy of White people.

74. See, e.g., LISA N. SCACCO, CONG. RSCH. SERV., IN10299, SIFTING DOMESTIC TERRORISM FROM HATE CRIME AND HOMEGROWN VIOLENT EXTREMISM (2021) (distinguishing between the “personal malice” of hate crimes and “ideologically motivated” terrorism, while noting that separating between the two might be difficult in particular cases).

75. See Eisenberg, *supra* note 66, at 860, 898 (noting that hate crime laws are often justified as expressing societal protection for targeted groups to counteract the exclusionary message that the hate crimes send to members of a victim's identity group); see also Colleen E. 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.”* 63 CRIME & DELINQ. 1191, 1194 (2017) (describing both hate crimes and terrorism as “message crimes” that instill fear in a larger group).

76. Mills et al., *supra* note 75, at 1196 (citing studies of hate crimes against Amish victims); see also Wesley S. McCann & Nicholas Pimley, *Eliminating Extremism: A Legal Analysis of Hate Crime and Terrorism Laws in the United States*, TERRORISM & POL. VIOLENCE 19 (2019) (noting the thin distinction between bias and ideology).

explanations.<sup>77</sup> The corresponding tendency to attribute ingroup behavior to individual factors may lead to the underdiagnosis of the political nature of White supremacist violence. Experimental studies have confirmed that people are more likely to describe acts as terrorism, and the result of extreme ideologies, rather than mental illness, when the assailants are described as Arab or Muslim rather than White.<sup>78</sup>

In sum, a significant number of White supremacist acts of violence potentially qualify as both hate crimes and terrorism under common legal definitions of these classifications. Meeting a legal definition of a phenomenon does not mean that acts will be prosecuted or regulated as such. Rather, the conceptualization of, and legal response to, White supremacist violence today depends in large part on the sociolegal *frames* constructed, over time, for “hate crimes” and “terrorism.”

### B. “Framing” Social Problems

A vast literature across sociology, psychology, media studies, political science, public policy, and other disciplines has explored how social problems get framed and addressed.<sup>79</sup> While specific theories abound, there are shared

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77. See Markus Brauer, *Intergroup Perception in the Social Context: The Effects of Social Status and Group Membership on Perceived Out-Group Homogeneity and Ethnocentrism*, 37 J. EXPERIMENTAL SOC. PSYCH. 15, 15 (2001) (listing studies showing outgroup homogeneity effect); Vito D’Orazio & Idean Salehyan, *Who Is a Terrorist? Ethnicity, Group Affiliation, and Understandings of Political Violence*, 44 INT’L INTERACTIONS 1017, 1019 (2018) (describing outgroup homogeneity effect in the context of threat perceptions).

78. See D’Orazio & Salehyan, *supra* note 77, at 1035 (finding that description of suspects as Arab influences characterization as terrorists and as driven by extreme ideologies, rather than mental illness); Connor Huff & Joshua D. Kertzer, *How the Public Defines Terrorism*, 62 AM. J. POL. SCI. 55 (2018) (finding that public perceptions of whether an act is terrorism are influenced by whether the perpetrator is described as Muslim, as opposed to White, as well as the weapon used and whether the perpetrator is a member of an organized group).

79. Sociologist Erving Goffman initiated much of the interdisciplinary attention to “framing” with a book seeking to explain how individuals make sense of events. See ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* (1974). Goffman used the concept of frames to explain how “definitions of a situation are built up in accordance with principles of organization which govern events—at least social ones—and our subjective involvement in them.” *Id.* at 10–11. Amos Tversky and Daniel Kahneman authored the leading work on framing in psychology, challenging rational choice theory with experiments that showed that the differential formulation of an identical problem could lead to very different decisions. See Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453 (1981). They used the concept of a “decision frame” to “refer to the decision-maker’s conception of the acts, outcomes, and contingencies associated with a particular choice” and explained it as a function of both the “formulation of the problem” and the “norms, habits, and personal characteristics of the decision-maker.” *Id.* at 453. In communication studies, Robert Entman described framing as the selection of “some aspects of a perceived reality” and making them salient in a “communicating text.” Robert M. Entman, *Framing: Toward Clarification of a Fractured Paradigm*, 43 J. COMM. 51, 55–56 (1993). For Entman, frames in communicative texts “define problems—determine what a causal agent is doing with what costs and benefits, usually measured in terms of common cultural values; diagnose causes—identify the forces creating the problem; make moral judgments—evaluate causal agents and their effects; and suggest remedies—offer and justify treatments for the problems and predict their likely effects.” *Id.* at 52. In sociology, scholars have paid extensive attention to the link between framing, social movements, and collective action, such that “framing processes have come to be regarded, alongside resource

insights across this literature. First, this scholarship has shown that individuals and societies interpret and respond to problems not according to their “objective” features but according to socially constructed meanings. The process of framing “is a way of selecting, organizing, interpreting, and making sense of a complex reality” such that “an amorphous, ill-defined, problematic situation can be made sense of and acted upon.”<sup>80</sup> Viewing a problem as “constructed” does not deny the reality of events in the world—such as the occurrence of acts of violence<sup>81</sup>—but recognizes that framing shapes the interpretation of events. Second, frames can powerfully influence both understanding and action. Once a particular frame has become common, it may be difficult to view phenomena outside that frame, because it seems so natural; those who depart from established frames risk not being understood.<sup>82</sup> Issue framing can “have a significant impact on people’s attitudes, their political behavior, and their policy preferences” as well as on policy consensus.<sup>83</sup> Third, despite this power, frames are neither permanent nor uncontested, and the framing of an issue can shift as a result of strategic action by elites or social movement actors.<sup>84</sup>

Drawing on this literature, I argue that “hate crimes” and “terrorism” today supply two distinct frames for White supremacist violence. By “frame,” I mean an organizing concept through which a particular set of laws, policies, government practices, and cultural understandings defines and responds to a social problem. My account especially emphasizes the role of law in framing social problems; law both *influences* how a problem comes to be classified and understood and *responds* to how social actors have categorized the problem.

Although bias-motivated crimes and the use of political violence are millennia-old phenomena, the categories of “hate crimes” and “terrorism” in U.S. law, policy, and public discourse became prevalent only in the latter half of

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mobilization and political opportunity processes, as a central dynamic in understanding the character and course of social movements.” Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOCIO. 611, 611 (2000). In political science and public policy studies, a related literature on agenda-setting has explored how and why certain issues receive public attention, including how government officials decide to focus attention on particular problems and move their institutions to address them. BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS 4–5 (1984) (explaining how child abuse became an issue of national policy concern).

80. Martin Rein & Donald Schon, *Reframing Policy Discourse*, in THE ARGUMENTATIVE TURN IN POLICY ANALYSIS AND PLANNING 145, 146 (Frank Fischer & John Forester eds., 1993).

81. Lisa Stampnitzky made this point in her analysis of the social construction of terrorism. LISA STAMPNITZKY, DISCIPLINING TERROR: HOW EXPERTS INVENTED “TERRORISM” 5 (2013) (“[T]o show that something is constructed is not to negate its reality [but to ask] how problems, concepts, and institutions came to be, and what makes them powerful.”).

82. See Entman, *supra* note 79, at 55 (“Once a term is widely accepted, to use another is to risk that target audiences will perceive the communicator as lacking credibility—or will even fail to understand what the communicator is talking about.”).

83. Volha Chamysh, Paulette Lloyd & Beth A. Simmons, *Frames and Consensus Formation in International Relations: The Case of Trafficking in Persons*, 21 EUR. J. INT’L RELS. 323, 328, 344–45 (2015) (arguing that the framing of trafficking as crime rather than human rights influenced the development of an international consensus around confronting it in the U.N. General Assembly).

84. See Rein & Schon, *supra* note 80, at 158; Benford & Snow, *supra* note 79, at 624–25.

the twentieth century. Parts II.C and II.D explain how these frames developed historically and changed over time. I rely on a wide range of sources, but parts of the analysis draw heavily on the work of several sociologists: Valerie Jenness and Ryken Grattet, who explained the emergence of hate crimes as a new domain of public policy,<sup>85</sup> and Lisa Stampnitzky, who argued that the problem of terrorism emerged from the application of specific forms of expertise to world events.<sup>86</sup>

### C. *The Hate Crimes Frame*

The term “hate crime” was virtually unknown as the 1980s began.<sup>87</sup> But in less than two decades, the concept became a standard frame for conceptualizing racist violence and the targeting of identity groups within the United States. A slew of advocacy group reports, government investigations, legislative hearings, state and federal laws, media reports, and police trainings through the 1980s and 1990s defined hate crimes as a problem, established a set of standard legal and policy responses, and created a dominant cultural understanding of the issue.<sup>88</sup> Supported by civil rights groups but constrained by prevailing law-and-order politics, the hate crimes frame elevated attention to racist violence but construed it as a problem of biased private individuals and prioritized criminal law solutions.

Advocacy against hate-motivated violence from the 1980s onward focused centrally on law and criminal law in particular.<sup>89</sup> In part, this was a reaction to the impunity that sometimes surrounded hate violence—as in the 1982 murder of Chinese American Vincent Chin, whose White attackers were only sentenced to probation and a \$3,000 fine for the murder.<sup>90</sup> Efforts to address racist violence through new criminal laws date at least to Reconstruction-era attempts to

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85. See VALERIE JENNESS & RYKEN GRATTET, *MAKING HATE A CRIME: FROM SOCIAL MOVEMENT TO LAW ENFORCEMENT* (2001). Jenness and Grattet described hate crimes as a “policy domain,” a socially constructed classification scheme referring both to “the range of collective actors . . . who have gained sufficient legitimacy to speak about or act upon a particular issue” and “the cultural logics, theories, frameworks, and ideologies those actors bring to bear in constructing and narrating the problem and the appropriate policy responses.” *Id.* at 6.

86. See STAMPNITZKY, *supra* note 81, at 25.

87. See JAMES B. JACOBS & KIMBERLY POTTER, *HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS* 4 (1998) (describing the term as non-existent until the mid-1980s and attributing coinage to the introduction of the federal Hate Crime Statistics Act in 1985).

88. See Terry A. Maroney, Note, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 567–68 (1998); see also JENNESS & GRATTET, *supra* note 85, at 1.

89. See JENNESS & GRATTET, *supra* note 85, at 2–3, 42; see *id.* at 3 (“In the war on hate violence, criminal law, rather than domestic military intervention, educational programs, media campaigns, or community activism, has been the primary weapon of choice.”).

90. John White, *His Life Cut Short, Vincent Chin Is Remembered for What Might Have Been*, NPR (June 23, 2017), <https://www.npr.org/2017/06/23/533977175/his-life-cut-short-vincent-chin-is-remembered-for-what-might-have-been> [<https://perma.cc/NY3A-TJ7B>]; see also Becky Little, *How the 1982 Murder of Vincent Chin Ignited a Push for Asian American Rights*, HISTORY (May 5, 2020), <https://www.history.com/news/vincent-chin-murder-asian-american-rights> [<https://perma.cc/7SL3-4RP9>].

suppress White supremacist violence against former slaves.<sup>91</sup> At the federal level, long before the “hate crime” term came into common usage, Congress had passed criminal laws that might be viewed as forerunners of hate crime laws: most significantly, in 1968, Congress prohibited interference, “by force or threat of force,” with any person engaging in certain federally protected activities because of race, color, religion, or national origin.<sup>92</sup> The newer approaches in the 1980s either created crimes for conduct motivated by bias, generally without limitation to certain activities, or increased the sentences for existing crimes when accompanied by a bias motive.<sup>93</sup>

In the early 1980s, Oregon and Washington became the first states to adopt hate crime laws, and forty other states followed suit by the end of the 1990s.<sup>94</sup> Many states drew heavily on a model penalty enhancement statute issued by the Anti-Defamation League, an organization that had published annual audits of anti-Semitic incidents ever since neo-Nazis sought to march through a heavily Jewish Illinois suburb.<sup>95</sup> State laws typically increased the penalties for crimes where prosecutors could prove that the defendant targeted victims on the basis of race, ethnicity, religion, or other protected grounds. Although these laws drew First Amendment challenges, the Supreme Court resolved the primary constitutional questions they posed with a pair of decisions in the early 1990s: one decision invalidated laws proscribing speech or expressive acts on the basis of viewpoint,<sup>96</sup> while a second decision upheld penalty enhancements for crimes targeting victims because of their identity.<sup>97</sup>

In the 1990s, the federal government followed suit with new hate crime laws. Thus, Congress mandated the collection of hate crime statistics in 1990,<sup>98</sup> authorized federal penalty enhancements for hate crimes in 1994,<sup>99</sup> and expanded federal hate crime offenses as well as their coverage of sexual orientation and

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91. See ELY AARONSON, FROM SLAVE ABUSE TO HATE CRIME: THE CRIMINALIZATION OF RACIAL VIOLENCE IN AMERICAN HISTORY 2 (2014) (arguing that efforts to use criminal law to address violence against Black people have a long historical trajectory); FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 118–49 (1999) (describing federal enforcement of criminal civil rights law from Reconstruction to the modern period).

92. An Act to Prescribe Penalties for Certain Acts of Violence and Intimidation, and for Other Purposes, Pub. L. No. 90-284, § 901, 82 Stat. 73, 89 (1968) (codified as amended at 18 U.S.C. § 245).

93. See JACOBS & POTTER, *supra* note 87, at 36–37 (distinguishing hate crime laws from earlier federal civil rights statutes).

94. JENNESS & GRATTET, *supra* note 85, at 74. Definitional questions arise when determining what qualifies as a hate crime law; for instance, California’s 1976 Ralph Act protecting people from violence based on race, religion, and other grounds has sometimes been viewed as a “precursor” to hate crime laws, though it attracted little notice at the time and did not use the term “hate crime.” CHRISTOPHER WALDREP, AFRICAN AMERICANS CONFRONT LYNCHING: STRATEGIES OF RESISTANCE FROM THE CIVIL WAR TO THE CIVIL RIGHTS ERA 117 (2009).

95. See WALDREP, *supra* note 94, at 118; JENNESS & GRATTET, *supra* note 85, at 171.

96. *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

97. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

98. See Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified at 18 U.S.C. § 534).

99. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003, 108 Stat 1796.

gender identity in 2009.<sup>100</sup> The 2009 Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act—named for a gay student and Black man killed in high-profile hate crimes—expanded federal jurisdiction over hate crimes and passed with the support of hundreds of civil rights groups.<sup>101</sup>

Although the standard depiction portrays hate crime laws as a product of civil rights advocacy or activism from affected identity groups,<sup>102</sup> a range of scholarship has highlighted the contribution of law-and-order politics to their passage. Thus, legal scholar Terry Maroney and sociologists Jenness and Grattet traced the anti-hate crime movement both to civil rights movements and to the more conservative victims' rights movement that had originated in the late 1960s and flourished in the Reagan era.<sup>103</sup> Civil rights organizations responding to hate violence against Black, Jewish, LGBTQ, and Asian communities framed hate crimes as an urgent problem requiring legislative and law enforcement attention, while the victims' rights movement had already primed political culture to elevate the status of crime victims.<sup>104</sup> In the face of Republican electoral victories emphasizing law-and-order themes, the enactment of hate crime laws allowed political leaders to support civil rights while remaining tough on crime.<sup>105</sup> Indeed, the federal sentence enhancement for hate crimes passed as part of the mammoth 1994 crime bill that funded 100,000 new police officers, allocated

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100. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, in National Defense Authorization Act for FY 2010, Pub. L. No. 111-84, 123 Stat. 2190 (2009) (codified at 18 U.S.C. § 249).

101. *Local Law Enforcement Hate Crimes Prevention Act of 2007: Support for This Legislation*, HUM. RTS. CAMPAIGN (Feb. 2007), [http://web.archive.org/web/20070516110138/http://www.hrc.org/Content/NavigationMenu/HRC/Get\\_Informed/Federal\\_Legislation/LLEEA\\_Coalition\\_Endorsement\\_Fact\\_Sheet/LLEEA\\_Coalition\\_Endorsement\\_Fact\\_Sheet.htm](http://web.archive.org/web/20070516110138/http://www.hrc.org/Content/NavigationMenu/HRC/Get_Informed/Federal_Legislation/LLEEA_Coalition_Endorsement_Fact_Sheet/LLEEA_Coalition_Endorsement_Fact_Sheet.htm) [<https://perma.cc/B73D-X3F2>] (listing supporters of the Local Law Enforcement Hate Crimes Prevention Act of 2007, an earlier bill that passed eventually as the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009).

102. The relationship to civil rights advocacy has been emphasized by both proponents and opponents of hate crime laws. *See, e.g.*, Brian Levin, *From Slavery to Hate Crime Laws: The Emergence of Race and Status-Based Protection in American Criminal Law*, 58 J. SOC. ISSUES 227, 230–37 (2002) (describing hate crime laws as “the refined modern progeny of . . . remedial post-Civil War laws and constitutional amendments” to protect groups on account of status); JACOBS & POTTER, *supra* note 87, at 6, 65–67 (attributing hate crime laws to “identity politics” and the political desire to satisfy interest groups representing various identities).

103. *See* Maroney, *supra* note 88, at 568–78; JENNESS & GRATTE, *supra* note 85, at 26–32.

104. *See* Maroney, *supra* note 88, at 570, 578–79; JENNESS & GRATTE, *supra* note 85, at 30–32. These accounts portrayed civil rights groups as the dominant players advocating for hate crime legislation, noting the smaller direct participation of victims' rights activists. *See* Maroney, *supra* note 88, at 581 & n.310; JENNESS & GRATTE, *supra* note 85, at 32–38. In addition to ADL, the National Institute Against Prejudice and Violence, various anti-Klan groups including the Center for Democratic Renewal and the Southern Poverty Law Center, and the National Coalition of Anti-Violence Projects (focused on violence against LGBTQ people) were especially active. *See* JENNESS & GRATTE, *supra* note 85, at 32–37. But these accounts emphasized that the victims' rights movement laid the political groundwork for the success of anti-hate crime efforts, despite the lesser direct participation.

105. *See* WALDREP, *supra* note 94, at 113–17 (describing Democrats' embrace of Republican anti-crime rhetoric leading to hate crime laws); AARONSON, *supra* note 91, at 174 (describing political incentives to support civil rights and appear tough on crime).

\$9.7 billion to prisons, expanded the federal death penalty, and enhanced sentences for gang-related crimes and immigration offenses.<sup>106</sup>

A historical context of waning support for civil rights and swelling support for carceral policies shaped hate crime laws in three important respects. First, by focusing on enhancing sentences for offenders, hate crime laws framed the problem of bias-motivated violence as one of individual rather than societal responsibility.<sup>107</sup> The enactment of hate crime laws allowed political leaders to respond symbolically to racist violence, without addressing the structural causes of such violence and while simultaneously displacing local-level mobilization “to initiate more pragmatic and holistic responses to minority victimization.”<sup>108</sup> While early advocacy against racist violence at both the local and federal levels emphasized its connection to systemic racism and state violence and called for a redistribution of power, hate crimes discourse and laws increasingly diagnosed bigotry as the problem, not power relations, and turned to the punishment of individual offenders as a remedy.<sup>109</sup> Legal scholar Ely Aaronson observed that, by adopting “tough on crime” rhetoric and policy recommendations, “the hate crime movement succeeded in triggering sweeping legislative reforms to address the underprotection of [B]lack victims in an era in which virtually every other challenge to the racially skewed operation of the criminal justice system failed to gain momentum.”<sup>110</sup>

Second, the growing emphasis on “colorblind” legal doctrine precluded any explicit legal focus on violence against subordinated groups.<sup>111</sup> Like other civil

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106. U.S. Dep’t of Just., Fact Sheet, Violent Crime Control and Law Enforcement Act of 1994 (Oct. 24, 1994) (describing law as “the largest crime bill in the history of the country”).

107. WALDREP, *supra* note 94, at 125 (“Reagan’s administration could not prevent Congress from enacting hate crime laws, but his determination to hold individuals and not society accountable clearly shaped the new legislation.”).

108. AARONSON, *supra* note 91, at 173.

109. Emmaia N. Gelman, *Empire Against Race: A Critical History of the Anti-Defamation League (1913-1990)* 248, 265, 287–95 (2021) (on file with author). Gelman documented this transition away from structural approaches to racist violence with respect to a series of congressional hearings that led to the passage of the 1990 Hate Crimes Statistics Act. *Id.* at 278–95. She argued that the Anti-Defamation League, as well as law enforcement officials, played a leading role in promoting a decontextualized approach to hate crimes that deemphasized power relations. *Id.* at 248, 294–95.

110. AARONSON, *supra* note 91, at 174; *see also* Maroney, *supra* note 88, at 599–616 (describing how the anti-hate crime movement’s institutionalization within the criminal justice system left unchallenged targeted communities’ concerns over police brutality, the death penalty, and other issues). Critical race theorists and other advocates for hate crime laws typically connected racist violence to state violence and other forms of racial subordination. *See, e.g.*, Mari J. Matsuda & Charles R. Lawrence III, *Epilogue: Burning Crosses and the R.A.V. Case*, in *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 133, 136 (1993) (“As critical race theorists, we do not separate cross burnings from police brutality nor epithets from infant mortality rates.”).

111. Some had advocated criminalizing only racist speech that was targeted at historically subjugated groups. *See* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, in *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 17, 36, 39 (1993). Matsuda argued that, although all statements vilifying a person’s race were hurtful, dominant group victims had access to spaces for “retreat and reaffirmation of personhood” less available to subjugated groups and that speech targeting dominant groups did not “work[] in concert with other racist tools to keep victim groups in an inferior position.” *Id.* at 39.



rights statutes, hate crime laws applied to bias without regard to the dominant or subordinated status of the victims. Jenness and Grattet attributed this to a general “equal treatment” requirement of American legal culture, which they argued resulted in laws that treated people the same within protected categories (for instance, equating an anti-White crime to an anti-Black crime) and across categories (for instance, treating alike bias crimes based on religion and disability status).<sup>112</sup> But beyond any general tendency in U.S. legal culture, the Supreme Court’s move towards “colorblind” interpretations of the Equal Protection Clause<sup>113</sup> during the very period of enacting hate crime laws virtually ensured that such laws would treat crimes by members of socially marginal communities as equivalent to those resulting from White supremacy.

Moreover, even as the popular understanding of hate crimes focused on the targeting of minorities,<sup>114</sup> the Supreme Court upheld the constitutionality of hate crime enhancements in cases where *Black* defendants targeted *White* victims. In *Wisconsin v. Mitchell*, the key decision upholding hate crime enhancements against a First Amendment challenge, a nineteen-year-old Black defendant had instigated a group of Black men and boys to attack a White teenager after they watched *Mississippi Burning*, a movie portraying the murder of three civil rights workers.<sup>115</sup> The Court permitted the doubling of the defendant’s prison sentence.<sup>116</sup> In fact, that decision relied in part on an earlier case that also involved a Black defendant targeting a White victim in politically charged circumstances: in *Barclay v. Florida*, a Black man had attacked White people to revolt against the state’s “atrocities and brutalizing of [B]lack people.”<sup>117</sup> The Court approved the Florida court’s consideration of the defendant’s “racial hatred” as a factor in its imposition of the death penalty.<sup>118</sup> Thus, the Court sustained elevated punishments for race-based targeting of victims in cases where the defendants were not only members of racial minority groups, but also where they acted specifically in retaliation for White supremacist violence.

Third, Supreme Court decisions sharply restricting the proscription of racist speech de-emphasized ideology—and White supremacy in particular—even within a hate crimes frame aimed at making bias visible. A year before *Mitchell*, the Court struck down a St. Paul, Minnesota municipal bias crime law used to

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112. See JENNESS & GRATTET, *supra* note 85, at 175–76. Jenness and Grattet argued that the “sameness” norm within legal culture gave hate crime laws’ proponents a ready model in the form of other anti-discrimination statutes, but also “limit[ed] the possibilities of using law as a focused instrument for resolving some specific problem or range of problems because, technically speaking, all groups must be considered and protected.” *Id.* at 176.

113. See Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1825–28 (2012) (describing colorblind constitutional reasoning as originating in Justice Powell’s opinion in *Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), and winning a court majority in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)).

114. See JENNESS & GRATTET, *supra* note 85, at 175.

115. 508 U.S. 476, 479–80 (1993).

116. *Id.* at 479.

117. *Barclay v. Fla.*, 463 U.S. 939, 943 (1983) (plurality opinion).

118. *Id.* at 949.

prosecute a teenager who burned a cross outside a Black family's home.<sup>119</sup> The Minnesota Supreme Court construed the ordinance as only covering "fighting words," a category of speech that the Court had previously found could be restricted consistent with the First Amendment.<sup>120</sup> But the U.S. Supreme Court held that the ordinance nonetheless violated the First Amendment because it outlawed only those "fighting words" expressing a particular viewpoint, such as "messages 'based on virulent notions of racial supremacy.'"<sup>121</sup> A year later, *Mitchell* distinguished this invalidated St. Paul ordinance from Wisconsin's hate crime enhancement on the grounds that the latter "aimed at conduct unprotected by the First Amendment," rather than expression.<sup>122</sup> The thin line between the impermissible regulation of hate speech and the permissible sanctioning of hate crimes focused inquiry on whether the defendant intentionally selected victims of a protected group in committing a crime, rather than on the expression of ideology *per se*.<sup>123</sup> While hate crime prosecutions following these decisions allowed for the consideration of evidence pertaining to a defendant's beliefs to establish a bias motive, the Court's First Amendment decisions constrained hate crime laws from prohibiting White supremacist speech or singling it out for disapproval.<sup>124</sup>

It is also possible that the very extension of hate crime laws to a broad range of legal statuses inadvertently contributed to de-emphasizing the ideological dimensions of hate crimes, and White supremacist violence in particular. Social movements representing groups other than racial minorities—especially Jews, women, and LGBTQ people—publicized violence targeting their members and fought for protection under hate crime laws.<sup>125</sup> Given the different historical and cultural circumstances affecting each group, however, the expansion of protected status may have increased the focus on "hate" or "bias" across groups as the

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119. *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). For more on the historical use of cross burnings to terrorize Black communities, see *Virginia v. Black*, 538 U.S. 343, 352–57 (2003).

120. *R.A.V.*, 505 U.S. at 381–86.

121. *Id.* at 392.

122. *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993). In *Mitchell*, the Court also distinguished *Dawson v. Delaware*, 503 U.S. 159 (1992), where it had prohibited the introduction of evidence in a death penalty case that the defendant belonged to the Aryan Brotherhood, a White supremacist prison gang, because the evidence related to "abstract beliefs" since the crime did not appear connected to the defendant's membership. *Id.* at 486–87.

123. See also *infra* Part III.E (discussing *Virginia v. Black*, 538 U.S. 343 (2003)). While *Virginia v. Black* addressed the ideological dimension of cross burning much more explicitly than *R.A.V.*, it continued to police vigilantly the line between protected speech and unprotected speech.

124. This is not to say that the advent of hate crime laws de-emphasized ideology relative to the previous criminal law regime, which formally treated bias-motivated crimes like other crimes. Hate crime laws directed attention to the existence of a bias motive, and such motives were often linked to ideology. But at the same time, the exacting First Amendment constraints imposed by courts—and the public backlash against the specter of punishing "thought crimes"—meant that hate crime laws could not legally sanction racist speech and that anti-hate crime advocates repeatedly had to demonstrate that they were targeting actions, not beliefs or ideas.

125. See JENNESS & GRATTET, *supra* note 85, at 48–69 (describing the extension of hate crime protection to gender and sexual orientation from its initial focus on race and religion).

common denominator—invoking a decontextualized psychological state of mind rather than any particular ideology of historical oppression.<sup>126</sup>

In sum, the development of hate crime laws grew out of domestic civil rights advocacy but bore the marks of the conservative backlash against civil rights—stressing individual blame and punishment, equating perpetrators from dominant and subordinated groups, and de-emphasizing ideology and racist speech. Moreover, hate crime legal remedies centered on criminal law solutions requiring implementation by law enforcement officials, thus focusing on private rather than state violence. The anti-hate crime movement proved less able to challenge police brutality, despite perceptions within minority communities that police were “among the most common perpetrators of bias-motivated violence.”<sup>127</sup>

#### D. *The Terrorism Frame*

The terrorism frame developed in the 1970s in a foreign affairs and national security context that pitted foreign, Third World adversaries against the United States or its international allies. As terrorism became strongly associated with Arab and Muslim peoples, especially after 9/11, a separate category of “domestic terrorism” evolved to distinguish White supremacists, anti-government militias, and other largely far-right threats from Muslims—when these groups were seen as terrorists at all.

##### 1. *The Emergence of “Terrorism”*

Several accounts date U.S. governmental and public attention to terrorism, conceived as such, to the killing of eleven Israeli athletes by the Palestinian Black September organization at the 1972 Munich Olympics.<sup>128</sup> That highly publicized attack spurred President Nixon’s creation of the Cabinet Committee to Combat Terrorism, described as the first U.S. government body focused on

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126. Ely Aaronson argued that, while the civil rights movement presented racial violence as structurally linked to segregation, southern lynchings, and the denial of citizenship rights to Black Americans, the hate crime movement linked racial violence against Black Americans to “other forms of intergroup violence and framed it as an aspect of the challenge of mediating group differences in a multicultural polity.” AARONSON, *supra* note 91, at 167–68. This linkage to other forms of bias-related violence had strategic benefits in expanding anti-hate crime coalitions but underemphasized the unique features of, and structural causes of, Black American victimization. *See id.* at 169. Emmaia Gelman has argued that the merger of concerns around anti-Black violence and anti-Semitic attacks in the single category of hate crimes “stripped anti-Black violence of its specificity and helped to dehistoricize it,” and that this conflation also deflected attention from the redistribution of power as a solution to Black disempowerment. Gelman, *supra* note 109, at 274, 277.

127. Maroney, *supra* note 88, at 609–11.

128. *See* TIMOTHY NAFTALI, *BLIND SPOT: THE SECRET HISTORY OF AMERICAN COUNTERTERRORISM* 54–55 (2005) (describing the terms “counterterrorism” and “international terrorism” as entering the “Washington political lexicon” and leading to the creation of government counterterrorism programs after Munich); STAMPNITZKY, *supra* note 81, at 21–27; Deepa Kumar, *Terrorcraft: Empire and the Making of the Racialised Terrorist Threat*, 62 *RACE & CLASS* 34, 45–48 (2020) (arguing that the Munich massacre initiated “sustained” media attention to terrorism and noting the New York Times’s indexing of terrorism as a search term for the first time in 1972).

terrorism, and the direction of funding to an emerging group of terrorism experts within academia, think tanks, and policymaking institutions.<sup>129</sup> In response to Munich, President Nixon also authorized the investigation and questioning of people of “Arabic background” within the United States to determine their relationship to terrorist activities and to discourage activism around Middle Eastern issues.<sup>130</sup> The Immigration and Naturalization Service’s “Operation Boulder” grilled Arab students about their visa status and political views, especially pro-Palestinian activism.<sup>131</sup> Later that decade, the State Department, which managed counterterrorism negotiations with governments, elevated the rank of its coordinator for countering terrorism, while the Defense Department created a special force designed to rescue hostages after high-profile hijackings and hostage seizures by Palestinian nationalists.<sup>132</sup>

Sociologist Lisa Stampnitzky has argued that, in the early 1970s, terrorism emerged in academic and public discourse as a “new and urgent problem” that united preexisting tactics of political violence—such as bombings, hijackings, and hostage-taking—and tied them to a “new and highly threatening sort of actor: the ‘terrorist.’”<sup>133</sup> According to Stampnitzky, the terrorism discourse replaced an earlier discourse on counterinsurgency: whereas the earlier discourse viewed insurgents as rational and did not necessarily assign moral judgment, the new discourse viewed terrorists as “evil, pathological, irrational actors, fundamentally different from ‘us.’”<sup>134</sup> She attributed that shift to the growing public and political locus of discussions of terrorism—beginning with congressional hearings on terrorism in 1974—and to the greater targeting of Americans and transnational civilian locations.<sup>135</sup> Stampnitzky also contended that, in contrast to early understandings of terrorism, definitions of terrorism after 1972 decreasingly referred to violence committed directly by states.<sup>136</sup>

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129. See STAMPNITZKY, *supra* note 81, at 27–41; see also Beverly Gage, *Terrorism and the American Experience: A State of the Field*, 98 J. AM. HIST. 73, 76 (2011) (observing that, while one social science encyclopedia defined the term “terrorism” as early as 1934, interest in the subject faded and did not “reemerge[] as a significant area of social science inquiry” until the 1970s).

130. Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 314 & n.107 (2002).

131. Pamela E. Pennock, *From 1967 to Operation Boulder: The Erosion of Arab Americans’ Civil Liberties in the 1970s*, 40 ARAB STUD. Q. 41, 44 (2018).

132. See NAT’L COMM. ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 94, 96 (2004) [hereinafter 9/11 COMMISSION REPORT], <https://govinfo.library.unt.edu/911/report/911Report.pdf> [<https://perma.cc/DBP2-YAHT>].

133. STAMPNITZKY, *supra* note 81, at 3. Stampnitzky argued that the terrorism discourse should not be seen as “a simple reflection of concrete events, nor as a mere rhetorical creation,” but as the result of “new sorts of *events*, new sorts of *experts*, and the means by which these came together: the application of specific forms of expertise to the problem.” *Id.* at 24–25.

134. *Id.* at 50.

135. See *id.* at 66–67.

136. See *id.* at 54. State-sponsored terrorism continued to be recognized, but this referred not to direct state violence but to activities by terrorist groups funded or facilitated by states.

While U.S. counterterrorism initially prioritized legal and diplomatic strategies, the understanding of terrorism as a form of warfare, not just a crime, grew during the Reagan era. In the 1970s, U.S. counterterrorism efforts centered around diplomacy and the promotion of international agreements to combat terrorism.<sup>137</sup> Law figured prominently in government-sponsored conferences on terrorism, and lawyers were prominent among terrorism experts.<sup>138</sup> By the 1980s, however, U.S. emphasis on international law responses declined as nations failed to agree on the definition of terrorism, with many Third World governments supporting national liberation efforts.<sup>139</sup> Moreover, after the failed attempt to rescue U.S. hostages in Iran, President Reagan came into office pledging a muscular foreign policy, including preemptive military action against terrorism.<sup>140</sup> The Reagan administration retaliated against terrorist acts on a couple occasions—most notably in bombing Libya after an attack on U.S. military personnel in Berlin—and the conception of terrorism as a form of warfare competed with the traditional view of terrorism as a crime.<sup>141</sup>

Stampnitzky described the growing conception of terrorism as war as “accompanied by a new narrative that reframed terrorism as a civilizational struggle, between ‘the democracies’ or ‘the West’ against a network of terrorists backed by the Soviet Union.”<sup>142</sup> That civilizational frame persisted even as the Cold War receded and attention shifted to the idea of a “new terrorism”—terrorism that was deemed exceedingly irrational, committed to massive violence, and especially associated with Islam.<sup>143</sup> The Clinton administration accepted elements of the “war” framing: it concluded that the United States had the right to respond to al-Qaeda with armed force under international law, initiated a rendition program for terrorist suspects, and launched military strikes against alleged al-Qaeda facilities in Sudan and Afghanistan.<sup>144</sup> In the same period, Congress enacted immigration laws excluding noncitizens who “reasonably should have known” their activities would provide “material support” to terrorist activities or groups, criminalized material support for terrorist activities, and designated foreign terrorist organizations.<sup>145</sup>

Despite changes between the 1970s and 1990s, the terrorism frame throughout this period largely centered on the violence of foreign people—

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137. See *id.* at 86–89; see also 9/11 COMMISSION REPORT, *supra* note 132, at 94 (“In the 1960s and 1970s, the State Department managed counterterrorism policy.”).

138. See STAMPNITZKY, *supra* note 81, at 88–89.

139. See *id.* at 91–93.

140. See DAVID C. WILLS, THE FIRST WAR ON TERRORISM: COUNTER-TERRORISM POLICY DURING THE REAGAN ADMINISTRATION 3–4 (2003).

141. See *id.* at 10–13.

142. STAMPNITZKY, *supra* note 81, at 109–10.

143. See *id.* at 140–41.

144. See Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1095 (2008).

145. See Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. LEGIS. 1, 11–18 (2005) (describing expansion of immigration exclusion provision and passage of two criminal material support laws in 1990s).

usually Brown or Black, increasingly Arab and Muslim—frequently acting in the pursuit of nationalist or anti-imperialist ends. One influential account argued that four historical waves of transnational terrorism occurred from the late nineteenth century to the early twenty-first century: an “anarchist” wave that began in Russia in the late 1800s; an anti-colonial wave from the 1920s through the 1960s; a “New Left” nationalist and radical wave in Third World and Western countries spurred by the Vietnam War, symbolized by the Palestine Liberation Organization (PLO), and lasting into the 1980s; and a religious wave triggered by the 1979 Iranian Revolution, the Soviet invasion of Afghanistan, and other events.<sup>146</sup> If one juxtaposes that periodization with Stampnitzky’s account, U.S. terrorism discourse emerged after four decades of anti-colonial activism and alongside the rise of the PLO and New Left violence, and moved towards a war paradigm in the face of religiously inspired terrorism.<sup>147</sup>

Media studies professor Deepa Kumar has argued that, while Munich launched the racialization of Arab and Muslim peoples as terrorists, media coverage in the 1970s depicted the terrorist as “a leftist from various parts of the world and often [W]hite”; by the 1990s, however, media coverage had shifted to presenting terrorists as predominantly Muslim.<sup>148</sup> Even before September 11, 2001, U.S. popular culture had conflated Arab and Muslim peoples with terrorists,<sup>149</sup> while FBI surveillance and immigration measures had already honed in on U.S. Arab and Muslim communities as potential terrorist threats.<sup>150</sup>

The attacks of September 11, 2001, sharply inflected U.S. counterterrorism in several respects. First, they led to widespread acceptance within government of the war model of terrorism and prompted the United States to launch a “global war on terror” against al-Qaeda and other Muslim groups deemed to be “associated forces” of al-Qaeda. Not limited to Afghanistan, where the Taliban

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146. See David C. Rapoport, *The Four Waves of Modern Terrorism*, in *ATTACKING TERRORISM: ELEMENTS OF A GRAND STRATEGY* 46–73 (Audrey Kurth Cronin & James M. Ludes eds., 2004).

147. See *id.* at 47–62.

148. Kumar, *supra* note 128, at 36, 58. Kumar further argued that the U.S. national security state “crafted” Arab American activists as terrorists beginning in the late 1960s, following a strategic U.S. foreign policy shift towards Israel and suspicions of U.S. Arab students’ participation in left-wing social movements, and that racial profiling was “systematised” after Munich. *Id.* at 43. She contended, “Together with urban crime, riots, feminist agitation, and anti-war protests, terrorism became part of a generalised moral panic that the national security state needed to subdue in order to restore order, the stability of capitalism, and global imperial dominance.” *Id.* at 40.

149. See JACK G. SHAHEEN, *REEL BAD ARABS: HOW HOLLYWOOD VILIFIES A PEOPLE* 7–8 (3d ed. 2012) (reviewing more than one thousand films through 2001 to conclude that Hollywood had “collectively indicted all Arabs as Public Enemy #1—brutal, heartless, uncivilized religious fanatics and money-mad cultural ‘others’ bent on terrorizing civilized Westerners, especially Christians and Jews”); see also JACK G. SHAHEEN, *THE TV ARAB* 4 (1984) (describing portrayals of Arab individuals in eight years of TV episodes as wealthy, barbaric sex maniacs who “revel in acts of terrorism”).

150. See Akram & Johnson, *supra* note 130, at 313–27 (describing surveillance of Arab Americans, efforts to deport political dissidents, and use of secret evidence in removal proceedings targeting Arabs and Muslims); see also Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists,”* 8 *ASIAN L.J.* 1, 12 (2001) (commenting before 9/11 on the racialization of Arab Americans and Muslims as “foreign, disloyal, and imminently threatening”).

had sheltered al-Qaeda's leaders, the United States took military action in Iraq, Syria, Pakistan, and other nations and detained suspects across the globe.<sup>151</sup> Unlike prior military force deployed in retaliation for discrete terrorist attacks, post-9/11 military interventions invoked "preemption"—a new doctrine that justified lethal force to prevent possible terrorist attacks, whether or not they were imminent.<sup>152</sup>

Second, within the United States, law enforcement agencies explicitly shifted from a prosecutorial to a preventative approach to terrorism.<sup>153</sup> In a high-level meeting shortly after the attacks, Attorney General John Ashcroft reportedly interrupted FBI Director Robert Mueller when he spoke about preserving evidence for prosecution: "Let's stop the discussion right here . . . The chief mission of U.S. law enforcement . . . is to stop another attack and apprehend any accomplices or terrorists before they hit us again. If we can't bring them to trial, so be it."<sup>154</sup> The FBI arrested hundreds of Muslim noncitizens in mass immigration sweeps after the attack, and, in the ensuing years, "mapped" and surveilled U.S. Muslim communities, added thousands to watchlists, recruited large networks of informants to identify individuals prone to "radicalization," and imprisoned many U.S. Muslims for material support to terrorism.<sup>155</sup> These programs often explicitly embraced racial and religious profiling on the grounds that Muslims of various backgrounds presented the threat.<sup>156</sup>

Third, U.S. agencies embraced the notion that the response to 9/11 and the ongoing threat of terrorism justified exceptional deviations from ordinary rules.<sup>157</sup> Torture, extraordinary rendition (the transfer of terrorist suspects to foreign governments for interrogation and possible torture), the interrogation of suspects in secret CIA "black sites," the indefinite detention of "enemy combatants" in Guantanamo, and the National Security Agency's warrantless surveillance represented some of the starkest legal violations. While the U.S. government subsequently retreated from some of these policies—and Congress retroactively provided legal authorization for others<sup>158</sup>—executive actions

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151. See Chesney, *supra* note 145, at 22–24 (describing conception of 9/11 attacks as acts of war and military detention beyond Afghanistan).

152. STAMPNITZKY, *supra* note 81, at 173–75.

153. See Chesney, *supra* note 145, at 26–28.

154. *Id.* at 27 (citing BOB WOODWARD, BUSH AT WAR 42 (2002)).

155. Amna Akbar, *Policing "Radicalization,"* 3 U.C. IRVINE L. REV. 809, 845–68 (2013).

156. See, e.g., Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEO. L.J. 379, 419–21 (2017).

157. See Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 J. CONST. L. 1001, 1051 (2004) (arguing that the Bush administration increasingly invoked exceptional circumstances to minimize congressional and judicial oversight over executive action in response to 9/11). Referencing the work of political theorist Carl Schmitt and his critics, Scheppele defined a "state of exception" as "the situation in which a state is confronted by a mortal threat and responds by doing things that would never be justifiable in normal times, given the working principles of that state." *Id.* at 1004.

158. See JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at 5–20 (2012) (describing the Obama administration's continuation of many Bush administration war-on-terror practices, with some adjustments).

continued to push the boundaries of legality by advancing questionable legal justifications for new practices, like targeted killings of U.S. citizens, and asserting terrorism exceptions to ordinary law.<sup>159</sup> Meanwhile, courts refused to hear many constitutional challenges to such policies on the basis that courts should defer to executive judgments in national security matters, even when cases implicated the rights of U.S. citizens.<sup>160</sup>

Thus, after September 11, 2001, the terrorism frame came to be strongly associated with military action, aggressively preventative law enforcement, and exceptions to ordinary law—almost entirely with respect to Muslim and Arab communities.

## 2. *The Emergence of “Domestic Terrorism”*

During the post-9/11 period, a separate category of “domestic terrorism” solidified within U.S. law, policy, and media coverage to distinguish it from terrorism attributable to al-Qaeda, ISIS, and Muslim communities.<sup>161</sup>

“Domestic terrorism” first existed in the law as an implicit, undefined category representing activities excluded from laws directed at international terrorism. Thus, the 1978 Foreign Intelligence Surveillance Act authorized surveillance within the United States of agents of groups engaged in “international terrorism,” and defined the latter term but not its domestic counterpart.<sup>162</sup> The distinction in that law between surveillance powers pertaining to foreign and domestic threats traced back to the “*Keith* case,” a 1972 Supreme Court decision that required judicial approval for “domestic security surveillance” while reserving judgment on warrantless surveillance of U.S. activities connected to foreign powers.<sup>163</sup>

Well before the 1970s, the federal government and states had addressed U.S.-based political violence—often repressively—but without generally framing the problem as terrorism. In the 1920s, almost half of U.S. states had prosecuted labor activists under “criminal syndicalism” statutes that forbade

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159. See, e.g., Memorandum from Jennifer K. Elsea, Legis. Att’y, Cong. Rsch. Serv. (May 4, 2012), <https://sgp.fas.org/crs/natsec/target.pdf> [<https://perma.cc/AHT8-S39R>] (discussing legal issues surrounding U.S. targeted killings); Memorandum from Gary Grindler, Acting Deputy Att’y Gen., U.S. Dep’t of Just., for John F. Clark, Dir., U.S. Marshals Serv. Michele Leonhart, Adm’r, Drug Enf’t Admin., Harley G. Lappin, Dir., Bureau of Prisons, Kenneth E. Melson, Dir., Bureau of Alcohol, Tobacco, Firearms and Explosives (Oct. 19, 2010) [hereinafter DOJ Memorandum to Law Enforcement Agents], <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-memo-ciot.pdf> [<https://perma.cc/7GL3-8TFJ>] (advising law enforcement agencies on interrogating suspects in terrorism cases without *Miranda* warnings in circumstances beyond the recognized public safety exception).

160. See Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CALIF. L. REV. 991, 993 (2018) [hereinafter Sinnar, *Procedural Experimentation*].

161. For an extended discussion of the legal divide between domestic and international terrorism, see generally Sinnar, *Separate and Unequal*, *supra* note 6.

162. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. § 1801); see also 50 U.S.C. § 1801(c)(3) (defining “international terrorism” under FISA).

163. *United States v. U.S. Dist. Court for E. Dist. of Mich., S. Div. (Keith)*, 407 U.S. 297, 308–09, 321–22, 324 (1972).



advocacy of political change by means of sabotage, terrorism, and other unlawful acts.<sup>164</sup> These statutes labeled terrorism as an unlawful tactic, but treated the problem as leftist radicalism.<sup>165</sup> The reference to terrorism as a problematic tactic but not as the underlying problem persisted.<sup>166</sup> The 1972 *Keith* decision arose out of the investigation of a bombing of a Michigan CIA office by individuals alleged to be “subversive,” but the opinion invoked “domestic security” without mentioning terrorism.<sup>167</sup> In the 1960s, the FBI infiltrated, disrupted, and suppressed civil rights groups, the Black Panther Party, and leftist student anti-war groups, regardless of any connection to foreign nations or to violence.<sup>168</sup> Under pressure from liberals, it also undertook a counterintelligence program against the Ku Klux Klan.<sup>169</sup> The FBI’s “Cointelpro” operations against both sets of targets identified threats primarily in terms of ideology—as “White Hate Groups,” “Black Nationalist/Hate Groups,” or the “New Left”<sup>170</sup>—rather than labeling the problem as terrorism.<sup>171</sup>

By 1995, when Timothy McVeigh bombed the Alfred P. Murrah Federal Building in Oklahoma City, “terrorism” had become a far more dominant frame for political violence. The media and government officials pervasively labeled that incident a terrorist attack and began to scrutinize right-wing militias as a domestic terrorist threat.<sup>172</sup> But the response to Oklahoma City simultaneously showed how strongly terrorism was associated with international threats and Muslims in particular; the news media initially blamed the attack on Middle Eastern terrorists, and when it became clear that the perpetrator was an “American” terrorist, it continued to link militias to cultural images of

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164. Ahmed A. White, *The Crime of Economic Radicalism: Criminal Syndicalism Laws and the Industrial Workers of the World, 1917–1927*, 85 OR. L. REV. 649, 652 (2006).

165. See *id.* at 652–53 (describing purpose of syndicalism laws as criminalizing membership and thereby destroying the International Workers of the World).

166. See Wadie E. Said, Humanitarian Law Project and the Supreme Court’s Construction of Terrorism, 2011 B.Y.U.L. REV. 1455, 1459 (2011) (observing of Supreme Court decisions that, “in the period between the turn of the twentieth century and the advent of the era of the airplane hijacking, terrorism, despite being legally impermissible, was considered to be a mere tactic, and not a type of existential threat to American civilization”).

167. See *Keith*, 407 U.S. 297.

168. See DAVID CUNNINGHAM, THERE’S SOMETHING HAPPENING HERE: THE NEW LEFT, THE KLAN, AND FBI COUNTERINTELLIGENCE 7, 32–34, 123 (2004).

169. See *id.* at 122, 126–28. Cunningham argued that, unlike civil rights and Black liberation groups, the Klan “was not threatening to predominantly [W]hite power structures in American communities,” *id.* at 126, and its racist ideas were widely shared in the South; thus, its violence and disrespect for authority made it a problem, not its views.

170. *Id.* at 32–33.

171. This is not to say that law enforcement officials, government leaders, or the public never used the word “terrorists” to describe those engaging in violence. For instance, after the Klan murder of a civil rights activist, President Johnson declared, “We will not be intimidated by the terrorists of the Ku Klux Klan any more than the terrorists of the Viet Cong.” John Drabble, *To Ensure Domestic Tranquility: The FBI, COINTELPRO-WHITE HATE and Political Discourse, 1964–1971*, 38 J. AM. STUD. 297, 320 (2004). But the FBI and much of the media primarily framed the Klan as “extremists” who inadvertently aided the Communists. See *id.* at 297, 309.

172. See STEVEN M. CHERMAK, SEARCHING FOR A DEMON: THE MEDIA CONSTRUCTION OF THE MILITIA MOVEMENT 66–67, 71–72, 119 (2002).

international terrorists.<sup>173</sup> In the aftermath of the attack, the U.S. government both weakened and strengthened the distinction between international and domestic terrorism: while Congress directed the U.S. Sentencing Commission to apply an existing terrorism sentencing enhancement to terrorism crimes not limited to international terrorism,<sup>174</sup> it simultaneously enacted a new prohibition on material support to terrorist organizations that only applied to foreign groups.<sup>175</sup>

Six weeks after the 9/11 attacks, Congress first defined domestic terrorism in the USA Patriot Act without attaching significant criminal or legal consequences to the definition.<sup>176</sup> Like the existing definition of international terrorism, the new definition centered on “activities that involve acts dangerous to human life” that violated federal or state criminal law and that were intended to “intimidate or coerce a civilian population” or “influence the policy of a government by intimidation or coercion.”<sup>177</sup> But Congress distinguished domestic terrorism as “occur[ing] primarily within the territorial jurisdiction of the United States,” as opposed to acts that occurred primarily outside the United States or that transcended national boundaries.<sup>178</sup>

The statutory definition of domestic terrorism focused on the geographical location of acts. But, as I have argued in earlier work, in the years after 9/11, domestic terrorism increasingly came to stand instead for terrorism not inspired by Islamic ideologies. Government agencies largely considered threats by

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173. *Id.* at 67, 119.

174. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 730, 110 Stat. 1214, 1303 (directing the Sentencing Commission to “amend the sentencing guidelines so that the chapter 3 adjustment relating to international terrorism only applies to federal crimes of terrorism [as defined by statute]”). A House of Representatives legislative report indicated a goal to ensure the Sentencing Commission had “authority to expand the scope of its Chapter 3 enhancement for ‘international terrorism offenses’ . . . to include all terrorism offenses . . . whether international or domestic.” H.R. REP. No. 104-383, at 87 (1995). The Senate report indicated that the new provision would limit the sentencing enhancement to defined federal crimes. *See* H.R. REP. No. 104-518, at 123 (1996). While the original enhancement was limited to international terrorism, the new enhancement applied to an offense “that involves, or is intended to promote a federal crime of terrorism.” 18 U.S.C. § 2332b(g)(5)(A).

175. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 302, 110 Stat. 1214, 1248. The material support ban excluded purely domestic activities against a backdrop of legislative concern for civil liberties. *See* Chesney, *supra* note 145, at 16–17 (describing civil liberties concerns in legislative debates over material support provision).

176. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, § 801, 115 Stat. 272 (codified at 18 U.S.C. § 2331(5)).

177. Domestic terrorism is defined as “activities that—(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States.” 18 U.S.C. § 2331(5).

178. *Id.* (defining domestic terrorism); *id.* § 2331(1) (limiting international terrorism to “activities that . . . occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum”).

Muslims to be international and threats by others, including White supremacists, to be domestic, even where they differed little in their geography.<sup>179</sup> Thus, the FBI classified U.S. citizen Muslims within the United States who were “inspired by” foreign organizations as an international terrorist threat, even when they had no contact with those organizations.<sup>180</sup> It ultimately created a separate subcategory of international terrorism for U.S. Muslims not collaborating with a foreign group—“homegrown violent extremists”—rather than treat them as domestic terrorists.<sup>181</sup> At the same time, the FBI classified White supremacists as domestic terrorists *even* when they traveled overseas for military training—a contradictory classification that puzzled members of Congress in a 2019 congressional hearing.<sup>182</sup> Other agencies likewise differentiated between Americans attracted to political violence in the name of Islam versus White supremacy, maintaining separate categories even when both groups had significant foreign connections.<sup>183</sup> And the media likewise used the “domestic terrorism” moniker to specify violence unconnected to Muslims and Islam.<sup>184</sup>

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179. Sinnar, *Separate and Unequal*, *supra* note 6, at 1337. For an updated discussion of these points, see Shirin Sinnar, *Questioning the “Domestic” and “International” in Biden’s Counterterrorism Strategy*, JUST SEC. (July 26, 2021), <https://www.justsecurity.org/77557/questioning-the-domestic-and-international-in-bidens-counterterrorism-strategy/> [<https://perma.cc/Q2PP-QKJT>].

180. Sinnar, *Separate and Unequal*, *supra* note 6, at 1337.

181. *Id.* at 1351 n.101 (referencing FBI definitions of international and domestic terrorism and “homegrown violent extremists”).

182. See *House Homeland Security Hearing on Global Threats*, C-SPAN, at 00:58:12 (Oct. 30, 2019), <https://www.c-span.org/video/?465777-1/fbi-director-wray-acting-dhs-secretary-mcaleenan-testify-global-threats> [<https://perma.cc/56YH-ECAN>] (oral statement of Christopher Wray, Dir. Fed. Bureau of Investigation in *Global Terrorism: Threats to the Homeland, Part II: Hearing Before the H. Comm. on Homeland Sec.*, 116th Cong. (2019)) (“We are starting to see racially motivated violent extremists connecting with like-minded individuals overseas, online certainly. In some instances we have seen some folks travel overseas to train.”). Although it has adopted different terminology over time, the FBI has classified “racially motivated violent extremists” as a subset of domestic terrorists or domestic “violent extremists.” *Worldwide Threats to the Homeland Hearing*, *supra* note 30 (written statement of Christopher A. Wray, Dir., Fed. Bureau of Investigation); see also Devlin Barrett, *FBI Director: Some Domestic Terrorism Suspects Travel Overseas for Training*, WASH. POST (Oct. 30, 2019), [https://www.washingtonpost.com/national-security/fbi-director-some-domestic-terror-suspects-travel-overseas-for-training/2019/10/30/0c3a6048-fb2f-11e9-8190-6be4deb56e01\\_story.html](https://www.washingtonpost.com/national-security/fbi-director-some-domestic-terror-suspects-travel-overseas-for-training/2019/10/30/0c3a6048-fb2f-11e9-8190-6be4deb56e01_story.html) [<https://perma.cc/LYX8-R5KF>].

183. See *HOMELAND THREAT ASSESSMENT OCTOBER 2020*, *supra* note 14, at 17–18 & nn.6–7 (distinguishing between “domestic violent extremists” and “foreign terrorist-inspired Homegrown Violent Extremists” even while acknowledging that White supremacists within the United States “have engaged in outreach and networking opportunities abroad with like-minded individuals to expand their violent extremist networks.”). Although White supremacists’ international connections may have grown in recent years, Kathleen Belew’s account suggested that the characterization of that movement as “domestic” is flawed even as a historical matter. She contended that the U.S. White power movement since the 1970s was inspired by an international experience—the Vietnam War—and that for several decades, White power activists went abroad to fight as mercenaries in foreign conflicts. See BELEW, *supra* note 23.

184. Kimberly A. Powell, *Framing Islam: An Analysis of U.S. Media Coverage of Terrorism Since 9/11*, 62 COMM’N STUD. 90, 98 (2011) [hereinafter Powell, *Framing Islam*] (observing from media coverage between 2001–2010 that “terrorism” was “reserved for those also labeled Muslim,” while “domestic terrorism” was “reserved for citizens of the United States who were not Muslim and had no international ties to terrorist organizations”).

The differentiation between domestic and international terrorism entailed significant legal consequences. When responding to threats within the United States associated with Muslims, U.S. agencies surveilled individuals with foreign intelligence surveillance court warrants, used a vast network of undercover informants, and charged individuals with material support to terrorism crimes.<sup>185</sup> When responding to threats from White supremacists, anti-government militants, or others classified as domestic threats, federal agencies used conventional law enforcement warrants, rarely used material support charges, often deferred to state and local prosecutors, and appear to have relied less aggressively and extensively on informants.<sup>186</sup> Federal law provided significant means for the investigation and prosecution of domestic terrorism, but for many years after 9/11, agencies did not prioritize it.<sup>187</sup>

### III.

#### THE CONTEMPORARY IMPLICATIONS OF THE HATE CRIMES AND TERRORISM FRAMES

The last Section described how the hate crimes and terrorism frames developed over time in U.S. law and society and how they differed. The hate crimes frame elevated attention to the harm of bias-motivated violence on identity groups, but focused on individual responsibility, de-emphasized the link between racist violence and historical subordination, and sought solutions in criminal law. The terrorism frame presented terrorism as an urgent problem between war and crime, perpetrated by racial and religious outsiders, and meriting a response that pushed legal boundaries. Meanwhile, the domestic terrorism category assigned threats the stigma of terrorism but distinguished the predominantly White perpetrators from archetypical international terrorists and, at least until recently, applied relatively conventional law enforcement responses.

This Section offers a side-by-side comparison of how the hate crimes and terrorism frames conceptualize and treat five issues today: (1) the nature and severity of the threat; (2) the type of law enforcement approach; (3) the characterization of perpetrators; (4) the identity of victims and perpetrators; and (5) the role of individual rights and courts. I argue that the two frames differ

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185. See Sinnar, *Separate and Unequal*, *supra* note 6, at 1335; see also *supra* Part I.A.

186. See Sinnar, *Separate and Unequal*, *supra* note 6, at 1336; see also *supra* Part I.A.

187. See, e.g., Ryan Lucas, *How the FBI Is Responding to the Rise in Home-Grown Extremism*, NPR (Feb. 8, 2021), <https://www.npr.org/2021/02/08/964537232/how-the-fbi-is-responding-to-the-rise-in-home-grown-extremism> [<https://perma.cc/P8RX-XCQ5>] (citing official who ran FBI's domestic terrorism division from 2013–2015 as saying it had approximately twenty people, compared to “several hundred” in international terrorism division, and that agency-led Joint Terrorism Task Forces did not have “squads” dedicated to domestic terrorism); Janet Reitman, *U.S. Law Enforcement Failed to See the Threat of White Nationalism. Now They Don't Know How to Stop It.*, N.Y. TIMES MAG. (Nov. 3, 2018), <https://www.nytimes.com/2018/11/03/magazine/FBI-charlottesville-white-nationalism-far-right.html> [<https://perma.cc/EXS8-NPRA>] (describing “apparent indifference” of government and law enforcement agencies to far-right extremism, including White supremacists).

sharply on all these issues, such that significant legal and social implications potentially flow from assigning particular acts or threats of violence to one category or another. My focus here is not on demonstrating the irrationality of these distinctions. For instance, because hate crimes are broadly defined to include relatively minor offenses such as vandalism, while terrorism is defined in terms of actual or threatened violence, one would expect that perceptions of dangerousness would differ across the categories.<sup>188</sup> But because a considerable amount of violence lies at the conceptual overlap between them, the characterization of an act or threat can entail profound legal and social consequences. The move to reframe White supremacist violence as domestic terrorism pushes it in the direction of terrorism, though for now, legal, political, and social constraints prevent it from taking on completely that frame's characteristics.

	<b>Hate Crimes Frame</b>	<b>Terrorism Frame</b>
<b>Nature/Severity of Threat</b>	Crime	War/Crime
	Civil rights problem	National security problem
<b>Law Enforcement Approach</b>	Reactive	Preventative
<b>Characterization of Perpetrators</b>	Worse than other criminals, but not irredeemable	Enemy combatants or perpetually dangerous criminals
<b>Identity of Victims and Perpetrators</b>	Victims: identity groups, prototypically minorities	Victims: the nation, prototypically White or multiracial
	Perpetrators: citizens, prototypically White	Perpetrators: foreigners, prototypically non-White and Muslim
<b>Individual Rights</b>	Strong First Amendment protection	Weak First Amendment protection
	Weak judicial deference	Strong judicial deference

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188. This is not to say that terrorism crimes all require a threat or act of violence; the connection to violence can actually be attenuated given broadly defined charges and preemptive law enforcement responses. *See, e.g., infra* Part III.B.; *infra* Part IV.C.2. But the basic idea of terrorism, unlike hate crimes, involves a threat or use of violence. *See supra* Part II.A.

A. *The Nature and Severity of the Threat*

The hate crimes and terrorism frames construe the nature and severity of the threats they address in dramatically different fashion. Hate crimes are seen as especially harmful crimes requiring special government attention, but they are still crimes for which the remedy is enhanced punishment for individuals. By contrast, terrorism is considered systemic and urgent, part war and crime, to be met with military operations and surveillance around the globe and an aggressive law enforcement response at home. Even the terms reflect this difference: hate crimes are plural—an aggregation of individual acts—while terrorism is a singular mass noun and “ism,” conjuring a phenomenon greater than the sum of its parts.<sup>189</sup>

Hate crimes, at most, are treated as crimes, whereas terrorism exists at the contested boundaries of crime and war, and squarely within conceptions of “national security.” From the 1980s onwards, the response to hate crimes centered on the creation of criminal offenses and penalty enhancements. To the extent that critics contested the framing of hate crimes as crime, the challenge came from those who viewed certain acts as protected speech rather than criminalizable conduct. In other words, the question was whether certain hate crimes should *even be* criminal.<sup>190</sup> By contrast, opposition to the framing of terrorism as crime came from those who viewed terrorism as unlawful warfare by enemies of the state, rather than “mere crime.” Based on such beliefs, Congress barred the use of funds for the transfer of Guantanamo Bay detainees to the United States for criminal trial, consigning them to military detention or trial by military commission instead.<sup>191</sup> Congressional Republicans, such as Senator Lindsey Graham, regularly called for interrogating terrorism suspects as “enemy combatants” rather than “common criminals,” even when they were U.S. citizens acting exclusively within the United States.<sup>192</sup>

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189. The singular “hate crime” often appears as an adjective, for example, “hate crime laws.” But when the term appears as a noun in reference to multiple incidents or the phenomenon as a whole, the plural “hate crimes” appears to be more common than the singular “hate crime.”

190. See, e.g., Martin H. Redish, *Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory*, 11 CRIM. JUST. ETHICS 29, 29 (1992); see also *supra* Part II.C. (describing First Amendment challenges to hate crime laws).

191. Pub. L. No. 111-383, § 1032, 124 Stat. 4137, 4351 (2011); see also Josh Gerstein, *Obama Signs Defense Bill that Could Cripple His Guantanamo Policy*, POLITICO (Jan. 7, 2011), <https://www.politico.com/blogs/under-the-radar/2011/01/obama-signs-defense-bill-that-could-cripple-his-guantanamo-policy-031996> [<https://perma.cc/4JLN-RPDE>] (describing passage of bill as partly motivated by opposition to a civilian trial for detainee accused of 9/11 involvement); Joseph I. Lieberman & Kelly Ayotte, *Send Suspected Terrorists To Guantanamo — Not New York*, WASH. POST (July 21, 2011), [https://www.washingtonpost.com/opinions/send-suspected-terrorists-to-guantanamo--not-new-york/2011/07/15/gIQAlalhSI\\_story.html](https://www.washingtonpost.com/opinions/send-suspected-terrorists-to-guantanamo--not-new-york/2011/07/15/gIQAlalhSI_story.html) [<https://perma.cc/R8AG-38AT>] (advocating that al-Shabab member be treated as “a suspected enemy combatant in our global war against Islamist terrorism, not a suspected common criminal”).

192. See, e.g., Charlie Savage, *G.O.P. Lawmakers Push to Have Boston Suspect Questioned as Enemy Combatant*, N.Y. TIMES (Apr. 21, 2013), <https://www.nytimes.com/2013/04/22/us/gop-lawmakers-push-to-hold-boston-suspect-as-enemy-combatant.html> [<https://perma.cc/H96X-AEL5>]; Tom Vanden Brook, *Senator Calls on Trump to Declare Terror Suspect an ‘Enemy Combatant,’ USA*

The enactment of hate crime laws throughout the country represented a successful effort to present hate crimes as especially serious, and the anti-hate crime movement spurred the creation of specialized hate crime police units, training programs, and funding streams.<sup>193</sup> These efforts generally sought to improve the policing and prosecution of hate crimes within existing institutions, but nothing in this resource mobilization remotely approached that of the war on terror. In 2010, a Washington Post investigation found that 1,271 government organizations and 1,931 private companies worked on counterterrorism, homeland security, and intelligence; 854,000 people held top-secret security clearances; and analysts produced 50,000 intelligence reports a year.<sup>194</sup> In 2021, the Costs of War Project at Brown University estimated that the United States had spent or incurred \$8 trillion on post-9/11 wars and counterterrorism spending, and that its counterterrorism operations spanned eighty-five countries.<sup>195</sup> The Project also found that these wars had caused the direct deaths of at least 897,000 people, including over 364,000 civilians and 7,000 U.S. military personnel.<sup>196</sup>

Even with respect to federal institutions that investigate or prosecute crime, the framing and priority accorded to hate crimes and terrorism differs considerably. The U.S. Department of Justice's Civil Rights Division prosecutes hate crimes through its Criminal Section, consistent with the characterization of hate crimes as a civil rights and criminal law issue.<sup>197</sup> It prosecutes just about

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TODAY (Nov. 1, 2017), <https://www.usatoday.com/story/news/politics/2017/11/01/senator-calls-trump-declare-terror-suspect-enemy-combatant/821464001/> [<https://perma.cc/Y9TN-EYV7>].

193. See JENNESS & GRATTET, *supra* note 85, at 128, 138–40, 142–47. Jenness and Grattet observed that, despite the spread of these innovations, “Even today, most departments have no specialized bias crime unit, no personnel assigned to routinely deal with bias crime incidents, and no formal policy on the definition, identification, and policing of hate crime.” *Id.* at 138.

194. Dana Priest & William M. Arkin, *A Hidden World, Growing Beyond Control*, WASH. POST (July 19, 2010), <https://www.washingtonpost.com/investigations/top-secret-america/2010/07/19/hidden-world-growing-beyond-control-2/> [<https://perma.cc/FGX3-C6AA>].

195. NETA C. CRAWFORD, COSTS OF WAR PROJECT, WATSON INST. INT’L & PUB. AFFS., BROWN UNIV., THE U.S. BUDGETARY COSTS OF THE POST-9/11 WARS 1 (2021), [https://watson.brown.edu/costsofwar/files/cow/imce/papers/2021/Costs%20of%20War\\_U.S.%20Budgetary%20Costs%20of%20Post-9%2011%20Wars\\_9.1.21.pdf](https://watson.brown.edu/costsofwar/files/cow/imce/papers/2021/Costs%20of%20War_U.S.%20Budgetary%20Costs%20of%20Post-9%2011%20Wars_9.1.21.pdf) [<https://perma.cc/FXR9-NQ89>] (estimating costs spent and obligated, including from post-9/11 wars, homeland security spending, war borrowing interest payments, and future veterans’ medical and disability care payments); STEPHANIE SAVELL, WATSON INST. INT’L & PUB. AFFS., BROWN UNIV., UNITED STATES COUNTERTERRORISM OPERATIONS 2018–2020 (2021), <https://watson.brown.edu/costsofwar/files/cow/imce/papers/2021/US%20Counterterrorism%20Operations%202018-2020%2C%20Costs%20of%20War.pdf> [<https://perma.cc/5N32-3FG6>] (identifying countries where U.S. government conducted drone strikes, ground combat operations, military exercises, or foreign military or police forces counterterrorism training).

196. COSTS OF WAR PROJECT, WATSON INST. INT’L & PUB. AFFS., BROWN UNIV., HUMAN COST OF POST-9/11 WARS (2021), <https://watson.brown.edu/costsofwar/figures/2021/WarDeathToll> [<https://perma.cc/A4BT-BPGY>].

197. *Criminal Section*, U.S. DEP’T OF JUST. (Dec. 2, 2020), <https://www.justice.gov/crt/criminal-section> [<https://perma.cc/76LC-KD2U>].

twenty-five defendants per year on federal hate crime charges.<sup>198</sup> The National Security Division, established by Congress in 2006, oversees terrorism prosecutions as part of the Justice Department's "highest priority" of protecting national security.<sup>199</sup> The division identifies hundreds of defendants prosecuted at the federal level in "international terrorism" cases.<sup>200</sup> Reflecting its identity as a national security agency, the department combines prosecutors with intelligence professionals and coordinates closely with the intelligence community.<sup>201</sup> The FBI likewise accords differential attention to these threats, ranking counterterrorism as its top priority and hate crimes as its fifth.<sup>202</sup> As the FBI transformed into an intelligence and counterterrorism agency after 9/11, it devoted singular attention and resources to international terrorism, providing a ready path to career advancement for agents who worked on it.<sup>203</sup>

### B. Reactive v. Preventative Law Enforcement

The hate crimes frame focuses on the prosecution and punishment of crimes after the fact. Following the enactment of hate crime laws, the central focus regarding hate crimes has been enforcement: to increase the identification and prosecution of completed crimes as hate crimes.<sup>204</sup> But terrorism laws and legal actors take an explicitly "preventative" approach, aimed at identifying and neutralizing those who cross the shifting line from thought to crime. That preventative apparatus maps the demographics of Muslim communities,<sup>205</sup> buys the location data of millions of users of Muslim prayer apps,<sup>206</sup> surveils individuals online and via informants,<sup>207</sup> places thousands on watchlists to

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198. MICHAEL GERMAN & EMMANUEL MAULEÓN, BRENNAN CTR. FOR JUST., FIGHTING FAR-RIGHT VIOLENCE AND HATE CRIMES 4 (2019), <https://www.brennancenter.org/our-work/research-reports/fighting-far-right-violence-and-hate-crimes> [<https://perma.cc/3KDU-LAD4>].

199. See *National Security Division: About the Division*, U.S. DEP'T OF JUST. (Apr. 12, 2019), <https://www.justice.gov/nsd/about-division> [<https://perma.cc/Q4BY-8KVD>].

200. See, e.g., NAT'L SEC. DIV., U.S. DEP'T OF JUST., INTRODUCTION TO THE NATIONAL SECURITY DIVISION'S CHART OF PUBLIC/UNSEALED INTERNATIONAL TERRORISM AND TERRORISM-RELATED CONVICTIONS FROM 9/11/01 TO 12/31/15 (2016).

201. See David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT'L SEC. L. & POL'Y 1, 8 (2011).

202. GERMAN & MAULEÓN, *supra* note 198, at 9.

203. See Reitman, *supra* note 187 (describing the overwhelming focus on Muslim extremism within the FBI and stating that FBI agents described international terrorism as the "only path to advancement" for agents).

204. See JENNESS & GRATTET, *supra* note 85, at 127–53 (describing focus on enforcing hate crime laws through policing and prosecution reforms). Jenness and Grattet described the late 1990s as the period in which anti-hate crime efforts shifted from enacting laws and resolving court challenges to ensuring enforcement. *Id.* at 127.

205. See Akbar, *supra* note 155, at 855–59.

206. Joseph Cox, *How the U.S. Military Buys Location Data from Ordinary Apps*, VICE (Nov. 16, 2020), <https://www.vice.com/en/article/jgqm5x/us-military-location-data-xmode-locate-x> [<https://perma.cc/3D7W-WF77>].

207. Sinnar, *Separate and Unequal*, *supra* note 6, at 1344–50 (FISA surveillance and National Security Letters); see also Akbar, *supra* note 155, at 861–66 (informants and Internet monitoring); Shirin Sinnar, *Questioning Law Enforcement: The First Amendment and Counterterrorism Interviews*, 77 BROOK. L. REV. 41 (2011) (questioning by FBI and Customs and Border Protection).



monitor their travel or pressure them to become informants,<sup>208</sup> and charges people with expansive crimes, including material support to terrorism.<sup>209</sup> These tactics have in common both a focus on prevention and the starting premise that broad communities defined by religious identity present a threat of “radicalization.”<sup>210</sup>

Within this wide surveillance net, cases that get prosecuted often follow a similar pattern. An undercover agent or informant approaches a young man who has expressed support for violence online, encourages that interest, and offers an ostensible opportunity to carry out a plot. If the young man follows through, law enforcement officers then arrest him for terrorism. For example, undercover FBI agents approached Adel Daoud, an eighteen-year-old in Chicago who said he wanted to use “flying cars” to attack people. They encouraged him to identify targets, quelled his moral doubts about mass violence with purported religious guidance from a fictional Saudi sheikh, and provided him with a fake bomb to detonate at a nightclub.<sup>211</sup> At sentencing, the district court described the plot as a “violent and heinous act,” but it also saw the defendant as a susceptible young man who might have chosen “a much less violent method of revolution if it had been presented instead of a 1000 lb. bomb.”<sup>212</sup> With terrorism, law enforcement officials aggressively pursue individuals thought to present even a slight risk of future crime on the theory that even small risks are unacceptable.

### C. Characterization of Perpetrators

The hate crimes frame casts perpetrators as deserving of greater punishment than other criminals, but the terrorism frame goes further in treating perpetrators as perpetually dangerous and potentially irredeemable. Advocates of hate crime laws justified sentence enhancements on various grounds: offenders acting out of bias were more culpable than other offenders; hate crimes created greater harms for victims and society; or enactment of these laws expressed society’s special condemnation for hate violence.<sup>213</sup> Across these theories, sentence

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208. See Shirin Sinnar, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566, 1583–86 (2016) (on the use, expansion, and lowering of standards for terrorist watchlists); see also *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020) (allowing suits for monetary damages under Religious Freedom Restoration Act, in a case where plaintiffs alleged they were added to terrorist watchlists because they refused to inform on Muslim communities).

209. See Sinnar, *Separate and Unequal*, *supra* note 6, at 1354–57.

210. Akbar, *supra* note 155, at 818–44 (describing the theory of “radicalization” centered on the religious and political cultures of Muslim communities). Akbar described counter-radicalization as the idea that “government must monitor and influence the religious and political cultures of Muslim communities as a way to ward off future terrorism.” *Id.* at 816.

211. *United States v. Daoud*, 980 F.3d 581, 585–86 (7th Cir. 2020).

212. *Id.* at 589–90.

213. See FREDERICK LAWRENCE, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* 60–61 (1999) (arguing that hate crime enhancements are justified by either a greater culpability or greater harm rationale); Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081, 1082–85 (2004) (explaining that hate crime laws are typically justified by the “greater wrongdoing” thesis, the “expressivist theory,” the “culpability thesis,” and the “equality thesis”); Eisenberg, *supra* note 66, at 868–71 (describing expressive rationale for hate crime laws).

enhancements reflected the view that hate crimes were especially bad crimes worthy of heightened punishment.

Despite this view, advocates for hate crime laws did not typically argue that hate crime offenders needed to be incapacitated for longer than conventional criminals because they were more dangerous or because their bias made them harder to rehabilitate.<sup>214</sup> Terrorism sentencing, however, turns on those beliefs. Federal hate crime and terrorism sentencing enhancements, both created in 1995 at Congress's direction,<sup>215</sup> suggest this difference. For any federal crime, judges must consider the U.S. Sentencing Commission Guidelines<sup>216</sup> in calculating both the base offense level for a crime and a defendant's criminal history category, before factoring in other circumstances.<sup>217</sup> The hate crime enhancement upgrades the base offense of a crime by three levels and leaves a defendant's criminal history category unchanged.<sup>218</sup> The terrorism enhancement upgrades the base offense of the crime by twelve levels or more, until it reaches a prescribed minimum, *and* assigns defendants the highest category of criminal history available.<sup>219</sup> Thus, the Guidelines treat a first-time offender convicted of any terrorism offense as presumptively incorrigible, equivalent to a person with a lifetime criminal record.<sup>220</sup> This is true despite the fact that the terrorism enhancement potentially applies to a wide range of conduct, including non-violent offenses like lying to law enforcement officials.<sup>221</sup> When a person with no past convictions challenged this policy, the Second Circuit approved the Guidelines rationale because, it postulated, "even terrorists with no prior

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214. See LAWRENCE, *supra* note 213 (offering other theories for sentence enhancements without relying on need for greater incapacitation); Hurd & Moore, *supra* note 213 (same); Eisenberg, *supra* note 66 (same). In fact, some states or judges required hate crime offenders to participate in rehabilitation efforts. Massachusetts, for instance, requires individuals convicted of hate crimes to undergo diversity training. GERSTENFELD, *supra* note 34, at 258–59. Some jurisdictions include hate crime offenders within restorative justice programs. Shirin Sinnar & Beth Colgan, *Revisiting Hate Crimes Enhancements in the Shadow of Mass Incarceration*, 95 N.Y.U. L. REV. ONLINE 149, 164 (2020). These efforts are sporadic, however, and not nearly as systematic as the effort to increase sentences. *Id.*

215. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003(b) and § 120004, 108 Stat. 1796.

216. Since *United States v. Booker*, 543 U.S. 220 (2005), federal judges have not been required to sentence defendants within Guidelines ranges, but they must still "consider Guidelines ranges" while taking account of "other statutory concerns." *Id.* at 245–46.

217. See U.S. Sentencing Guidelines Manual § 1b1.1 (U.S. Sentencing Comm'n 2018).

218. See U.S. Sentencing Guidelines Manual § 3A1.1(a).

219. U.S. Sentencing Guidelines Manual § 3A1.4.

220. As I note in a prior article, this means that a person without a record convicted of maliciously damaging a building with an explosive, causing no injury, would receive seventy to eighty-seven months with a hate crime enhancement and 210–262 months with a terrorism enhancement. Sinnar, *Separate and Unequal*, *supra* note 6, at 1359.

221. Sameer Ahmed, *Is History Repeating Itself? Sentencing Young American Muslims in the War on Terror*, 126 YALE L.J. 1520, 1529 (2017). Ahmed argued that punishments of young Muslims in terrorism cases have turned on the notion that these individuals are "uniquely dangerous" and unable to be either deterred or rehabilitated. These beliefs are held despite the lack of empirical information supporting either assertion and the harm to the individual defendants and the larger Muslim community. See *id.* at 1523, 1549–50. He compared this portrayal of young Muslims in the war on terror to the portrayal of Black men as "irredeemable" "super-predators" in the war on drugs. *Id.* at 1569.

criminal behavior are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation.”<sup>222</sup>

In fact, federal appellate courts have departed from the standard deference given to district courts in sentencing decisions by rejecting terrorism sentences as too light—reflecting a view that individuals once associated with terrorist activities remain indefinitely dangerous. U.S. authorities held Jose Padilla, a U.S. citizen arrested at O’Hare airport in Chicago, as an enemy combatant on a naval brig for three years, after accusing him of planning to detonate a “dirty” bomb for al-Qaeda.<sup>223</sup> The government never produced evidence of the alleged plot, but after transferring Padilla to civilian authorities, eventually convicted him of conspiring to support militants in foreign conflicts.<sup>224</sup> The district judge sentenced him to seventeen years in prison and twenty years of supervised release, departing downwards from the advisory Sentencing Guidelines range because of Padilla’s harsh treatment on the naval brig, which had impaired his mental health,<sup>225</sup> and because of his anticipated age at the time of release.<sup>226</sup> Yet the Eleventh Circuit ruled that his sentence was unreasonably low because, even if people ordinarily age out of criminality, Padilla was “far more sophisticated than an individual convicted of an ordinary street crime.”<sup>227</sup> As the dissent in the case pointed out, the majority simply assumed, without evidence, that Padilla remained dangerous because he had once attended a terrorist training camp twenty years earlier.<sup>228</sup>

The presumption of perpetual dangerousness also appears in the extraordinary measures the government has taken against individuals convicted of terrorism offenses who have completed lengthy sentences. Rather than treat a person who has served out their term as ready for reintegration into society, the government has deported many individuals on immigration charges,<sup>229</sup> attempted to strip the citizenship of others to make them deportable,<sup>230</sup> and sought to indefinitely hold others who cannot be deported.<sup>231</sup>

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222. *United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003) (rejecting challenge to increase in both offense level and criminal history as an impermissible form of “double counting”).

223. Warren Richey, *The Strange Saga of Jose Padilla: Judge Adds Four Years*, CHRISTIAN SCI. MONITOR (Sept. 9, 2014), <https://www.csmonitor.com/USA/Justice/2014/0909/The-strange-saga-of-Jose-Padilla-Judge-adds-four-years> [<https://perma.cc/VLS8-9L44>].

224. *United States v. Jayyousi*, 657 F.3d 1085, 1091–92 (11th Cir. 2011).

225. *See* Richey, *supra* note 223.

226. *Jayyousi*, 657 F.3d at 1117–18.

227. *Id.* at 1117.

228. *Id.* at 1133 (Barkett, J., concurring in part and dissenting in part).

229. Carol Rosenberg, *U.S. Deports Terrorism Convict It Had Sought to Hold Indefinitely*, N.Y. TIMES (July 22, 2020), <https://www.nytimes.com/2020/07/22/us/politics/terrorism-Adham-Hassoun-deported.html> [<https://perma.cc/4YLB-CA4Y>] (noting regular practice of deporting noncitizens after sentences end).

230. Josh Gerstein, *Trump Officials Pushing to Strip Convicted Terrorists of Citizenship*, POLITICO (June 8, 2019), <https://www.politico.com/story/2019/06/08/trump-convicted-terrorists-citizenship-1357278> [<https://perma.cc/MA9G-5GZ7>].

231. Rosenberg, *supra* note 229.

#### D. Identity of Perpetrators and Victims

In addition to diverging as to the redeemability of defendants, the hate crimes and terrorism frames diverge as to the racial, ethnic, and religious identity of prototypical perpetrators and victims. For hate crimes, the prototypical hate crime in public discourse remains an attack by a person from a majority group targeting a member of a minority group. Hate crime legislation invokes such cases: for instance, the key federal law that expanded hate crime protection is known as the “Shepard Byrd” law in memory of Matthew Shepard, a gay student tortured and killed by two men in Wyoming, and James Byrd, Jr., a Black man dragged to death at the back of a pickup truck by White supremacists in Texas.<sup>232</sup> Public images of hate crimes involve “[W]hite offenders and [B]lack victims,” even though hate crimes data reflect many variations.<sup>233</sup>

For terrorism, the prototypical perpetrator is Muslim, Middle Eastern, or both.<sup>234</sup> The responses to political violence by government actors and the media—not just the perpetration of such violence by groups like al-Qaeda and ISIS—shape the association between terrorism and Muslims. For instance, the massive scale of U.S. military counterterrorism operations in Muslim countries<sup>235</sup> continually directs attention to the threat of Muslim violence, as does the overwhelming and lopsided attention of U.S. law enforcement agencies to threats of terrorism from Muslims.<sup>236</sup> These governmental decisions, in turn, influence media coverage and public perceptions of terrorism. For example, law enforcement decisions to direct sting operations at Muslim individuals<sup>237</sup>

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232. Jeannine Bell, *There Are No Racists Here: The Rise of Racial Extremism, When No One is Racist*, 20 MICH. J. RACE & L. 349, 368 (2015) (describing Byrd murder as the incident that would occur to most Americans as the typical hate crime); Ahmad, *supra* note 63, at 1286 (describing Shepard and Byrd murders as paradigmatic hate crimes).

233. Brendan Lantz, Andrew S. Gladfelter & R. Barry Ruback, *Stereotypical Hate Crimes and Criminal Justice Processing: A Multi-Dataset Comparison of Bias Crime Arrest Patterns by Offender and Victim Race*, JUST. Q. 9 (2017); see also JENNESS & GRATTET, *supra* note 85, at 175 (referring to popular understanding of hate crimes); Christopher J. Lyons, *Individual Perceptions and the Social Construction of Hate Crimes: A Factorial Survey*, 45 SOC. SCI. J. 107 (2008). On the demographics of reported hate crime offenders and victims, including concerns with the statistical overrepresentation of people of color among defendants in some data sources, see TYLER BISHOP, ARIELLE ANDREWS, SAM BECKER, LAUREN MARTIN, BENJY MERCER-GOLDEN, MARIEL PÉREZ-SANTIAGO, TIARRA ROGERS & KAI WIGGINS, STAN. L. SCH. POL’Y LAB & BRENNAN CTR. FOR JUST., EXPLORING ALTERNATIVE APPROACHES TO HATE CRIMES 13–14 (2021), [http://law.stanford.edu/wp-content/uploads/2021/06/Alternative-to-Hate-Crimes-Report\\_v09-final.pdf](http://law.stanford.edu/wp-content/uploads/2021/06/Alternative-to-Hate-Crimes-Report_v09-final.pdf) [<https://perma.cc/VG2N-W8KR>].

234. See Caroline Mara Corbin, *Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda*, 86 FORDHAM L. REV. 455, 458–60 (2017).

235. CRAWFORD, *supra* note 195; SAVELL, *supra* note 195.

236. See Reitman, *supra* note 187.

237. See Jesse J. Norris & Hanna Grol-Prokopczyk, *Estimating the Prevalence of Entrapment in Post-9/11 Terrorism Cases*, 105 J. CRIM. L. & CRIMINOLOGY 609, 655 (2015) (finding that “jihadi” and “left-wing” terrorism cases in dataset contained more indicators of government “entrapment” or “borderline entrapment” than right-wing cases); David Neiwert, *Home Is Where the Hate Is*, TYPE INVESTIGATIONS (June 22, 2017), <https://www.typeinvestigations.org/investigation/2017/06/22/home-hate/> [<https://perma.cc/V67X-URB7>] (stating that higher proportion of preempted plots in dataset of

generate repeated sensational news coverage of ostensible terrorist plots by Muslims, notwithstanding law enforcement's role in suggesting and facilitating those plots. For its part, the media covers Muslim terrorism more extensively than other terrorism and presents it as more threatening.<sup>238</sup> Thus, a matrix of legal, political, and media responses to violence cements the public association between Muslims and terrorism—an association that, in turn, feeds a punitive response.<sup>239</sup>

The hate crimes and terrorism frames likewise differ in construing the identity of victims. The hate crimes frame treats identity groups as the primary victims, especially racial or religious minorities, LGBTQ people, or members of other minority communities. By contrast, the terrorism frame treats the nation as a whole as the victim. Some media coverage might portray that nation as a White or Christian nation,<sup>240</sup> but other accounts present the victim as a multiracial nation whose racial divisions are erased in the face of terrorism—at least with respect to citizens of racial backgrounds not associated with “the enemy.” Legal scholar Leti Volpp wrote that, after the September 11, 2001, attacks, “a national identity . . . consolidated that is both strongly patriotic and multiracial.” This was epitomized by a political cartoon that showed Americans of various hyphenated racial identities dropping their hyphens simply to become “American.”<sup>241</sup> Volpp argued that U.S. national identity consolidated in *opposition* to those who appeared Middle Eastern, Arab, or Muslim, in part because government racial profiling of those groups publicly identified them as potential terrorists rather than citizens.<sup>242</sup>

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“Islamist” incidents, compared to far-right incidents, suggested that law enforcement has placed a lower priority on the latter, including through use of undercover operations).

238. See Erin M. Kearns, Allison E. Betus & Anthony F. Lemieux, *Why Do Some Terrorist Attacks Receive More Media Attention Than Others?*, 36 JUST. Q. 985, 999 (2019) (assessing coverage of 136 terrorism incidents in the United States between 2006 and 2015 and finding “clear evidence that terrorist attacks perpetrated by Muslims receive drastically more media coverage than attacks by non-Muslims,” while ruling out alternative hypotheses explaining differential coverage); Powell, *supra* note 184, at 91 (concluding that media coverage of eleven terrorist incidents in the United States from Oct. 2001 to Jan. 2010 displayed dominant fear of international terrorism, especially Muslims “working together in organized cells against a ‘Christian America,’” while portraying “domestic terrorism” as a “minor threat that occurs in isolated incidents by troubled individuals”); Kimberly A. Powell, *Framing Islam/Creating Fear: An Analysis of U.S. Media Coverage of Terrorism from 2011–2016*, 9 RELIGIONS 257, 260 (2018) [hereinafter Powell, *Framing Islam/Creating Fear*] (finding that media coverage of terrorist incidents from 2011 to 2016 was slower to label acts as terrorism, compared to prior decade, but continued to portray Muslim terrorism as alarming and connected to international threats, while depicting other terrorists as “troubled, mentally ill loners”).

239. See Kelly Welch, *Middle Eastern Terrorist Stereotypes and Anti-Terror Policy Support: The Effect of Perceived Minority Threat*, 6 RACE & JUST. 117, 133 (2016) (concluding from analyses of survey data that those who stereotype terrorists as Middle Eastern are more likely to support punitive anti-terrorism measures, controlling for other factors).

240. See, e.g., Powell, *supra* note 184, at 105 (noting description of victims of terrorism in media accounts as Christian, as opposed to Muslim perpetrators).

241. See Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1584 (2002).

242. See *id.* at 1576–84.

Others have argued, with respect to more recent acts of violence, that the framing of incidents as hate crimes or terrorism affects the characterization of victims. After the 2016 Orlando mass shooting at the Pulse gay nightclub on “Latin night,” for example, some scholars argued that predominant media coverage of the shooting as terrorism, rather than as a hate crime, presented it as “an attack on America, on all its citizens,” while failing to recognize the particular oppression of gay and Latinx people.<sup>243</sup>

### E. *The Role of Rights and Courts*

Hate crime and terrorism laws reflect a very different understanding of individual rights and the judicial role. Hate crime suspects have the same procedural rights accorded other criminal defendants, but the rights of terrorism suspects drop below that floor in cases of perceived public safety need.<sup>244</sup> The difference in substantive rights comes through most clearly with respect to the First Amendment, where the hate crimes frame maintains a strict separation between criminalizable conduct and protected speech. Although both hate crimes and terrorism are “message crimes” that communicate ideas and often do so intentionally, the free speech concerns that have shaped and constrained hate crime laws give way when it comes to terrorism.

The Supreme Court’s most recent First Amendment decisions in the hate crime and terrorism contexts illustrate this difference. In 2003, the Supreme Court ruled in *Virginia v. Black* that Virginia could prohibit the burning of a cross with “an intent to intimidate a person or group of persons,” but that it could not treat the cross burning as “prima facie evidence” of that intent.<sup>245</sup> The Virginia Supreme Court had previously struck down the cross-burning prohibition in reliance on *R.A.V. v. St. Paul*, which invalidated a ban on cross burning known to “arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”<sup>246</sup> But the U.S. Supreme Court disagreed, ruling that the Virginia law, unlike the ordinance in *R.A.V.*, did not “single out for opprobrium only that speech directed toward ‘one of the specified disfavored topics.’”<sup>247</sup> It held that the state could permissibly ban cross burning with an

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243. Jace L. Valcore & Kevin Buckler, *An Act of Terror and an Act of Hate: National Elite and Populace Newspaper Framing of Pulse Nightclub Shooting*, 33 CRIM. J. STUD. 276, 280 (2020); see also Frederick M. Lawrence, *Why Calling the Orlando Shooting a Hate Crime Matters: Analysis*, MSNBC (June 15, 2016), <https://www.msnbc.com/msnbc/mass-shooting-orlando-represents-both-terrorism-and-hate-crime-analysis-msna864816> [<https://perma.cc/WY8X-K52W>] (arguing that defining these attacks as hate crimes matters since “crimes that are aimed at victims because of their group-identity cause a special additional [vicarious group] harm that similar crimes without bias motivation do not”).

244. See, for example, the exception to the reading of *Miranda* warnings to individuals suspected of terrorism, in cases that go beyond the standard “public safety” exception. DOJ Memorandum to Law Enforcement Agents, *supra* note 159. This is not to suggest that the procedural rights accorded criminal defendants, in general, are capacious, only that the extent of rights provided in terrorism cases drops even further.

245. 538 U.S. 343, 348–49 (2003).

246. See *Virginia v. Black*, 538 U.S. at 351 (citing *R.A.V. v. St. Paul*, 505 U.S. 377 (1992)).

247. *Id.* at 362.

intent to intimidate because “of cross burning’s long and pernicious history as a signal of impending violence”—falling within the permissible rule that “a State [may] choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm.”<sup>248</sup>

On one hand, *Virginia v. Black* stands out because it upheld a cross-burning prohibition as constitutionally permissible and because it emphasized the historical connection between a flaming cross, White supremacy, and the Ku Klux Klan.<sup>249</sup> In both these respects, the Supreme Court went further than it had in *R.A.V.* On the other hand, the Court sharply distinguished between cross burnings intended to intimidate, which could be prohibited, from acts amounting to “core political speech.”<sup>250</sup> Because burning a cross could be a “statement of ideology” or a “symbol of group solidarity,” as in Klan rituals or political rallies, the Court concluded that the “prima facie evidence provision in this statute blurs the line between these two meanings of a burning cross.”<sup>251</sup> As a result, it overturned the conviction of a man who set ablaze a twenty-five-to-thirty-foot-high cross at a Klan rally of over two dozen people, in full view of homes and traffic, because the jury had not determined whether the act was intended to intimidate.<sup>252</sup>

The Supreme Court has not exhibited the same solicitude for political speech, or the intentions of individuals, when it comes to speech related to terrorism. In 2010, the Court upheld a statutory ban on providing material support to designated foreign terrorist organizations, even in the form of speech.<sup>253</sup> In *Holder v. Humanitarian Law Project*, U.S. citizens and nonprofit groups sought to support the political and humanitarian activities of two Kurdish and Tamil organizations, designated by the State Department as foreign terrorist organizations, by advocating for them and training them on international law.<sup>254</sup> The Court recognized that the plaintiffs sought to engage in speech, thus requiring a “more demanding standard” of First Amendment scrutiny than for conduct unrelated to expression.<sup>255</sup> But the Court rejected the plaintiffs’ free speech challenge because it concluded that Congress justifiably rejected “the view that ostensibly peaceful aid would have no harmful effects.”<sup>256</sup> Most notably, the Court opined that support for a group’s peaceful activities could

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248. *Id.* at 363.

249. *See id.* at 352–56 (recounting history).

250. *Id.* at 365.

251. *Id.* at 365–66.

252. *Id.* at 367–68, 348–49. Jeannine Bell has argued that, not only does this decision make it difficult to convict Klan members who insist they burn crosses only to enhance their “solidarity,” but it also departs from twentieth century First Amendment decisions that “accepted the argument that racist expression was linked to the particular disorder the state was trying to regulate.” Bell, *supra* note 232, at 358 (referencing *Beauharnais v. Illinois*, 343 U.S. 250, 260–62 (1952)).

253. *Holder v. Humanitarian L. Project*, 561 U.S. 1 (2010).

254. *Id.* at 9–10.

255. *Id.* at 28.

256. *Id.* at 29.

increase its legitimacy, making it “easier for those groups to persist, to recruit members, and to raise funds,” thus facilitating more attacks.<sup>257</sup>

Ordinarily, a government motive to suppress disfavored ideas is an impermissible basis for restricting speech, even in the service of averting harmful conduct. But in *Humanitarian Law Project*, the Supreme Court treated a desire to deny organizations legitimacy—to limit the popularity of their ideas—as an explicit justification for suppressing speech.<sup>258</sup> And unlike in *Virginia v. Black*, where the Court took pains to distinguish between Klan cross burnings designed to express political views and those designed to intimidate people, the Court upheld the material support ban in spite of plaintiffs’ peaceful intentions and the political nature of their speech.

*Humanitarian Law Project* and other cases pitting individual rights against counterterrorism measures regularly defer to the national security claims of the political branches. The Court partly explained its decision not to distinguish between support for a terrorist group’s violence and its nonviolent activities on the basis that courts should defer to congressional and executive judgments implicating “sensitive and weighty interests of national security and foreign affairs.”<sup>259</sup> It embraced the view that judges lack the competence to gather information and assess risk with respect to evolving national security threats, such as those that the “preventative” material support statute aimed to address: “The Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions.”<sup>260</sup> As in *Humanitarian Law Project*, courts frequently profess their lesser competence or their limited political accountability as a reason to defer to government factual findings—or decline review altogether—when the government claims that national security is at stake.<sup>261</sup>

To be clear, the Court’s lesser solicitude for speech in *Humanitarian Law Project* cannot be attributed purely to the fact that “terrorism” as a category was at issue, since the Court specifically refused to say that Congress could ban material support to domestic terrorist organizations.<sup>262</sup> The Court’s evaluation of the costs of suppressing speech, and the need for blunt material support bans, may have differed in a case involving purely U.S.-based groups.<sup>263</sup> Therefore, classifying domestic threats as terrorism would not automatically permit particular legal responses, such as a prohibition on material support to terrorist

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257. *Id.* at 30.

258. *See id.* at 49–51 (Breyer, J., dissenting) (critiquing majority’s “legitimacy” rationale).

259. *Id.* at 33–34 (majority opinion).

260. *Id.* at 35.

261. Sinnar, *Procedural Experimentation*, *supra* note 160, 993, 999–1006 (describing national security deference, its rationales, and the many doctrines through which it is made operational).

262. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 39 (2010).

263. I have previously argued that attempts to distinguish the First Amendment implications of material support bans on foreign versus domestic terrorist organizations are unpersuasive, in that they both raise similar civil liberties concerns. *See Sinnar, Separate and Unequal*, *supra* note 6, at 1368–73.



organizations. But relative to the hate crimes frame, the terrorism frame has curtailed individual rights and judicial review in the name of national security.

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The hate crimes and terrorism frames differ in how they construe the nature and severity of the problem, the law enforcement approach deemed appropriate, the redeemability of perpetrators, the racial identity of those responsible and their victims, and the role of rights and courts in limiting government action. “Assigning” a phenomenon to one frame or the other does not mean that it will automatically take on all those frame’s characteristics. Rather, legal limits, political factors, and public perception will constrain the treatment of White supremacist violence as terrorism, especially due to the race of perpetrators. But framing that violence as terrorism, rather than hate crimes, encourages government actors and the public to treat it more like a national security problem, to be addressed through intense preventative and punitive measures, and with significant judicial deference. The following Section demonstrates the existing movement towards the terrorism frame and addresses the normative implications of such a choice.

#### IV.

##### A RACIAL JUSTICE APPROACH TO WHITE SUPREMACIST VIOLENCE

In recent years, some political leaders and segments of the public have increasingly called for treating White supremacist violence as terrorism, both as a matter of language and law. They argue that expanding the terrorism frame—including through enacting new laws—would accord White supremacist violence the same stigma as terrorism by Muslims and lead to greater attention and resource allocation to the problem. The hate crimes frame is, indeed, limited in conceptualizing and responding to such violence. But the move to a terrorism frame comes with grave risks: it shifts institutional power towards a national security apparatus far removed from affected communities and civil rights advocates; it entrenches and expands preemptive and punitive law enforcement practices that target people on suspicion of future threats; and it ignores state actors’ tendencies to respond most harshly to security threats associated with challenges to the dominant racial and socioeconomic order.

Despite their differences, neither the hate crimes nor terrorism frame addresses White supremacist violence in a way that is consistent with developing ideas of racial justice. In broad terms, I adopt a conception of racial justice as including not simply the provision of formal legal equality but also the proactive repair of racial subordination and the promotion of structural reforms that enable all racial communities to thrive.<sup>264</sup> This Section briefly describes the push to

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264. For an explanation—and critique—of the historical and contemporary usages of the term “racial justice,” see generally Leigh Patel & Alton Price, *The Origins, Potentials, and Limits of Racial Justice*, 2 CRIT. ETHNIC STUD. 61 (2016). While the origins and definitions of the term vary considerably, I use the term in line with definitions that move beyond formal equal treatment and that

reframe White supremacist violence as terrorism and the shortcomings of the hate crimes frame before analyzing in depth the risks of a terrorism reframing. It then explores preliminary ideas for addressing White supremacist violence in line with key themes in recent writing on racial justice, including the systemic nature of White supremacist violence, its connection to state violence, and the critique of conventional carceral responses to social problems.

### A. *From Hate Crimes to Terrorism*

More so than any prior incident, the June 2015 mass shooting of Black worshippers at the Mother Emanuel church in Charleston, South Carolina, prompted calls to recognize White supremacist violence as terrorism, not just a hate crime. FBI Director James Comey initially said he did not view the massacre as terrorism, because he did not see it as a “political act.”<sup>265</sup> Senator Lindsey Graham, who had long advocated treating Muslim suspects as enemy combatants, called the perpetrator “one of these whacked out kids,” and speculated, “I don’t think it’s anything broader than that.”<sup>266</sup> Media coverage immediately identified the massacre as a hate crime, but not terrorism.<sup>267</sup>

After widespread backlash, the Justice Department asserted that it was “looking at this crime from all angles, including as a hate crime and as an act of domestic terrorism.”<sup>268</sup> Attorney General Loretta Lynch, speaking at the site of the Birmingham church bombing that killed four Black girls fifty-two years earlier, pointedly said: “Make no mistake. Hate crimes are the original domestic terrorism.”<sup>269</sup>

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embrace the need for material transformation in the conditions of racial groups. For example, Race Forward, an organization that “catalyzes movement building for racial justice,” defines the term as “a vision and transformation of society to eliminate racial hierarchies and advance collective liberation, where Black, Indigenous, Latinx, Asian Americans, Native Hawaiians, and Pacific Islanders, in particular, have the dignity, resources, power, and self-determination to fully thrive.” *What is Racial Equity?*, RACE FORWARD (Oct. 5, 2021), <https://www.raceforward.org/about/what-is-racial-equity-key-concepts> [https://perma.cc/M4MS-MT6P]. The National Education Association defines racial justice as “the systematic fair treatment of people of all races, resulting in equitable opportunities and outcomes for all. Racial justice—or racial equity—goes beyond ‘anti-racism.’ It is not just the absence of discrimination and inequities, but also the presence of deliberate systems and supports to achieve and sustain racial equity through proactive and preventative measures.” NAT’L EDUC. ASSOC., RACIAL JUSTICE IN EDUCATION RESOURCE GUIDE 2 (2018), <https://www.nea.org/sites/default/files/2021-01/Racial%20Justice%20in%20Education.pdf> [https://perma.cc/8EHT-SVM5].

265. Shane Harris, *White House Won’t Back FBI Chief on Charleston ‘Terror,’* DAILY BEAST (Apr. 14, 2017), <https://www.thedailybeast.com/white-house-wont-back-fbi-chief-on-charleston-terror> [https://perma.cc/VJZ6-S3XB]; Ryan J. Reilly, *FBI Director James Comey Still Unsure If White Supremacist’s Attack in Charleston Was Terrorism,* HUFF POST (July 9, 2015), [https://www.huffpost.com/entry/james-comey-charleston-terrorism-\\_n\\_7764614](https://www.huffpost.com/entry/james-comey-charleston-terrorism-_n_7764614) [https://perma.cc/3RC2-V9XY].

266. Reston, *supra* note 3.

267. See Powell, *Framing Islam/Creating Fear*, *supra* note 238, at 260.

268. Harris, *supra* note 265.

269. Kevin Johnson, *Attorney General Lynch: ‘Hate Crimes Are the Original Domestic Terrorism,’* USA TODAY (June 24, 2015), <https://www.usatoday.com/story/news/nation/2015/06/24/loretta-lynch-baptist-church-birmingham/29238615/> [https://perma.cc/EXH8-C5G7].

Six years after Charleston, law enforcement officials and government agencies routinely describe White supremacist mass shootings as both hate crimes and terrorism—as they did after a White supremacist protesting the “Hispanic invasion of Texas” killed twenty-two people, mostly Latinx people, in an El Paso Walmart.<sup>270</sup> Along with the rhetorical shift, agencies have established new mechanisms to address hate crimes and domestic terrorism jointly and with the “preventative” approach long used for terrorism. For example, the FBI created a “Domestic Terrorism-Hate Crimes . . . Fusion Cell”<sup>271</sup> and made its first “proactive arrest on a hate crimes charge” in “recent history.”<sup>272</sup>

Lawmakers and security officials have also increasingly responded to White supremacist violence as both “domestic” and “international” terrorism. Several members of Congress introduced bills to create a new federal domestic terrorism crime.<sup>273</sup> Some advocated criminalizing material support to domestic terrorist organizations.<sup>274</sup> Additionally, the executive branch has announced new policies to respond to the problem. In June 2021, the Biden administration released a “National Strategy for Countering Domestic Terrorism” that covered intelligence collection, prevention of recruitment and mobilization, and deterrence and disruption of domestic terrorists, as well as “long-term issues that contribute to domestic terrorism.”<sup>275</sup> At the same time, agencies focused on international terrorism expanded their mandates or attention to White supremacists. In 2018, the National Counterterrorism Center, established in 2004 to integrate terrorism information except for intelligence “pertaining exclusively to domestic terrorism,”<sup>276</sup> quietly began to analyze domestic terrorism.<sup>277</sup> In 2020, the State Department listed the Russian Imperial Movement as a “specially designated global terrorist,” billed as the first terrorist designation of a White

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270. Erin Coulehan, *Federal Hate Crime Charges Filed in El Paso Shooting That Targeted Latinos*, N.Y. TIMES (Feb. 6, 2020), <https://www.nytimes.com/2020/02/06/us/politics/el-paso-shooting-federal-hate-crimes.html> [<https://perma.cc/9LSV-KGP6>].

271. *Worldwide Threats to the Homeland Hearing*, *supra* note 30 (statement of Christopher A. Wray, Dir., Fed. Bureau of Investigation).

272. *Id.*; see also Derek Hawkins, *FBI Arrests Self-Proclaimed White Supremacist in Alleged Plot to Blow up Historic Synagogue*, WASH. POST (Nov. 4, 2019), <https://www.washingtonpost.com/nation/2019/11/04/fbi-arrests-self-proclaimed-white-supremacist-alleged-plot-blow-up-historic-synagogue/> [<https://perma.cc/74F7-B657>].

273. Francesca Laguardia, *Considering a Domestic Terrorism Statute and Its Alternatives*, 114 NW. U. L. REV. ONLINE 1061, 1078–79 (2020).

274. See, e.g., Ali H. Soufan, *I Spent 25 Years Fighting Jihadis. White Supremacists Aren't So Different.*, N.Y. TIMES (Aug. 5, 2019), <https://www.nytimes.com/2019/08/05/opinion/white-supremacy-terrorism.html> [<https://perma.cc/VTJ4-L567>].

275. NAT'L SEC. COUNCIL, *supra* note 1, at 7.

276. Intelligence Reform & Terrorism Prevention Act of 2004, Pub L. No. 108-458, § 1021, 118 Stat. 3638, 3672.

277. Betsy Swan, *Post-9/11 Intel Center Now Going After Domestic Terror*, DAILY BEAST (Aug. 7, 2019), <https://www.thedailybeast.com/national-counterterrorism-center-set-up-after-911-now-going-after-domestic-terrorism> [<https://perma.cc/RAL2-MY6Y>].

supremacist organization.<sup>278</sup> The National Defense Authorization Act of 2021 required the State Department to develop a plan for addressing “[W]hite identity terrorism” at a global level.<sup>279</sup>

Although some initial calls for recognizing racist violence as terrorism came from communities of color, the most vocal advocates for expanding domestic terrorism laws were law enforcement and national security officials who had prosecuted the war on terror.<sup>280</sup> Civil rights groups and racial justice activists, especially those contesting counterterrorism and policing practices, increasingly challenged such efforts.<sup>281</sup> For instance, the Leadership Conference

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278. Anna Meier, *The U.S. Labeled a White Supremacist Group as ‘Terrorists’ for the First Time. It’s Less Significant Than You Think.*, WASH. POST (Apr. 30, 2020), <https://www.washingtonpost.com/politics/2020/04/30/us-labeled-white-supremacist-group-terrorists-first-time-its-less-significant-than-you-think/> [https://perma.cc/9TVQ-MJS2]. The State Department did not designate that group, or any other White supremacist group, as a foreign terrorist organization, a designation that would criminalize material support to the organization.

279. National Defense Authorization Act of 2021, Pub. L. No. 116-283, § 1299F, 134 Stat. 3388, 4004.

280. For one prominent early example of a Black commentator calling for recognition of White supremacist violence as terrorism, not just a hate crime, see Cobb, *supra* note 2 (describing Charleston church shooting as not “simply” a hate crime but also an “act of terror”). For leading examples of security and law enforcement officials calling for a new domestic terrorism law, see Mary B. McCord, *It’s Time for Congress to Make Domestic Terrorism a Federal Crime*, LAWFARE, LAWFARE BLOG (Dec. 5, 2018), <https://www.lawfareblog.com/its-time-congress-make-domestic-terrorism-federal-crime> [https://perma.cc/MY97-85TU] (former Principal Deputy Assistant Attorney General for National Security); Soufan, *supra* note 274 (former FBI special agent); Richard B. Zabel, *Domestic Terrorism Is a National Problem. It Should Also Be a Federal Crime.*, WASH. POST (Feb. 2, 2021), <https://www.washingtonpost.com/opinions/2021/02/02/domestic-terrorism-federal-crime/> [https://perma.cc/U2HN-ZJ52] (former federal terrorism prosecutor); Brian O’Hare, *Make Domestic Terrorism A Federal Crime: FBI Agents Association*, USA TODAY (Feb. 22, 2021), <https://www.usatoday.com/story/opinion/todaydebate/2021/02/22/make-domestic-terrorism-federal-crime-fbi-agents-association-editorials-debates/4536043001/> [https://perma.cc/8SJ6-NGQ8] (president of FBI agents’ association).

281. Prominent opponents of the expansion of counterterrorism powers to fight white supremacist violence included the Brennan Center for Justice, the Center for Constitutional Rights, the ACLU, the Creating Law Enforcement Accountability and Responsibility (CLEAR) Clinic at CUNY Law School, as well as community groups organizing around a counterterrorism abolitionist framework. See, e.g., Michael German & Harsha Panduranga, *How to Combat White Supremacist Violence? Avoid Flawed Post-9/11 Counterterrorism Tactics*, BRENNAN CTR. FOR JUST. (Sept. 1, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/how-combat-white-supremacist-violence-avoid-flawed-post-911> [https://perma.cc/U2UU-N7TJ]; Diala Shamas & Tarek Z. Ismail, *Calling the Capitol Riot ‘Terrorism’ Will Only Hurt Communities of Color*, WASH. POST (Jan. 10, 2021), <https://www.washingtonpost.com/outlook/2021/01/10/capitol-invasion-terrorism-enforcement/> [https://perma.cc/Y9MH-ULZW] (Center for Constitutional Rights and CUNY Law professor); *The Rise of Domestic Terrorism in America: Hearing Before Subcomm. on Crime, Terrorism, and Homeland Sec., H. Comm. on the Judiciary*, 116th Cong. (2021) (written statement of the ACLU); Ramzi Kassem, *Domestic Terrorism? Not So Fast: Those Looking to Bring down the Hammer on the Capitol Rioters Should Be Careful What They Wish for*, N.Y. DAILY NEWS (Jan. 12, 2021), <https://www.nydailynews.com/opinion/ny-oped-domestic-terrorism-not-so-fast-20210112-gbsrw5zfwvcrja37havo2if3bu-story.html> [https://perma.cc/Y7ZK-UMEJ] (founding director of CLEAR Clinic); ABOLISHING THE WAR ON TERROR & BUILDING COMMUNITIES OF CARE: A GRASSROOTS POLICY AGENDA FOR THE BIDEN-HARRIS ADMINISTRATION AND 117TH CONGRESS (2021), <https://static1.squarespace.com/static/5daa2e451959d419aa03a0ed/t/60380009ddf0701b42b6b8fe/161>

on Civil and Human Rights, a coalition of over two hundred national organizations, publicly opposed proposals to create a new domestic terrorism crime. The Leadership Conference expressed concern that such charges would be used to target marginalized communities and “reinforce counterterrorism policies, programs, and frameworks that are rooted in bias, discrimination, and denial or diminution of fundamental rights.”<sup>282</sup>

### B. *The Limits of the Hate Crimes Frame*

The hate crimes frame is a limited frame for addressing White supremacist violence, despite the historical importance of the anti-hate crime movement in elevating attention to bias-motivated violence. In earlier joint work, I have explored critiques of the hate crime legal model in greater depth.<sup>283</sup> Here, I specifically address how the hate crimes frame falls short in responding to White supremacist violence.

First, the hate crimes frame often fails to recognize the systemic and political character of White supremacist violence. As discussed above, while hate crimes are seen as especially harmful crimes that affect larger communities, the key legal remedies of hate crime charges and penalty enhancements target individual perpetrators.<sup>284</sup> Moreover, hate crime laws treat bias crimes the same regardless of whether they stem from members of historically dominant communities or subordinated ones, and without regard to the organization, ideology, or scale of the threat.<sup>285</sup> In addition, the response to hate crimes has

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4282764135/Abolish+WOT+Policy+Agenda.pdf [https://perma.cc/BZ6R-S8A7] (Justice for Muslims).

282. Letter from Leadership Conf. on Civ. and Hum. Rts. to Members of Cong. (Jan. 19, 2021) [hereinafter Leadership Conference Letter], [http://civilrightsdocs.info/pdf/policy/letters/2020/No\\_Domestic\\_Terrorism\\_Charge\\_1\\_21\\_2021.pdf](http://civilrightsdocs.info/pdf/policy/letters/2020/No_Domestic_Terrorism_Charge_1_21_2021.pdf) [https://perma.cc/V2AQ-XSFG]; see also Letter from Vanita Gupta, President, Leadership Conf. on Civ. and Hum. Rts. (Sept. 6, 2019), <http://civilrightsdocs.info/pdf/policy/letters/Letter-to-House-on-Domestic-Terrorism-09-06-19.pdf> [https://perma.cc/UV8W-GLN9] (asking members of Congress to “oppose a new federal domestic terrorism crime”).

283. See, e.g., Sinnar & Colgan, *supra* note 214; BISHOP ET AL., *supra* note 233.

284. Queer activists and theorists were among the first to articulate this critique of hate crime laws. For instance, Dean Spade argued that hate crime laws focused on individual biased perpetrators rather than structural racism and state violence, part of his larger critique of individual rights-based law reform strategies for trans people and other marginalized communities. See DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* 9, 42–45 (2015); see also KATHERINE WHITLOCK, AM. FRIENDS SERV. COMM., *IN A TIME OF BROKEN BONES: A CALL TO DIALOGUE ON HATE VIOLENCE AND THE LIMITATIONS OF HATE CRIMES LEGISLATION* 8–10 (2001), [https://www.afsc.org/sites/default/files/documents/In\\_A\\_Time\\_Of\\_Broken\\_Bones.pdf](https://www.afsc.org/sites/default/files/documents/In_A_Time_Of_Broken_Bones.pdf) [https://perma.cc/YA5Q-3F8W] (arguing against hate crime penalty enhancements for ignoring the violence of the criminal justice system and calling for community-centered approaches to “healing justice”); CHRISTINA B. HANHARDT, *SAFE SPACE: GAY NEIGHBORHOOD HISTORY AND THE POLITICS OF VIOLENCE* 155–84 (2013) (describing the formation of the national gay and lesbian antiviolence movement and the shift from calls for documentation of that violence to support for penalty enhancement).

285. To some extent, these limits flow from natural features of criminal law. Criminal law requires findings of individual guilt for good reason. Moreover, legal cultural norms mean that, even if hate crimes are conceptualized as crimes by members of majority groups against minorities, criminal

never achieved a level of funding or government attention equivalent to other societal problems, certainly compared to other forms of political violence conventionally labeled terrorism.<sup>286</sup> While not all of these limits are inherent or inevitable features of framing a problem as hate crimes—indeed, advocates for hate crime laws presented hate violence as a serious and urgent problem—they are features of how the hate crimes frame has evolved over time, especially its legal and law enforcement dimensions.

Some contemporary associations with the hate crime label are especially ironic. For instance, the anti-hate crime movement presented hate violence as a threat to society at large, not just individual victims or even identity groups. Nonetheless, for some people today, the hate crime label connotes harm to a particular community (those who share the victim's identity), but not to society as a whole—at least relative to “terrorism,” which is seen as victimizing the nation. Thus, ironically, the hate crime label for some audiences fails to capture sufficiently the expectation of collective solidarity and suffering in the wake of an incident.

Second, the hate crimes frame is reactive in focusing on the charging of crimes and enhancement of penalties. There is little evidence that the passage of hate crime laws, including sentence enhancements, deters would-be perpetrators.<sup>287</sup> Hate crime charges and penalties may serve an expressive function in signifying official recognition of the bias motive behind an incident and elevated condemnation for such an act.<sup>288</sup> That expressive recognition by the state may, indeed, matter to communities whose targeting has often gone unacknowledged.

But hate crime charges and enhancements remain after-the-fact remedies not oriented to prevention. To be clear, a focus on prevention can be problematic when law enforcement agencies identify people as threatening based on their identity or political activities or apply coercive tactics in an effort to interdict

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law will not formally differentiate between majority and minority defendants according to status. JENNESS & GRATTET, *supra* note 85, at 175. Nonetheless, these are also consequences that flow from the strategic *choice* to prioritize criminal law in addressing hate violence, as opposed to, for instance, systemic approaches such as racial justice education, political accountability for racist speech, socioeconomic investment in communities, or other political reforms to undo White supremacy.

286. See *supra* Part III.A.

287. See PHYLLIS B. GERSTENFELD, HATE CRIMES: CAUSES, CONTROLS, AND CONTROVERSIES 19–22 (2018). Gerstenfeld surveyed the limited empirical research on the connection between hate crime laws' enactment and reported hate crimes, which do not provide evidence of deterrence, and further argued that the theoretical basis for a deterrence effect rests on likely flawed assumptions—that people know about hate crime laws, believe it is reasonably likely they will be arrested and prosecuted, and would be deterred by the addition to a sentence when they would not be deterred by the baseline sentence. *Id.* Other studies on criminal sentencing outside the hate crime context suggest that the length of punishment is less effective as a deterrent compared to the certainty of apprehension. See, e.g., Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 202 (2013).

288. Even these benefits are hard to realize in practice, given the difficulty of proving a bias motive, law enforcement resistance, and other reasons. See BISHOP ET AL., *supra* note 233, at 11–12.

potential threats.<sup>289</sup> But such problematic practices are not the only means available to address the underlying causes of bias-motivated violence, and a threat as systemic as White supremacist violence cannot be addressed purely through the reactive measures of the hate crimes frame.

Third, by setting up increased imprisonment as the primary legal response, the hate crimes frame minimizes state violence and repression, including the problems of mass incarceration and disparities in the criminal legal system. As Part II recounts, the movement to pass hate crime laws succeeded where other demands from communities of color and civil rights activists, such as those related to police brutality or structural discrimination, failed to gain traction. But the challenges of the criminal legal system, including systemic inequality, do not leave hate crimes untouched. The remedy of sentence enhancements neglects the pathologies of prison, including the pervasiveness of violence, inhumane conditions of confinement, and the prevalence of White supremacist networks within prison walls.<sup>290</sup> In addition, despite popular conceptions of hate crimes, various hate crime data compilations have reported a substantial number of people of color as suspects.<sup>291</sup> The disproportionate identification of people of color as suspects, relative to their share of the population, may derive from some combination of reporting gaps, biases in the criminal legal system, and facts on the ground, such as interracial conflicts between poor communities of color.<sup>292</sup> Whatever the precise set of factors, the result is that, just as the Supreme Court decision approving hate crime laws extended a young Black defendant's prison term, hate crime laws lengthen incarceration for poor people of color, not just White supremacists or historically privileged groups.<sup>293</sup>

### C. *The Risks of the Terrorism Frame*

The terrorism frame has a rhetorical and material appeal: rhetorically, the label conveys the systemic, political, and serious nature of White supremacist violence, and materially, the frame generates an extraordinary deployment of resources and attention. But serious risks surround the adoption of the terrorism

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289. Indeed, this is one of the main problems with the terrorism frame, considered below in Part IV.C.2.

290. See, e.g., P.R. Lockhart, *America Is Finally Being Exposed to the Devastating Reality of Prison Violence*, VOX (Apr. 5, 2019), <https://www.vox.com/policy-and-politics/2019/4/5/18297326/prison-violence-ohio-alabama-justice-department-lawsuit> [<https://perma.cc/7ADK-RWFS>]; Talk of the Nation, *A Look Inside White Supremacist Prison Gangs*, NPR (Apr. 9, 2013), <https://www.npr.org/2013/04/09/176681634/a-look-inside-white-supremacist-prison-gangs> [<https://perma.cc/D686-ER9C>]; see also SPADE, *supra* note 284, at 46–47 (arguing that hate crime laws legitimize state punishment systems that target trans populations and people of color and undermine resistance to those systems).

291. See BISHOP ET AL., *supra* note 233, at 13–14; see also MOVEMENT ADVANCEMENT PROJECT, POLICY SPOTLIGHT: HATE CRIME LAWS 31–32 (2021), <https://www.lgbtmap.org/file/2021-report-hate-crime-laws.pdf> [<https://perma.cc/3Y5M-LTLJ>] (describing disproportionate listing of Black offenders in certain law enforcement data).

292. See *id.*

293. See *supra* Part II.C (discussing *Wisconsin v. Mitchell*, 508 U.S. 476 (1993)).

frame, especially through the enactment or implementation of new criminal or surveillance measures.

*1. Shifting Power to Security Agencies and Terrorism Experts*

Framing White supremacist violence as terrorism shifts power to security agencies and those viewed as terrorism experts, as opposed to civil rights groups or communities of color. It does this to a greater extent than the hate crimes frame, which empowers law enforcement officials but also treats civil rights groups as an important constituency and source of expertise.<sup>294</sup>

Security agencies and an industry of private “terrorism experts” claim authority when the subject is terrorism. Although the people within these institutions have relevant knowledge and experience, they also reflect the biases and blinders of their professional backgrounds. To begin, the national security establishment is more racially and ideologically homogenous than the U.S. population. Security agencies are less racially diverse than other federal agencies.<sup>295</sup> FBI special agents are overwhelmingly White and became more so in the years after 9/11.<sup>296</sup> Political scientist Stephen Walt has argued that the foreign policy community, both inside and outside government, is insular and conformist, and ideologically biased towards an interventionist U.S. international role.<sup>297</sup> Personnel in parts of the national security establishment, such as the military, lean to the right, especially among younger age groups.<sup>298</sup>

Moreover, the ideas, culture, and structure of security agencies reflect a view of national security as an exceptional arena where the executive dominates and operates with few political or legal limits. Formed by the National Security Act of 1947, most national security agencies arose out of a World War II-era belief in the vulnerability of the United States and the need for a strong state that could address threats during both war and peace, even at the risk of infringing

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294. Civil rights advocates frequently testify at congressional hearings, draft legislation, or help design programs related to hate crimes. Even within law enforcement agencies, hate crime units often attract individuals with civil rights experience. Within the Department of Justice, for instance, the Civil Rights Division responsible for prosecuting hate crimes frequently has leaders and line-level attorneys drawn from civil rights organizations.

295. See Memorandum on Promoting Diversity and Inclusion in the National Security Workforce, 2016 DAILY COMP. PRES. DOC. 1 (Oct. 5, 2016) (stating that national security workforce is “less diverse on average than the rest of the Federal Government”).

296. See James B. Comey, *Strength Through Diversity: Building a Better FBI*, FED. BUREAU OF INVESTIGATION (Aug. 17, 2016), <https://www.fbi.gov/news/speeches/strength-through-diversity-building-a-better-fbi> [<https://perma.cc/HL7X-KDD6>] (describing FBI agents as 83 percent White and observing that that percentage had grown for ten to twelve years).

297. See STEPHEN M. WALT, *THE HELL OF GOOD INTENTIONS: AMERICA’S FOREIGN POLICY ELITE AND THE DECLINE OF U.S. PRIMACY* 103–24 (2018).

298. See David L. Leal & Jeremy M. Teigen, *Recent Veterans are More Republican Than Older Ones. Why?*, WASH. POST (Nov. 11, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/11/11/recent-veterans-are-more-republican-than-older-ones-why/> [<https://perma.cc/WW72-B29A>].



on civil liberties.<sup>299</sup> Security agencies have often shielded controversial programs from public knowledge or accountability, invoking expansive classification schemes and legal doctrines to justify the secrecy.<sup>300</sup> The Supreme Court regularly defers to the executive branch on matters of national security, even against citizens' claims of rights violations, and even to the point of refusing to hear such challenges altogether.<sup>301</sup> Of course, national security agencies are not a monolith, and transparency and oversight vary across institutions. And a rich academic debate has surrounded exactly how constrained national security agencies are, with some arguing that media coverage, internal oversight, and agency lawyers provide a measure of constraint.<sup>302</sup> But few would argue with the notion that, relative to other mandates, a connection to "national security" confers an expectation of lesser external oversight.<sup>303</sup>

By design, the mandates of security agencies do not prioritize civil rights, racial justice, or the concerns of subordinated communities. A sizeable academic literature has pointed to the challenges that government institutions face in pursuing values that are secondary to the primary mandates assigned by Congress or other principals.<sup>304</sup> Political incentives and psychological factors make the security mandate especially hard to resist.<sup>305</sup> Even designated civil

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299. See DOUGLAS T. STUART, *CREATING THE NATIONAL SECURITY STATE: A HISTORY OF THE LAW THAT TRANSFORMED AMERICA* 1–11, 19–42 (2008) (describing how "before the 1940s were over . . . arguments about the preconditions for national security were accepted as commonsensical [as were] arguments about the acceptability of the risks that such a bureaucracy posed for civil liberties and the constitutional system of checks and balances"); Aziz Rana, *Who Decides on Security?*, 44 *CONN. L. REV.* 1417, 1458–69 (2012) (arguing that political scientist Pendleton Herring, one of the key authors of the National Security Act, helped shape an understanding of national security as requiring expert judgment within the executive branch, with a focus on secrecy, rather than open and popular deliberation).

300. See SUDHA SETTY, *NATIONAL SECURITY SECRECY: COMPARATIVE EFFECTS ON DEMOCRACY AND THE RULE OF LAW* (2017); Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 *YALE L. & POL'Y REV.* 399, 399–401 (2009).

301. See Sinnar, *Procedural Experimentation*, *supra* note 160, at 993; Shirin Sinnar, *Courts Have Been Hiding Behind National Security for Too Long*, BRENNAN CTR. FOR JUST. (Aug. 11, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/courts-have-been-hiding-behind-national-security-too-long> [<https://perma.cc/G7CC-TBKS>].

302. See, e.g., JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012) (arguing that presidential authority grew, but remained accountable, after 9/11). For sources debating the extent of legal constraints on executive authority, see Shirin Sinnar, *Institutionalizing Rights in the National Security Executive*, 50 *HARV. C.R.-C.L. L.J.* 290, 340–41 (2015) [hereinafter Sinnar, *Institutionalizing Rights*].

303. Indeed, even those who believe that current oversight of security agencies is relatively robust acknowledge that the secrecy surrounding their activities presents special challenges for democratic accountability. See, e.g., GOLDSMITH, *supra* note 302, at 57–58, 94–95.

304. See, e.g., Sinnar, *Institutionalizing Rights*, *supra* note 302, at 331–32, 346–47; J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 *COLUM. L. REV.* 2217, 2221 (2005); Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 *VA. L. REV.* 271, 307–09 (2013); Emily Berman, *Regulating Domestic Intelligence Collection*, 71 *WASH. & LEE L. REV.* 3, 66–67 (2014); Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 *CARDOZO L. REV.* 53, 103–05 (2014); Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple Goal Agencies*, 33 *HARV. ENV'T L. REV.* 1, 6–13 (2009).

305. See Sinnar, *Institutionalizing Rights*, *supra* note 302, at 331–32; Marc Sageman, *The Stagnation in Terrorism Research*, 26 *TERRORISM & POL. VIOLENCE* 565, 574–75 (2014).

rights units within security agencies may see their missions drift towards their agency's security goals,<sup>306</sup> with personnel in such units facing “careerist” and “collegial” incentives to conform to those larger mandates.<sup>307</sup> Thus, once a problem is assigned to security agencies, even those with a civil rights orientation within those agencies will find it challenging to prioritize racial justice concerns.

Moreover, the framing of White supremacist violence as terrorism elevates the claims to expertise of a group of people outside security agencies who either self-identify, or are identified by those agencies, as terrorism experts. This group's dependency on government patronage and the field's limited gatekeeping, however, make their claims to expertise and independent analysis questionable. First, the terrorism-consulting industry profits from satisfying security agencies' strategic needs, which often lie in emphasizing the terrorist threat. With vast counterterrorism resources, security agencies wield unusual power to anoint particular individuals within consulting firms, think tanks, or academic institutions as experts. For instance, prosecutors select expert witnesses who are able and willing to depict an expansive, interconnected global terrorist threat, regardless of whether they have traditional qualifications. One of the government's most frequently used expert witnesses in terrorism cases is a consultant who establishes connections between defendants and al-Qaeda, despite his lack of fluency in the relevant languages, no advanced degree in related subjects, and a methodology that relies primarily on Internet searches of terrorist speech.<sup>308</sup> In addition, some terrorism researchers have offered simplistic theories of “radicalization” to feed law enforcement agencies' desire for research to guide (or justify) surveillance decisions.<sup>309</sup> One study of the most cited terrorism experts in mainstream English-language media concluded that a significant number of these experts were current or former members of government, security, policing, intelligence, or military institutions, and that most subscribed to an “orthodox view” of terrorism as a war waged by al-Qaeda and its affiliates against the United States, its allies, and Western values.<sup>310</sup>

Second, the mechanisms of gatekeeping and internal regulation that constrain other fields of study have not applied to terrorism expertise. Sociologist Lisa Stampnitzky has argued that terrorism studies has remained a marginal and “undisciplined” field in academia, where experts failed to “gain control over either the boundaries of the field or the production and certification of

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306. See Sinnar, *Institutionalizing Rights*, *supra* note 302, at 346–56.

307. Schlanger, *supra* note 304, at 112–13.

308. See Wadie E. Said, *Constructing the Threat and the Role of the Expert Witness: A Response to Aziz Rana's Who Decides on Security?*, 44 CONN. L. REV. 1545, 1552–56 (2012) (describing criticism of government witness Evan Kohlmann); DARRYL LI, *THE UNIVERSAL ENEMY: JIHAD, EMPIRE, AND THE CHALLENGE OF SOLIDARITY* 66–67 (2019) (critiquing Kohlmann's factual claims and methods as an example of the “symbiotic but fraught relationship between the national security state and outside experts”).

309. See Akbar, *supra* note 155, at 810–32 (describing radicalization theories that formed the intellectual foundation for broad-based NYPD and FBI surveillance of Muslim communities).

310. David Miller & Tom Mills, *The Terror Experts and the Mainstream Media: The Expert Nexus and Its Dominance in the News Media*, 2 CRIT. STUD. ON TERRORISM 414, 419, 422 (2009).

experts.”<sup>311</sup> Unlike other disciplines where professionals exercise power over knowledge production “through certification, through legal regulation, or through a monopoly on certain forms of technical knowledge,” there is “little regulation of who may become an expert” on terrorism.<sup>312</sup> Stampnitzky attributed the core problem to the conceptualization of terrorism as illegitimate violence; given the politicized nature of the discourse, even most academics who have sought to study terrorism in a rational, non-polemical fashion have engaged in “strategic ambiguity” about the concept in order to “bridge between the academic, public, and policy worlds.”<sup>313</sup> According to Stampnitzky, a “politics of anti-knowledge” surrounds terrorism: once events or people have been defined as terrorist, “all we need to know about them is that they are evil.”<sup>314</sup> Not only does that prevent the development of a rigorous discipline, but it also impedes real understanding of terrorism because researchers risk being delegitimized by studying participants first-hand or seeking to explain root causes.<sup>315</sup>

Shifting power to security agencies and terrorism experts with respect to White supremacist violence will not fully replicate these dynamics, given the White identity of most perpetrators and their identification with the political right. The “insider” status of White perpetrators and the support they receive from part of the political spectrum and within state institutions mean that political leaders, courts, and the public will likely subject counterterrorism measures directed at that group to greater oversight than counterterrorism directed at Muslims, perhaps citing arguments to justify the bifurcated approach to domestic and international terrorism.<sup>316</sup> In addition, the focus on right-wing violence will elevate not only self-identified terrorism experts, but also researchers on right-wing violence who have existed on the margins of terrorism studies.<sup>317</sup> Those researchers have often had a different set of research methods

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311. STAMPNITZKY, *supra* note 81, at 194–95.

312. *Id.* at 195.

313. *Id.* at 199, 203.

314. *Id.* at 187, 200, 203; *see also* Gage, *supra* note 129, at 83. Gage argued that “the label ‘terrorism’ is an epithet as well as a category of analysis, and many scholars are rightly concerned that it may discredit, simplify, or otherwise misrepresent complex historical situations.” *Id.* She observed that historians still have not engaged terrorism comprehensively, and that the field remains divided between “those who study terrorism and embrace the term and those who study what might be labeled as terrorism but who reject the term itself.” *Id.*

315. *See* STAMPNITZKY, *supra* note 81, at 191–94. For another critique of terrorism research, both in academia and in intelligence agencies, *see* Sageman, *supra* note 305. Sageman concluded that “academic terrorism research has stagnated for the past dozen years because of a lack of both primary sources and vigorous efforts to police the quality of research, thus preventing the establishment of standards of academic excellence and flooding the field with charlatans.” *Id.* at 572. In addition to the fear of delegitimization, research is also limited by concerns that “coordination” with research subjects designated as terrorists will get scholars prosecuted or investigated for material support to terrorism. *See* LI, *supra* note 308, at 37 (describing challenge presented by material support prohibition).

316. *See* Sinmar, *Separate and Unequal*, *supra* note 6, at 1395–97 (explaining and rejecting arguments for the domestic-international divide in terrorism law, including civil liberties, federalism, and the magnitude of the threats).

317. *See* STAMPNITZKY, *supra* note 81, at 148.

and relationships than traditional terrorism experts; for instance, many have relied on primary sources and interviews with subjects, as well as information from civil rights groups.<sup>318</sup> Thus, the unique racial and political status of White supremacists will affect the response of both security agencies and experts. Still, even qualified in this fashion, the terrorism frame will nonetheless empower relatively homogenous and insulated security agencies and segments of the compromised terrorism consulting industry. It is unrealistic to expect that a national security establishment accustomed to limited transparency and oversight—for institutional, cultural, and legal reasons—will respond to White supremacist violence in an open or accountable fashion, or with significant engagement with the minority communities most targeted by the threat.

## 2. *Entrenching Preventative Counterterrorism*

Unlike the hate crimes frame, the terrorism frame is explicitly preventative. As discussed in Part III, law enforcement agencies seek to prevent acts of violence rather than prosecute them after the fact. At one level, the basic objective is unobjectionable: the greater the stakes of potential violence for human life or democratic governance, the more pressing it is to avert that violence in the first place. Yet preventative counterterrorism operates from two flawed starting points, and an expansion of the terrorism frame risks entrenching those flaws.

First, much of the political and public discourse on terrorism expects not just prevention of terrorist attacks, but prevention at almost any cost. When it comes to al-Qaeda, ISIS, or threats from Muslims, political leaders often embrace a “zero tolerance” posture for terrorism risk, precluding an honest conversation about the costs to individuals, communities, and democracy from efforts to eliminate that risk. In fact, political leaders who advocate societal “resilience” to terrorist attacks face backlash for accepting the prospect of some acts of terrorism succeeding.<sup>319</sup> That is not to say that security agencies have *in fact* set the level of acceptable risk at zero; agencies do not actually surveil, investigate, or prosecute every person brought to their attention as a potential threat. But these agencies face serious political recrimination from failures to prevent acts of terrorism, motivating them to overvalue the benefits of aggressive prevention and undervalue the costs.<sup>320</sup> Lopsided political pressures send the

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318. In fact, that research has sometimes been criticized for *overreliance* on civil rights groups as information sources, because those groups have incentives to present the problem as a growing threat and because the methodologies used for identifying and tracking hate groups have fallen under criticism. See, e.g., CHURCHILL, *supra* note 25, at 7–11; Montgomery, *supra* note 36.

319. See Uri Friedman, *Learning to Live with Terrorism*, ATLANTIC (Aug. 15, 2016), <https://www.theatlantic.com/international/archive/2016/08/terrorism-resilience-isis/493433/> [<https://perma.cc/X3A5-SCTR>].

320. For examples of the political pressure on the FBI for failing to prevent terrorist attacks, see Scott Shane & Michael S. Schmidt, *F.B.I. Did Not Tell Police in Boston of Russian Tip*, N.Y. TIMES (May 9, 2013), <https://www.nytimes.com/2013/05/10/us/boston-police-werent-told-fbi-got-warning-on-tsarnaev.html> [<https://perma.cc/DJ7M-JHNJ>] (Boston Marathon bombing); Richard A. Serrano,

message that the cost of “false negatives” (individuals not subjected to counterterrorism measures who go on to commit or support violence) is far greater than the cost of “false positives” (those subjected to counterterrorism measures who do not pose an actual threat).

Further, the political pressure on agencies to root out terrorism risk leads agencies to adopt permissive standards for counterterrorism programs. Consider, for instance, the vast terrorism watchlist infrastructure that has developed over the past twenty years, which the Biden administration now says is being “fully utilized” against domestic threats.<sup>321</sup> The consolidated Terrorist Screening Database, the largest centralized watchlist, reportedly lists 1.2 million people, including about 4,600 U.S. citizens and permanent residents.<sup>322</sup> The consequences of inclusion even for those not barred from travel can be severe. For instance, according to the complaint filed in one constitutional challenge to the watchlist, border officials detained a Muslim U.S. citizen from Michigan several times for more than seven or eight hours at a time when he returned to the United States, seizing and searching his cell phone, and once sending him to a hospital in handcuffs when he required life support during a ten-hour interrogation.<sup>323</sup> The U.S. government not only uses the watchlist to screen people at borders and airports, but also shares it with more than sixty foreign governments, 18,000 U.S. law enforcement agencies, and hundreds of private companies.<sup>324</sup> As a result, a person on the watchlist can find herself flagged for extra scrutiny during an ordinary traffic stop or when applying for a job with a government contractor.

Despite these serious consequences and proliferating uses, the watchlist uses a notoriously low “reasonable suspicion” standard for inclusion that predicates suspicion on an undefined “relationship” to terrorist activities, rather than any crime.<sup>325</sup> After the thwarted 2009 bombing of a Detroit-bound airliner by a man not placed on a watchlist, intelligence agencies secretly bypassed even this permissive standard with categorical exceptions for noncitizens described by sources as “terrorists,” “extremists,” or “jihadists,” and for U.S. citizens in undefined exigent circumstances.<sup>326</sup> The “prevention at any cost” mentality has led to hundreds of thousands of people added to terrorist watchlists, with low standards and little oversight, and significant consequences, including lost jobs, split families, and the stigma of constant scrutiny. Yet the Biden administration’s

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*Report Faults FBI Work Before Boston Marathon Attack*, L.A. TIMES (Apr. 10, 2014), <https://www.latimes.com/nation/la-na-boston-bombing-20140411-story.html> [<https://perma.cc/Z3NG-2X4A>] (same); Michael Hirsh, *Why Didn't the FBI Stop Omar Mateen?*, POLITICO (June 17, 2016), <https://www.politico.com/magazine/story/2016/06/orlando-terrorism-fbi-omar-mateen-213971/> [<https://perma.cc/LNA3-FR54>] (Orlando Pulse nightclub shooting).

321. NAT'L SEC. COUNCIL, *supra* note 1, at 26.

322. Elhady v. Kable, 391 F. Supp. 3d 562, 568 (E.D. Va. 2019), *rev'd and remanded*, 993 F.3d 208 (4th Cir. 2021).

323. *Id.* at 572.

324. *Id.* at 570, 580.

325. Sinnar, *Rule of Law Tropes in National Security*, *supra* note 208, at 1586–89, 1592.

326. *Id.* at 1585–86, 1594–96.

domestic terrorism strategy simply declares that watchlisting has been “refined and calibrated over time” to protect civil liberties.<sup>327</sup>

Second, counterterrorism programs overestimate their ability to identify those who present the greatest risk from a larger pool of people deemed threatening. In other words, law enforcement agencies not only err on the side of false positives, but also inflate their capacity to predict true threats. The use of counterterrorism undercover sting operations displays this dynamic. As explained in Part III, such investigations involve federal agents approaching a person who has expressed sympathy for violence, usually online, and presenting opportunities to conduct a violent act over time to see if the person will take the bait. As Jacqueline Ross has explained, sting operations differ from “naturalistic” undercover operations that contact individuals in their “natural social environment, seeking to mimic criminal opportunities that approximate those that are already available to them and to replicate offenses that targets are suspected of already committing independently of government influence.”<sup>328</sup> In a naturalistic operation, for instance, an undercover agent might infiltrate an existing criminal organization to learn about activities initiated by others.<sup>329</sup> By contrast, sting operations create an “artificial scenario for the realization of the target’s criminal plans, under conditions controlled by the government, without an established link to prior criminal activities of this type.”<sup>330</sup>

Sting operations are premised on the idea that such operations can accurately determine those who would actually commit an act of terrorism from a larger number of people who only “talk the talk.” But that idea minimizes the influence of the undercover operatives themselves, and their potential to induce people to agree to terrorist activities who would never have embraced them without protracted government intervention. In the course of “testing” a person’s willingness to act, FBI agents and informants have provided financial incentives to economically struggling individuals,<sup>331</sup> supplied fake religious guidance purporting to endorse the legitimacy of violence,<sup>332</sup> and lavished attention on young men with few friends or authority figures in their lives.<sup>333</sup> In response to

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327. NAT’L SEC. COUNCIL, *supra* note 1, at 26.

328. Jacqueline Ross, *Anti-Terror Stings and Human Subjects Research: The Implications of the Analogy for Notions of Entrapment and for the Pursuit of Strategic Deterrence*, 47 N.Y.U. J. INT’L L. & POL. 379, 383–87 (2015).

329. *See id.* at 387.

330. *Id.* Ross did not necessarily oppose the use of sting operations in terrorism cases but argued that the correct question is whether the target would have been likely to engage in similar acts if contacted by actual recruiters, not whether he was already involved in planning violence as part of a terrorist network. *Id.* at 406.

331. *See* Graham Rayman, *Newburgh 4 Terror Case: Judge Sentences Three to 25 Years in Prison, U.S. Constitution Shivers [Updated]*, VILL. VOICE (June 29, 2011), <https://www.villagevoice.com/2011/06/29/newburgh-4-terror-case-judge-sentences-three-to-25-years-in-prison-u-s-constitution-shivers-updated/> [<https://perma.cc/F4TW-HNP2>].

332. *See* United States v. Daoud, 980 F.3d 581, 585–86 (7th Cir. 2020).

333. *See* Abbie VanSickle, *Small-Town “Terrorists”: The Infamous Post-9/11 California “Sleeper Cell” Case Continues to Unravel*, INTERCEPT (Nov. 19, 2016), <https://theintercept.com/2016/11/19/infamous-post-911-california-sleeper-cell-case-continues-to->

concerns about such influence, law enforcement agencies argue that real terrorist organizations are always at the ready to recruit vulnerable targets.<sup>334</sup> But rarely is it clear that a “real terrorist” would have approached a particular target, let alone invested the time, attention, and resources expended by the government to enlist a person. Nor is it apparent that defendants could have obtained the weapons they are charged with attempting to use—fake stinger missiles or thousand-pound bombs—on their own.

Federal judges have expressed concerns about the FBI providing the motive and the means for terrorism plots. At the sentencing of James Cromitie, a man who agreed to bomb a synagogue after an informant’s financial inducement and moral suasion, the federal judge questioned the defendant’s ability to commit an act of terrorism without government intervention.<sup>335</sup> She averred, “I suspect that real terrorists would not have bothered themselves with a person who was so utterly inept. . . . Only the government could have made a terrorist out of Mr. Cromitie, whose buffoonery is positively Shakespearean in scope.”<sup>336</sup> Nonetheless, no terrorism defendant has succeeded in presenting an entrapment defense at trial.<sup>337</sup> To succeed on entrapment, a federal defendant must show “both that he was not predisposed to commit the crime *and* that the government’s tactics were unfair, meaning that the pressures and inducements were excessive.”<sup>338</sup> This defense offers little opportunity for a defendant to prevail, especially a Muslim defendant faced with jurors already fearful of Islam, because evidence of a person’s offensive speech or beliefs alone can often convince a jury of predisposition to a crime.<sup>339</sup>

Moreover, in terrorism cases, it is too easy for judges and jurors alike to believe the circular notion that “only a terrorist would agree to terrorism”—that is, if a person agreed to commit an act of violence, he must have been predisposed to do so.<sup>340</sup> There are good reasons to question this supposition. Some cognitive science studies have shown that “behavior is heavily influenced by situational factors—not just latent dispositions—and that many otherwise law-abiding people can be manipulated into committing relatively low-level

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unravel/ [https://perma.cc/QF3Q-JNK5]; see also *United States v. Hayat*, No. 05-CR-240, 2019 WL 3760714 (E.D. Cal. Aug. 9, 2019) (ordering release of Hamid Hayat after vacating conviction for constitutionally ineffective assistance of counsel).

334. See Sahar Aziz, *Manufacturing a Muslim Threat: Entrapment and Sting Operations* (unpublished manuscript) (on file with author).

335. Rayman, *supra* note 331.

336. *Id.*

337. Aziz, *supra* note 334 (“Scholars and lawyers agree there has yet to be a successful entrapment defense in a terrorism case since 9/11.”).

338. Ross, *supra* note 328, at 397.

339. See Aziz, *supra* note 334.

340. Indeed, a legal scholar has even argued for this interpretation. See Dru Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125, 144 (2008) (“We can infer predisposition merely by the fact that the person agreed to engage in such a horrible act, and that other evidence of predisposition is unnecessary.”).

offenses in controlled experimental settings.”<sup>341</sup> Several European countries have prohibited undercover operations except in their passive, naturalistic form.<sup>342</sup> Some U.S. terrorism researchers have also questioned the reliability of terrorism sting operations, arguing that terrorist attacks are “very low base rate events” and therefore generate “an enormous number of false positives,” but that “special agents and juries cannot fully appreciate the ramifications of introducing older and authoritative FBI *agents provocateurs* that influence impressionable young men to do things such as detonating bombs that they would never have done on their own.”<sup>343</sup>

Expanding preventative counterterrorism programs, such as watchlists or sting operations, to White supremacists will not necessarily result in the same level of aggressive enforcement. Even FBI agents and prosecutors incentivized to arrest and convict White supremacists act knowing that juries are more likely to believe that a young White man was entrapped than a Muslim defendant. The racist prejudices of a White supremacist are likely more familiar to the average juror, who might know someone who “talks the talk” without ever acting on angry rhetoric. As a result, young White men are more likely to receive the benefit of the doubt. Moreover, high-profile acquittals of White supremacists and blowback from aggressive FBI interventions over several decades have likely taught law enforcement agencies that judges and juries are wary of government overreach in cases involving White defendants.<sup>344</sup> So the fear of public exposure or acquittal in court—if not the agent’s own ability to empathize with a White suspect—may rein in decisions to add a person to a watchlist or induce a person to criminal activity.

While these dynamics will likely protect White suspects from the most aggressive implementation of watchlisting, sting operations, and other preventative counterterrorism practices, they will not shield them entirely. At a time of rising concern over far-right and other internal threats, some law enforcement agencies and prosecutors will deploy existing counterterrorism tactics against new groups including White supremacists. At the same time, this expansion will only entrench, expand, and relegitimize the use of these measures against traditional targets.

### 3. *Targeting Racially Subordinated Communities and Leftist Threats*

Even if political and racial dynamics protect White supremacists from the full scope of counterterrorism, other individuals or communities subject to an

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341. Ross, *supra* note 328, at 381. For obvious reasons, psychology experiments have not tested the ease with which people can be manipulated into committing much more serious violence, and even the classic experiments have been criticized on ethical grounds.

342. *See id.* at 388–89.

343. Sageman, *supra* note 305, at 575.

344. *See* BELEW, *supra* note 23, at 67–74, 170–83, 199–208 (2018) (describing acquittals of Klansmen and neo-Nazis in 1979 Greensboro, North Carolina, murder trial; the acquittal of White supremacist leaders in a 1988 sedition trial; and backlash against the FBI resulting from interventions in Ruby Ridge, Idaho, and Waco, Texas in the early 1990s).



expanded domestic terrorism regime will not benefit from the same protection. There is reason to fear that people of color or activists contesting racial or socioeconomic hierarchies will experience harsher effects from an expanded framing of terrorism, even if the White supremacist threat currently motivates advocacy for its expansion. Moreover, advocacy by liberals for the expansion of counterterrorism will make it politically harder for the left to challenge future abuse.

While security agencies and independent researchers have concluded that White supremacists present the most serious threat of “domestic terrorism,”<sup>345</sup> some political leaders and law enforcement officials have advocated treating as terrorists those protesting oil or gas pipelines or police brutality. For instance, after the Standing Rock Sioux Tribe’s resistance to the Dakota Access Pipeline, legislators in at least thirty-one states introduced bills to curtail pipeline protests, some of which widened definitions of terrorism, and eighty-four members of Congress wrote to Attorney General Jeff Sessions inquiring whether damaging pipelines qualifies as domestic terrorism.<sup>346</sup> Others called for treating Antifa, a loose affiliation claimed by some “anti-fascist” activists, or Black Lives Matter activists as terrorists.<sup>347</sup> During the racial justice protests in the summer of 2020, President Trump announced that the government would designate Antifa a terrorist organization—a move not permitted under existing law—and Attorney General Barr pledged to use Joint Terrorism Task Forces nationwide against

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345. See *supra* Part I.

346. Nicholas Kusnetz, *Harsh New Anti-Protest Laws Restrict Freedom of Speech, Advocates Say*, WASH. POST (Aug. 22, 2018), <https://www.washingtonpost.com/energy-environment/2018/08/22/environmentalists-say-new-pipeline-protest-laws-restrict-their-freedom-speech/> [<https://perma.cc/AM6B-MQQ2>]; Letter from Rep. Ken Buck, et al, to Att’y Gen. Jeff Sessions (Oct. 23, 2017), [https://buck.house.gov/sites/buck.house.gov/files/wysiwyg\\_uploaded/Protecting%20Energy%20Infras%20structure.pdf](https://buck.house.gov/sites/buck.house.gov/files/wysiwyg_uploaded/Protecting%20Energy%20Infras%20structure.pdf) [<https://perma.cc/ZPE4-SA52>]. U.S. attorneys have also labeled individuals convicted of vandalizing oil pipelines as domestic terrorists. See U.S. Att’y’s Off., S.D. Iowa, U.S. Dep’t of Just., Press Release, *Des Moines Woman Sentenced to Eight Years in Prison for Conspiracy to Damage the Dakota Access Pipeline* (June 30, 2021), <https://www.justice.gov/usao-sdia/pr/des-moines-woman-sentenced-eight-years-prison-conspiracy-damage-dakota-access-pipeline> [<https://perma.cc/L8NW-SFQP>].

347. See A Resolution Calling for the Designation of Antifa as a Domestic Terrorist Organization, S. Res. 279, 116th Cong. (2019) (introduced July 18, 2019); Calling for the Designation of Antifa as a Domestic Terrorist Organization, H.R. Res. 525, 116th Cong. (2019) (introduced July 25, 2019); Ryan J. Foley, *Police Guide That Calls BLM a Terrorist Group Draws Outrage*, AP NEWS (Dec. 2, 2020), <https://apnews.com/article/police-guide-calls-blm-terrorist-group-8dc0afce2ce6b60dbaa0d1d9c53ce1e3> [<https://perma.cc/JM3C-LUWQ>]; PATRISSE KHAN-CULLORS & ASHA BANDELE, *WHEN THEY CALL YOU A TERRORIST: A BLACK LIVES MATTER MEMOIR* 6–8 (2017); Gary LaFree, *Is Antifa a Terrorist Group?*, 55 SOC’Y 248, 252 (2018) (concluding that Antifa is not a “group” and that, based on application of Global Terrorism Database criteria through 2017, Antifa-associated individuals did not commit terrorist attacks in Charlottesville or “most likely . . . anywhere else”). In 2019, a Seattle activist identifying as Antifa was shot by police after throwing Molotov cocktails outside an ICE detention center, the one death reportedly linked to the U.S. Antifa movement. See Hannah Allam, *Terrorist or Hero? Politics Shape the Story Behind Antifa’s Only Fatal Attack*, NPR (July 22, 2020), <https://www.npr.org/2020/07/22/894343496/terrorist-or-hero-politics-shape-the-story-behind-antifas-only-fatal-attack> [<https://perma.cc/JQ6C-XVHN>].

“violent radical elements.”<sup>348</sup> Several Republicans invoked the war on terror in calling for a military response to those protests. Rep. Matt Gaetz tweeted: “Now that we clearly see Antifa as terrorists, can we hunt them down like we do those in the Middle East?”<sup>349</sup> And Senator Tom Cotton stated, “[L]et’s see how tough these Antifa terrorists are when they’re facing off with the 101st Airborne Division.”<sup>350</sup> Thus, political leaders on the right moved from advocating legal designations to calling for military force within the United States, all in the context of protest movements led by Indigenous people and people of color.

To be clear, calls to designate activists or political organizations as terrorists are not exclusive to the right. The city of San Francisco, for instance, sought to label the National Rifle Association a terrorist group.<sup>351</sup> But the association between race, criminality, and subversion in U.S. culture, the historical record of law enforcement agencies, and the ideological proclivities of law enforcement suggest that an expanded terrorism frame will disproportionately affect communities of color and left-wing threats, rather than smiting all equally.

To begin, associations in U.S. society between race and criminality, and race and subversion, are longstanding and pervasive. Cultural ideas of Black criminality trace back to at least the late nineteenth century, when social scientists leveraged crime statistics in an effort to demonstrate Black inferiority.<sup>352</sup> Social psychology studies have documented the enduring—and sometimes unconscious—association between race and crime that affects the criminal legal system at every level, from policing to punishment.<sup>353</sup> The political linkage of immigrants to subversion dates to the earliest days of the republic, and stereotypes of “enemy aliens” have easily transitioned into stereotypes of “enemy races”—as for Japanese Americans deemed unassimilable and disloyal during World War II.<sup>354</sup> Non-White groups such as Asian Americans are often seen as “perpetual foreigners,” regardless of citizenship.<sup>355</sup>

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348. See Shirin Sinnar, *Invoking “Terrorism” Against Police Protestors*, JUST SEC. (June 3, 2020), <https://www.justsecurity.org/70549/invoking-terrorism-against-police-protestors/> [<https://perma.cc/Z4VN-7DQA>].

349. Erin Banco & Spencer Ackerman, *Barr Promises to Sic Terror-Hunters on Protesters*, DAILY BEAST (June 1, 2020), <https://www.thedailybeast.com/bill-barr-pledges-to-sic-terrorism-task-forces-on-protesters> [<https://perma.cc/DD8G-2MU3>].

350. *Id.*

351. See Mariel Padilla, *San Francisco Declares the N.R.A. a ‘Domestic Terrorist Organization,’* N.Y. TIMES (Sept. 6, 2019), <https://www.nytimes.com/2019/09/04/us/san-francisco-nra-terrorist.html> [<https://perma.cc/8FXK-PH24>].

352. See KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* 3–5 (2010).

353. See, e.g., JENNIFER L. EBERHARDT, *BIASED: UNCOVERING THE HIDDEN PREJUDICE THAT SHAPES WHAT WE SEE, THINK, AND DO* (2019).

354. See David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 989, 991–92 (2002).

355. Stacey J. Lee, Nga-Wing Anjela Wong & Alvin N. Alvarez, *The Model Minority and the Perpetual Foreigner: Stereotypes of Asian Americans*, in *ASIAN AMERICAN PSYCHOLOGY: CURRENT PERSPECTIVES* 69, 76 (Nita Tewari & Alvin N. Alvarez eds., 2008); see also Thierry Devos & Mahzarin R. Banaji, *American = White?*, 88 J. PERSONALITY & SOC. PSYCH. 447, 463 (2005) (concluding that

In addition to race, the ideology of political groups has long differentiated state responses to political violence. Historian Beverly Gage argued that “[n]ormative judgments . . . have long shaped how and if acts of terrorism become national emergencies.”<sup>356</sup> She pointed to “one of the most fascinating and revealing contradictions” in government responses to terrorism: “Beginning in the 1880s, bombings attributed to anarchists or labor activists often served to justify widespread campaigns of suppression against radical movements. Lynchings and race riots, by contrast, generally met with inaction, even approval, in official circles.”<sup>357</sup> She further observed that, while “right-wing terrorism has more than matched the violence of the Left” during the twentieth century, “[r]eactionary violence tends to attract less attention from government officials.”<sup>358</sup>

For instance, sociologist David Cunningham argued that the FBI’s clandestine counterintelligence operations of the 1960s targeted a variety of political targets but diverged along racial and ideological lines. As is well known, the FBI surveilled and harassed Dr. Martin Luther King, whom FBI Director J. Edgar Hoover branded “the most notorious liar in America,” and systematically disrupted civil rights and Black power activists.<sup>359</sup> The Bureau often directed its “harshest” Cointelpro actions towards “Black Nationalist/Hate Group” targets, such as the Black Panthers, because it saw “any challenge by [non-Whites] . . . as threatening to a conventional vision of an ideal America.”<sup>360</sup> While pervasive racism within the agency helps explain the FBI’s treatment of Black activism, Cunningham also argued that ideology distinguished the FBI’s treatment of White activists on the left and right.<sup>361</sup> The Bureau engaged in “far more than token repression” against the Klan, using disruptive tactics against the group that contributed to its decline.<sup>362</sup> But in contrast to its approach to White “New Left” groups, the FBI sought to control rather than eliminate the Klan, because it objected to the Klan’s violence but not its beliefs.<sup>363</sup> Unlike civil rights and Black liberation groups, the Klan did not threaten “predominantly [W]hite power structures in American communities,” and unlike the New Left, it did not threaten “traditional American values” through linkages with Communism or by challenging established authority.<sup>364</sup> Thus, the FBI distinguished between the targets whose *ideas* it deemed subversive and those whose *tactics* alone merited suppression.

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several studies of implicit associations related to White, African American, and Asian American groups showed “a very consistent and robust American = [W]hite association” in which American national identity was equated with White identity, despite widespread explicit support for equality).

356. Gage, *supra* note 129, at 88.

357. *Id.*

358. *Id.* at 89.

359. CUNNINGHAM, *supra* note 168, at 110.

360. *Id.* at 113, 116.

361. *See id.* at 117.

362. *Id.* at 111, 127.

363. *See id.* at 126–28.

364. *Id.* at 126.

Even assuming that overt racism within the FBI and other law enforcement agencies has declined over time, ideological linkages to the right persist within many agencies. As discussed in Part I, far-right groups including White supremacists have often identified with the state's force-deploying institutions, such as the military and law enforcement agencies. In fact, some far-right groups heavily recruit military personnel, veterans, and law enforcement agents because of shared beliefs in law and order and in the threat posed by immigrants, Muslims, and people of color.<sup>365</sup> Police often welcome the presence of armed White activists during racial justice protests because those activists claim to be defending the police.<sup>366</sup> A number of military personnel and police officers participated in the Capitol invasion.<sup>367</sup> While active membership in far-right groups is likely the exception for law enforcement personnel, more widespread ideological affinities contribute to the potential for disparate treatment of threats along racial and political lines.

The FBI has identified White supremacist and far-right violence as leading threats. During the Trump administration, FBI director Christopher Wray repeatedly departed from President Trump's positions—including by characterizing the left-wing Antifa movement as a lesser threat than Trump claimed<sup>368</sup>—and the FBI union supported Wray against Trump's threat to terminate him.<sup>369</sup> Nonetheless, the FBI's recent history and personnel suggest that the likelihood of differentiating threats on the basis of ideology and race persists. Anecdotal evidence suggests that the agency's counterterrorism program attracted a fair number of military veterans who spent years fighting

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365. See *supra* Part I.

366. See, e.g., Tim Craig, *Proud Boys and Black Lives Matter Activists Clashed in a Florida Suburb. Only One Side Was Charged.*, WASH. POST (Feb. 4, 2021), [https://www.washingtonpost.com/national/florida-protest-bill-unequal-treatment/2021/02/01/415d1b02-6240-11eb-9061-07abcc1f9229\\_story.html](https://www.washingtonpost.com/national/florida-protest-bill-unequal-treatment/2021/02/01/415d1b02-6240-11eb-9061-07abcc1f9229_story.html) [https://perma.cc/2Y8Q-Q5HK] (describing differential enforcement of a noise ordinance against Black Lives Matter and far-right protestors); Zack Beauchamp, *Why Police Encouraged a Teenager with a Gun To Patrol Kenosha's Streets*, VOX (Aug. 27, 2020), <https://www.vox.com/2020/8/27/21404117/kenosha-kyle-rittenhouse-police-gun-populism> [https://perma.cc/3EKK-U6Z3] (describing police welcome of Kyle Rittenhouse during Wisconsin racial justice protests and racially disparate police attitudes towards armed civilians).

367. See Eric Westervelt, *Off-Duty Police Officers Investigated, Charged with Participating in Capitol Riot*, NPR (Jan. 15, 2021), <https://www.npr.org/2021/01/15/956896923/police-officers-across-nation-face-federal-charges-for-involvement-in-capitol-ri> [https://perma.cc/8Q6T-WJ3L]; Michael Biesecker, Jake Bleiberg & James LaPorta, *Capitol Rioters Included Highly Trained Ex-Military and Cops*, AP NEWS (Jan. 15, 2021), <https://apnews.com/article/ex-military-cops-us-capitol-riot-a1cb17201dfdde98291eadead5badc257> [https://perma.cc/5TZ8-GWJY].

368. See Colby Itkowitz & Devlin Barrett, *Trump Suggests He'd Consider Removing FBI Director Over Unfavorable Testimony*, WASH. POST (Sept. 18, 2020), [https://www.washingtonpost.com/politics/trump-wray-fbi-testimony/2020/09/18/2c7d16a2-f9f3-11ea-89e3-4b9efa36dc64\\_story.html](https://www.washingtonpost.com/politics/trump-wray-fbi-testimony/2020/09/18/2c7d16a2-f9f3-11ea-89e3-4b9efa36dc64_story.html) [https://perma.cc/F3HS-BRWP].

369. See Chris Strohm, *FBI Union Calls for Wray to Be Protected Amid Threats from Trump*, BLOOMBERG (Oct. 28, 2020), <https://www.bloomberg.com/news/articles/2020-10-28/fbi-union-calls-for-wray-to-be-protected-amid-threats-from-trump> [https://perma.cc/8LKK-2XJ3].

Muslim populations in the global war on terror,<sup>370</sup> while the agency alienated agents concerned about racism and racial profiling.<sup>371</sup> The agency devoted extraordinary attention to perceived threats from Muslims for two decades, while spending far less attention on right-wing threats.<sup>372</sup> Its recent efforts to investigate a broad category of “Black Identity Extremists” create additional concern.<sup>373</sup> Thus, even though the FBI now declares White supremacist or right-wing violence the greatest domestic threat, declaring so does not transform decades-long institutional culture and practices oriented at non-White threats.

Moreover, liberal support for expanding counterterrorism against White supremacists will make it more difficult to challenge future applications of such measures against people of color or leftist activists. In the civil rights era, the FBI benefited politically from its campaign against the Klan despite its much wider and harsher targeting of the left. Support from liberals for FBI infiltration of “[W]hite hate” groups gave the agency a freer hand to target Black activists and anti-war groups.<sup>374</sup> A terrorism framing of White supremacist violence facilitates the framing of other U.S. activists as terrorists, especially those from, or allied with, communities of color.

#### D. *Towards a Racial Justice Approach*

If both hate crimes and terrorism are inadequate frames for White supremacist violence, what would a better approach look like? Ultimately, any frame for addressing White supremacist violence ought to be assessed for its compatibility with racial justice. In a society deeply structured around race and racial injustice, the framing of any social problem ought to be evaluated for its

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370. See Arun Kundnani, *The FBI’s ‘Good’ Muslims*, NATION (Aug. 30, 2011), <https://www.thenation.com/article/archive/fbis-good-muslims/> [https://perma.cc/6WS5-SR6U] (offering an unsourced estimate that one-third of agents working on counterterrorism in the FBI Houston office previously served in the U.S. military in the Middle East). In general, police departments have a larger proportion of military vets than the U.S. population. See Simone Weichselbaum & Beth Schwartzapfel, *When Warriors Put on the Badge*, MARSHALL PROJECT (Mar. 30, 2017), <https://www.themarshallproject.org/2017/03/30/when-warriors-put-on-the-badge> [https://perma.cc/E9ST-KZCP] (estimating that 19 percent of police officers served in the military, compared to 6 percent of the U.S. population).

371. For one example, see Janet Reitman, *I Helped Destroy People*, N.Y. TIMES MAG. (Sept. 9, 2021), <https://www.nytimes.com/2021/09/01/magazine/fbi-terrorism-terry-albury.html> [https://perma.cc/4V5Y-HQ8M] (describing case of Black agent in Minneapolis FBI field office sentenced to four years in prison for leaking FBI documents showing use of racial profiling in terrorism investigations).

372. See, e.g., Reitman, *supra* note 187 (describing differential attention to Muslim and White nationalist threats); Jesse J. Norris & Hanna Grol-Prokopczyk, *Estimating the Prevalence of Entrapment in Post-9/11 Terrorism Cases*, 105 J. CRIM. L. & CRIMINOLOGY 609, 655 (2015) (using an original dataset to conclude that “jihadi” and “left-wing” terrorism cases featured more indicators of government “entrapment” or “borderline entrapment” than right-wing cases).

373. See Michael German, *The FBI Targets a New Generation of Black Activists*, BRENNAN CTR. FOR JUST. (June 26, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/fbi-targets-new-generation-black-activists> [https://perma.cc/D3KC-9EKK].

374. See CUNNINGHAM, *supra* note 168, at 111 (citing WILLIAM W. KELLER, *THE LIBERALS AND J. EDGAR HOOVER: RISE AND FALL OF A DOMESTIC INTELLIGENCE STATE* (1989)).

attention to racial justice concerns. But the importance of racial justice as a criterion is paramount when the subject is White supremacist violence—a form of violence inspired by a belief in White superiority and historically leveraged to subjugate Native people, Black Americans, immigrants, Muslims, Jews, and other groups seen as threatening White dominance.

What racial justice requires in relation to the framing of White supremacist violence is not simple or self-evident, and ultimately requires public deliberation both on the meaning of racial justice and its application to the problem.<sup>375</sup> That deliberation must center communities most harmed by racial violence. Social movements in a range of contexts, especially those dealing with police violence, have emphasized the need to shift power “to those who have been most harmed by mass criminalization and mass incarceration.”<sup>376</sup> In line with such calls, the political processes that determine responses to White supremacist violence must empower diverse affected communities, not just legal or security experts.

At a high level of generality, several themes have appeared in the recent work of academics, activists, and writers, especially those within communities of color, theorizing racial justice and its relationship to violence. First, a recurrent theme is the systemic nature of violence undertaken in the United States in the name of White supremacy. Rather than viewing an incident like the Charleston church massacre as aberrational, a racial justice perspective sees in such violence a continuity with historical racist violence, including the Klan’s campaign of violence against newly freed slaves, the 1921 massacre of Black residents in Tulsa, Oklahoma, and attacks on Black people and institutions during the civil rights era.<sup>377</sup> Racial justice advocates have especially highlighted the role of lynchings as a form of racial control in U.S. history, with groups such as the Equal Justice Initiative arguing both that lynchings were more frequent and more political than commonly recognized.<sup>378</sup> Beyond the Black/White binary, theorists have also connected other forms of contemporary violence—like anti-Asian hate violence during the pandemic—to longer histories of racist purges intended to exclude and suppress competition from racial outsiders, such as the

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375. See Patel & Price, *supra* note 264, at 77 (“The term ‘racial justice’ is perhaps least strong when it assumes a common working definition by forestalling the important work of deliberating contesting views, goals, and theories of change.”).

376. Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 783 (2021). More generally, critical race theorists have long advocated “looking to the bottom”—to historically oppressed and non-White people—for ideas on law and justice. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324–26 (1987).

377. See, e.g., Cobb, *supra* note 2 (linking Charleston massacre to prior racial violence against Black people); Johnson, *supra* note 269 (describing Attorney General Loretta Lynch’s speech connecting Charleston massacre to Birmingham, Alabama, church bombing and other historic incidents).

378. See EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 4–5 (2017). <https://lynchinginamerica.eji.org/report/> [https://perma.cc/9D6L-8NE9].

expulsions of Chinese laborers from West Coast towns in the late nineteenth century.<sup>379</sup>

Scholars and advocates theorizing racial justice have often invoked, explicitly or implicitly, a set of ideas associated with the international field of transitional justice, which addresses how societies recover from serious human rights abuses and violence.<sup>380</sup> As Yuvraj Joshi observed, “Transitional justice focuses on promoting accountability for wrongdoings, opening political and social space to marginalized people, providing redress for and ensuring non-repetition of injustices, and facilitating societal reconciliation by alleviating negative emotions and transforming individual and communal identities.”<sup>381</sup> These values of accountability, redress, non-repetition, and reconciliation are considered “crucial” in processes of transition from oppression, though societies may face dilemmas in resolving competing claims for justice, peace, and stability.<sup>382</sup>

In recognizing the historical continuities and systemic nature of White supremacist violence, racial justice advocates have often called for remedies evocative of transitional justice processes. Many have proposed public memorials to mark lynchings and other episodes of racist violence in the physical space of local communities to reshape collective memory, enable healing, and promote reconciliation.<sup>383</sup> A renewed movement for reparations at the national and local levels aspires to achieve societal recognition and redress of harms from slavery, segregation, and other forms of racial oppression.<sup>384</sup> Others have

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379. See, e.g., *Hearing on Discrimination and Violence Against Asian Americans Before the Subcomm. on Civ. and Const. Rts., H. Comm. on the Judiciary*, 117th Cong. (2021) (statement of Professor Erika Lee, Univ. of Minn.); *id.* (statement of Professor Hiroshi Motomura, UCLA Sch. of L.).

380. See, e.g., Yuvraj Joshi, *Racial Transition*, 98 WASH. U. L. REV. 1181, 1187 (2021) (advocating applying a transitional justice lens to enable a reckoning with America’s legacy of slavery and racial oppression); *Exploring the Path to Reparative Justice in America: Hearing on H.R. 40 Before Subcomm. on the Const., C.R., and C.L., H. Comm. on the Judiciary*, 117th Cong. (2021) (statement of E. Tendayi Achiume, Professor of Law, UCLA Sch. of L., U.N. Special Rapporteur on Contemp. Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance) (evoking transitional justice in advocating U.S. reparations for slavery); SHERRILYN A. IFILL, *ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE 21ST CENTURY* 117–31 (2007) (drawing on international truth and reconciliation processes from South Africa, Bosnia, and Rwanda to suggest reconciliation measures for U.S. lynchings).

381. Joshi, *supra* note 380, at 1187.

382. *Id.* at 1197.

383. See EQUAL JUST. INITIATIVE, *supra* note 378, at 66–75 (proposing formal spaces that would memorialize racial violence, such as through plaques, statues, and monuments); IFILL, *supra* note 380, at 127 (proposing a range of locally determined forms of reparation including naming and marking public spaces).

384. See Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 15, 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/B3BG-JZ3H>]; Commission to Study and Develop Reparation Proposals for African Americans Act, H.R. 40, 117th Cong. (2021) (introduced Jan. 4, 2021); Mark Guarino, *Evanston, Ill., Leads the Country with First Reparations Program for Black Residents*, WASH. POST (Mar. 22, 2021), [https://www.washingtonpost.com/national/evanston-illinois-reparations/2021/03/22/6b5a308c-8b2d-11eb-9423-04079921c915\\_story.html](https://www.washingtonpost.com/national/evanston-illinois-reparations/2021/03/22/6b5a308c-8b2d-11eb-9423-04079921c915_story.html) [<https://perma.cc/CB8Y-G5QR>]; M4BL, *REPARATIONS NOW*

proposed public compensation for contemporary acts of racism.<sup>385</sup> And racial justice proponents have emphasized the importance of storytelling and education on racial injustice, including the history of racist violence, at all levels.<sup>386</sup> A revised frame for White supremacist violence, more consistent with racial justice, would recognize the systemic nature of that violence and enable deliberation over a wider set of collective remedies than those considered under either the hate crimes or terrorism frames.

A second prominent racial justice theme is the prevalence of state violence and repression—a theme that both the hate crimes and terrorism frames obscure. State actors who deploy racist violence in the course of their official responsibilities are not deemed perpetrators of hate crimes or terrorism, as both frames treat state action as remedial, not a source of harm. But the terrorism frame, in particular, has legitimized expansive state violence, and many communities of color experience state and non-state White supremacist violence as interrelated, not separate concerns. A racial justice perspective identifies how such violence interacts: how state stand-your-ground laws protect the violence of racist individuals, how policing practices interact with “move-in violence” to enforce racial boundaries in neighborhoods, how weapons and ideas from the twenty-year war on terror feed not only policing but also paramilitary violence by private militias, or how immigration exclusions premised on an “invasion” of migrants license private violence against the same people.

One area at the intersection of state and non-state violence that has recently received attention is the participation of military and law enforcement officers in political violence, such as the Capitol insurrection.<sup>387</sup> This problem, however, is often considered one of rooting out members of those institutions who belong to extremist groups or embrace White supremacist ideas, or disrupting the recruitment of such individuals by paramilitary groups.<sup>388</sup> Yet the frame can be

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TOOLKIT (2019), <https://m4bl.org/wp-content/uploads/2020/05/Reparations-Now-Toolkit-FINAL.pdf> [<https://perma.cc/N3SN-EFM7>].

385. See Monica C. Bell, *The Case for Racism Response Funds – A Collective Response to Racist Acts*, APPEAL (July 17, 2020), <https://theappeal.org/the-case-for-racism-response-funds-a-collective-response-to-racist-acts/> [<https://perma.cc/L5TZ-JND6>].

386. See Ward, *supra* note 59 (calling for storytelling to render racist violence visible as part of transformative justice efforts); Marisa Iati, *What Is Critical Race Theory, and Why Do Republicans Want to Ban It in Schools?*, WASH. POST (May 29, 2021), <https://www.washingtonpost.com/education/2021/05/29/critical-race-theory-bans-schools/> [<https://perma.cc/YL84-89ZY>] (addressing ideas from, and backlash to, critical race theory).

387. See, e.g., Rachel E. VanLandingham & Geoffrey S. Corn, *Perception and Reality: The Urgency of Finding and Fixing Extremism and Racial Bias in the Armed Forces*, J. NAT’L SEC. L. & POL. ONLINE (Jan. 25, 2021).

388. See, e.g., Zolan Kanno-Youngs, *Homeland Security Will Assess How It Identifies Extremism in Its Ranks*, N.Y. TIMES (July 1, 2021), <https://www.nytimes.com/2021/04/26/us/politics/homeland-security-extremism-white-supremacy.html> [<https://perma.cc/L5A8-XG4B>] (describing internal review within Department of Homeland Security to identify members of extremist groups or agents espousing extremist beliefs); Eric Schmitt, Jennifer Steinhauer & Helene Cooper, *Pentagon Accelerates Efforts to Root Out Far-Right Extremism in the Ranks*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2021/01/18/us/politics/military-capitol-riot-inauguration.html> [<https://perma.cc/QD2Y-2ZJ9>] (describing vetting of military officers and criminal investigations of



broadened beyond the “bad apples” perspective to consider how these institutions teach ideas and transmit practices that contribute to White supremacist violence. For example, when an armed group plotting violence against non-White people or governments includes members of the military, the question should not only be how to identify “extremists” in the armed forces. A racial justice perspective would also consider how the twenty-year war on terror and earlier foreign interventions conditioned members of the military to see non-White populations as threats to be countered by battlefield and counterinsurgency practices.<sup>389</sup>

Unlike both the hate crimes and terrorism frames, a racial justice approach to political violence not only acknowledges state violence, but also has the potential to unite conversations on interpersonal and state violence that often occur in siloes. One reason for a unified conversation is that it enables consideration of the complex—and sometimes counterintuitive—interactions between these forms of violence. While state violence and White supremacist private violence often reinforce each other, in some cases, they tend in opposite directions. For example, reducing state violence in the form of militarized immigration enforcement and exclusion at U.S. borders may, at times, invite xenophobic backlash from groups who feel their status in the United States is politically threatened.<sup>390</sup> Measures to reduce policing may diminish direct state violence against communities of color, while catalyzing increases in gun ownership and private security forces that may also target those communities.<sup>391</sup> These complicated interactions mean that a racial justice approach must consider state and non-state violence together, not either at the expense of the other.

A third theme in recent writing on racial justice is a deep critique of conventional criminal legal responses to social problems—a critique in tension

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current or former military members); Neil MacFarquhar, *Efforts to Weed Out Extremists in Law Enforcement Meet Resistance*, N.Y. TIMES (May 11, 2021), <https://www.nytimes.com/2021/05/11/us/police-extremists-state-laws.html> [<https://perma.cc/VW38-EQTL>] (describing efforts to purge officers with extremist ties from police forces).

389. For more on the connections between the war on terror, counterinsurgency models, and U.S. policing, see, for example, RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES* 242–308 (2013) (describing intensifying police militarization in response to the war on terror and Homeland Security funding); BERNARD E. HARCOURT, *THE COUNTERREVOLUTION: HOW OUR GOVERNMENT WENT TO WAR AGAINST ITS OWN CITIZENS* 129–43 (2018) (describing accelerating use of counterinsurgency practices developed abroad against U.S. communities); Asli Bâli, *Defund America’s Endless Wars*, JUST SEC. (July 29, 2020), <https://www.justsecurity.org/71723/defund-americas-endless-wars/> [<https://perma.cc/4Z62-HY8Y>] (arguing that ending racist policing requires ending U.S. foreign wars).

390. See Dugan & Chenoweth, *supra* note 64, at 716.

391. See Marc Fisher, Miranda Green, Kelly Glass & Andrea Eger, *‘Fear on Top of Fear’: Why Anti-Gun Americans Joined the Wave of New Gun Owners*, WASH. POST (July 10, 2021), <https://www.washingtonpost.com/nation/interactive/2021/anti-gun-gun-owners/> [<https://perma.cc/GLM2-KJ3W>] (describing surge in gun ownership among diverse groups of Americans); Candice Bernd, *“Defund Police” Doesn’t Mean Hire Private Guns — But Cities Are Doing Just That*, TRUTHOUT (Sept. 1, 2020), <https://truthout.org/articles/defund-police-doesnt-mean-hire-private-guns-but-cities-are-doing-just-that/> [<https://perma.cc/6SZ5-PBVD>] (describing rise in both municipal and civilian hiring of private security forces).

with the hate crimes' and terrorism frames' emphasis on criminal law responses to political violence.<sup>392</sup> In recent years, racial justice advocates have increasingly called for shrinking the state's carceral footprint, if not abolishing police and prisons. Alongside the negative project of reducing reliance on criminal processes, they have advocated positive projects to reimagine public safety—whether through renewed investment in communities, violence prevention and intervention programs, trauma and mental health services, restorative justice, or other efforts.<sup>393</sup> Like earlier activists, many have sought to frame social ills more broadly than “crime” and to explore non-carceral solutions.

Scholars have long pointed out the tendency of American legal culture to reduce complex social ills to problems of criminal law, displacing other conceptions of the problem and the possibility of alternative social, economic, and political responses. Jonathan Simon has argued that, since the late 1960s, federal and state actors “govern[ed] through crime”—seeking to establish legitimacy by showing that they could deliver measurable results (such as making arrests or filling prisons) in response to popular concerns.<sup>394</sup> Handling societal problems through criminal law became increasingly popular as the welfare state lost legitimacy in the decades after the New Deal.<sup>395</sup> A literature on “carceral feminism”<sup>396</sup> documents how women's movement activism against domestic violence, sexual assault, and human trafficking resulted in law enforcement and carceral solutions, despite the fact that many of these efforts did not initially emphasize criminal sanctions.<sup>397</sup>

Views among racial justice advocates and within marginalized communities on the proper response to White supremacist violence are mixed,

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392. Note that, with the terrorism frame, civil libertarians have often celebrated criminal law responses as the liberal and rights-protective approach, compared to military or security responses. See WADIE E. SAID, *CRIMES OF TERROR: THE LEGAL AND POLITICAL IMPLICATIONS OF FEDERAL TERRORISM PROSECUTIONS 2–3* (2015) (critiquing the liberal discourse on terrorism cases for extolling the criminal justice system in the terrorism context).

393. See generally Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 *UCLA L. REV.* 1156, 1163 (2015) (advocating positive social projects and non-criminal preventive justice to replace prisons); Dorothy Roberts, *Abolition Constitutionalism*, 133 *HARV. L. REV.* 1 (2019) (describing major tenets of prison abolition and intersection with constitutional claims); Amna Akbar, *Toward a Radical Imagination of Law*, 93 *N.Y.U. L. REV.* 405 (2018) (contrasting the Movement for Black Lives with liberal police reform projects); *Invest-Divest*, M4BL (Feb. 1, 2021), <https://m4bl.org/policy-platforms/invest-divest/> [<https://perma.cc/BW35-SNYY>] (calling for investment in the “education, health and safety of Black people”); *About Us*, PROJECT NIA (Dec. 6, 2020), <https://project-nia.org/mission-history> [<https://perma.cc/3H5U-GC82>] (advocating restorative and transformational justice to end youth incarceration).

394. See generally JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007).

395. See *id.*

396. Elizabeth Bernstein, *Carceral Politics as Gender Justice? The “Traffic in Women” and Neoliberal Circuits of Crime, Sex, and Rights*, 41 *THEORY & SOC'Y* 233, 236, 242 (2012) (describing “carceral feminism” as the redefinition of “justice and liberation struggles . . . in carceral terms”).

397. See AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION 42–45* (2020); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWES: THE POLITICS OF MASS INCARCERATION IN AMERICA 137–38* (2006).

as they are on policing and abolition more generally. For decades, activists of color called for *increased* criminal law enforcement against White supremacists, who often escaped accountability at the hands of complicit state actors. Groups like the NAACP were defined by their advocacy for federal anti-lynching laws to prosecute perpetrators and complicit law enforcement officials,<sup>398</sup> and in the 1980s, the Asian American civil rights movement galvanized around the near-impunity for two White men who had murdered Chinese American Vincent Chin.<sup>399</sup> These histories are reflected in contemporary disagreements among communities and advocates on the role of criminal law in confronting White supremacist violence. For example, while many mainstream civil rights organizations support hate crime penalty enhancements, other groups resist such laws from an abolitionist perspective or due to more general concerns with mass incarceration.<sup>400</sup> After the January assault on the Capitol, a wide spectrum of civil rights groups endorsed the idea that counterterrorism powers should not be expanded, without opposing the use of existing criminal charges against White supremacist violence,<sup>401</sup> while abolitionists grappled with the proper response to the Capitol invasion.<sup>402</sup>

Resolving these broader debates exceeds the scope of this Article. This Article does *not* argue against law enforcement investigations or prosecutions of political violence, nor challenges the use of existing hate crime or terrorism criminal laws across the board.<sup>403</sup> Still, without excluding law enforcement responses, conceptualizations of White supremacist violence and potential solutions that rely *less* on criminal law are possible.

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398. See MEGAN MING FRANCIS, CIVIL RIGHTS AND THE MAKING OF THE MODERN AMERICAN STATE 2–8, 98–103 (2013) (describing the NAACP’s focus on racial violence and advocacy for federal anti-lynching legislation).

399. Little, *supra* note 90.

400. See Sinnar & Colgan, *supra* note 214; 100+ Asian and LGBTQ Organizations’ Statement in Opposition to Law Enforcement-Based Hate Crime Legislation, REAPPROPRIATE (May 12, 2021), <http://reappropriate.co/2021/05/75-asian-and-lgbtq-organizations-statement-in-opposition-to-law-enforcement-based-hate-crime-legislation/> [https://perma.cc/S38L-2SMZ].

401. See Leadership Conference Letter, *supra* note 282.

402. See, e.g., Neil Gong & Heath Pearson, *Can Abolition Work in an Age of Right-Wing Extremism?*, ATLANTIC (Jan. 22, 2021), <https://www.theatlantic.com/ideas/archive/2021/01/stop-right-wing-extremism-without-bolstering-police-power/617759/> [https://perma.cc/2BFR-JHF4]; Kali Holloway, *I’m for Abolition. And Yet I Want the Capitol Rioters in Prison*, NATION (Feb. 4, 2021), <https://www.thenation.com/article/society/prison-abolition-capitol-riot/> [https://perma.cc/58ZS-P6AC].

403. I believe that, under current conditions, law enforcement investigations and prosecutions of White supremacist threats and acts of violence remain important to providing individual accountability, deterring other would-be perpetrators, and preventing genuine plots from succeeding. In other work, I have discussed more specific policy questions related to the use of existing hate crime and terrorism laws and practices. For instance, I have argued against the establishment of a new federal crime of domestic terrorism, in part because existing federal hate crime statutes and federal offenses classified as terrorism offenses under the U.S. criminal code provide sufficient legal authority to respond to White supremacist violence. See *Countering Domestic Terrorism: Examining the Evolving Threat: Hearing Before the H. Comm. on Homeland Sec. and Gov’t Affs.* 116th Cong. (2019) (written statement of Shirin Sinnar, Professor, Stan. L. Sch.).

A broader frame attuned to racial justice might consider forms of accountability beyond criminal law and incarceration. For instance, if White supremacist violence is as much a political problem as a crime, then a quest for accountability should focus at least as much attention on those in power whose words or behavior license White supremacist violence, compared to the individuals who act upon that license. Whether that accountability takes the form of investigative commissions, electoral strategies, social media deplatforming, civil litigation, or the withdrawal of corporate sponsorship, the underlying idea is that political violence merits responses directed at political leaders, not just the low-hanging fruit.<sup>404</sup>

Moreover, even for individuals who have engaged in violence, incarceration is not the sole response possible. Some U.S. restorative justice programs include hate crimes within their ambit, replacing incarceration where victims and offenders agree on other measures to hold offenders accountable and support victims to heal, and where offenders successfully comply with those agreements.<sup>405</sup> These programs raise a complicated set of questions in the hate crime context, and must avoid retraumatizing victims or placing the burden of rehabilitation on minority communities.<sup>406</sup> In addition, they are generally off the table where offenders remain ideologically committed to their actions. But where perpetrators are willing to take responsibility for their actions, especially in cases with relatively less serious offenses or young defendants, restorative alternatives to imprisonment may meaningfully address the harm from bias-motivated crimes.<sup>407</sup> A number of empirical studies, though mostly not specific to hate crimes, have shown that restorative justice programs reduce recidivism and improve victim satisfaction compared to traditional criminal proceedings.<sup>408</sup>

Although it cannot settle every question debated across and within communities struggling towards racial justice, a reframing of White supremacist violence should avoid treating the problem as purely “criminal” by definition and defaulting to law enforcement and punitive solutions.

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404. To be clear, those who support application of the terrorism label and laws to White supremacist violence do not rule out additional political measures, but the question is one of emphasis.

405. See Sinnar & Colgan, *supra* note 214, at 164–65; BISHOP ET AL., *supra* note 233, at 16–24 (describing multiple examples of restorative justice applications to hate crimes and assessing the potential benefits and concerns with such programs).

406. BISHOP ET AL., *supra* note 233, at 22; MARK AUSTIN WALTERS, HATE CRIME AND RESTORATIVE JUSTICE: EXPLORING CAUSES, REPAIRING HARMS 198–204 (2014).

407. See Sinnar & Colgan, *supra* note 214, at 165–69. Thus far, U.S. restorative justice programs that have addressed hate crimes have generally done so in the case of juveniles or relatively less serious offenses, although the Common Justice program in New York addresses some violent felonies committed by adults and has done so in at least one hate crime case. See DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 114–16 (2019) (describing Common Justice’s work on a hate crimes case).

408. BISHOP ET AL., *supra* note 233, at 21.

## CONCLUSION

Originating in different histories, the hate crimes and terrorism frames are now commonly invoked in response to White supremacist violence. This Article encourages a “frame-reflective policy discourse by identifying the taken-for-granted assumptions that underlie people’s apparently natural understandings and actions” with respect to this challenge.<sup>409</sup> Despite their differences, neither frame is consistent with racial justice. While the hate crimes frame offers only a limited account of the challenge, calls for expanding the terrorism frame to counter White supremacist violence neglect the power shift to security agencies that would accompany that framing, the problems with preventative and punitive counterterrorism, and the potential for expanded domestic terrorism laws to target subordinated communities. Addressing White supremacist violence should begin with recognizing the frames that have shaped the social and legal treatment of political violence and that continue to limit our imagination.

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409. Rein & Schon, *supra* note 80, at 150.