ANTISEMITIC TERRORISM

by
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Recent surges in antisemitic activity—and antisemitic violence, in particular—have led increasingly to conversations about the connections between antisemitism and domestic terrorism. While the nexus between antisemitic violence and domestic terrorism has long been expressed in rhetorical terms, its connection in legal terms—notably, federal criminal law—has been more attenuated. This Article explores that connection and finds that existing federal criminal law requires rethinking: it is underinclusive and thus inadequate to fully capture and punish the threats posed by today's domestic violent extremism, and particularly antisemitic violence. The Article surveys recent federal prosecution in cases involving actual or threatened antisemitic violence, and finds that prosecutors often rely on civil rights offenses, weapons offenses, and interstate threats offenses. Yet those offenses are largely excluded from coverage in the existing criminal law of terrorism, which tends to focus on conventional terrorism crimes. Therefore, although federal criminal law is more than ample to assure prosecution and punishment of antisemitic violence, the mere availability of general tools is unsatisfactory, as the law often would not permit the Government to express its condemnation of the violence in terms specific to the law of terrorism. This Article suggests some legislative reforms that could accomplish this, and also notes the important steps that the Justice Department has taken to identify and assess cases that implicate contemporary domestic violent extremism and terrorism. Of course, this Article acknowledges, this is an area that demands special caution so as to ensure appropriate limits on federal power and the protection of civil liberties. Nonetheless, this Article contends that rethinking the criminal law of terrorism—expressed in both legislative and enforcement-side reforms—would serve important criminal law and security interests. Those reforms could identify the unique terrorism purpose or motive in cases of antisemitic violence (and thus distinguish them from other forms of criminality) and impose punishment that accounts for the

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unique harms of domestic terrorism and the distinctive harms done to Jewish people and institutions.

I. INTRODUCTION

"*[W]e were counting on the fact that darkness was going to be our friend that day.*"[1]

Carol Black described the moments when she and several others moved into a dark room—"pitch black," she called it—on Saturday, October 27, 2018.[2] Her Rabbi had led her and the others to the room after hearing rapid gunfire.[3] Black was a member of the New Light Congregation, a Jewish congregation that shared the Tree of Life Synagogue in Pittsburgh with two other Jewish congregations: Tree of Life (L'Simcha) and Dor Hadash.[4] She and Barry Werber stayed in the room in absolute silence, fearing that the gunman who had just shot Melvin Wax, one of the others who had hidden with them but pushed the door open after a brief pause in gunfire, would find them.[5] According to Werber, the gunman stepped over Wax,

[1] A TREE OF LIFE: THE PITTSBURGH SYNAGOGUE SHOOTING (HBO Documentary Films 2021) (interview of Carol Black).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

who had been killed, then turned and left the area.[6] Werber, who had remained quiet even as he had a 911 operator on his phone line, eventually spoke to the dispatcher.[7] A short time later, law enforcement arrived and escorted Black and Werber to safety. Black's brother, Richard Gottfried, was killed in the shooting, along with ten others, including Wax.[8]

Robert Bowers arrived at the synagogue at 5898 Wilkins Avenue that day and opened fire while the congregations were engaged in religious worship.[9] He was carrying three Glock .357 handguns and an AR-15 rifle and was there because of his expressed view that "[J]ews are the children of [S]atan" and because he could not "sit by and watch my people get slaughtered."[10] In addition to killing 11 people, Bowers shot and critically injured 2 others, while 12 congregants escaped without physical harm.[11] Five law enforcement officers were also injured attempting to save the victims and apprehend Bowers.[12] A jury in Pittsburgh convicted Bowers on each of the 63 counts of federal crimes for which he was indicted and he was sentenced to death.[13]

Though not every incident of antisemitism involves force or violence, antisemitic violence has featured prominently in recent years. Apart from the Pittsburgh synagogue killings, John Earnest was convicted and sentenced to life in prison plus 30 years for shooting four people and killing one, Lori Gilbert Kaye, at a synagogue in Poway, California in 2019.[14] The shooting—in which Earnest used a Smith & Wesson M&P 15 assault rifle with a ten-round magazine and wore a chest rig with five additional magazines—occurred during Passover.[15] Earnest also pleaded guilty

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[6] *Id.* (statement of Barry Werber).

[7] *Id.*

[8] *Id.*; *see also* Moriah Balingit, Kristine Phillips, Amy B Wang, Deanna Paul, Wesley Lowery & Kellie B. Gormly, *The Lives Lost in the Pittsburgh Synagogue Shooting*, WASH. POST, https://www.washingtonpost.com/graphics/2018/national/victims-of-the-pittsburgh-synagogue-shooting (Oct. 28, 2018).

[9] Superseding Indictment at 1–2, United States v. Bowers, No. 18-292 (W.D. Pa. Jan. 29, 2019).

[10] *Id.* at 1–2, 5 (quoting social media posts by Bowers).

[11] *Id.* at 3, 6; *see also* Press Release, U.S. Dep't of Just., Jury Recommends Sentence of Death for Pennsylvania Man Convicted for Tree of Life Synagogue Shooting (Aug. 2, 2023).

[12] Superseding Indictment, *supra* note 9, at 9.

[13] Guilt Phase Verdict Form at 1–28, United States v. Bowers, No. 18-292 (W.D. Pa. June 16, 2023); Sentence Selection Phase Verdict Form at 23, United States v. Bowers, No. 18-292 (W.D. Pa. Aug. 2, 2019).

[14] *See* Press Release, U.S. Att'y's Off., S.D. Cal., John T. Earnest Sentenced to Life Plus 30 Years in Prison for Federal Hate Crimes Related to 2019 Poway Synagogue Shooting and Attempted Mosque Arson (Dec. 28, 2021), https://www.justice.gov/usao-sdca/pr/john-t-earnest-sentenced-life-plus-30-years-prison-federal-hate-crimes-related-2019.

[15] *Id.*

in state court to arson charges for setting a mosque ablaze.[16] He wrote a manifesto in which he said, "I can only kill so many Jews," and "I only wish I killed more."[17]

According to the Anti-Defamation League (ADL)'s Center on Extremism, antisemitic "incidents" increased 34% from 2020 to 2021.[18] Of the 2,717 incidents collected for 2021 alone, 88 of those involved an assault, and 11 with deadly weapons—though none resulted in death and there were no mass casualty incidents that year.[19] This number included a record 416 incidents in New York alone, 51 of which were assaults.[20] In 2019, the ADL reported 2,107 incidents, 61 of which involved assaults.[21]

This troubling state of affairs was exacerbated in 2022 by numerous episodes, including, as the ADL has summarized, threats against Jewish institutions, distribution of antisemitic literature, and other forms of harassment of and openly expressed bigotry toward Jewish people.[22] In November 2022, FBI officials confirmed a "broad" threat against synagogues in New Jersey.[23] That same month, at Penn Station in New York, police arrested two men possessing an eight-inch knife and a firearm with a 30-round magazine, based on evidence that the men were allegedly planning to attack a Manhattan synagogue.[24] One of the men reportedly possessed a ski mask and an arm band bearing a swastika, and posted on social media: "Gonna ask a Priest if I should become a husband or shoot up a synagogue and die"; a subsequent post reportedly stated, "This time I'm really gonna do it."[25] Both men have been indicted in New York state court.[26]

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[16] *Id.*

[17] *Id.*

[18] ANTI-DEFAMATION LEAGUE CTR. ON EXTREMISM, AUDIT OF ANTISEMITIC INCIDENTS 2021, at 5 (2022), https://www.adl.org/resources/report/audit-antisemitic-incidents-2021.

[19] *Id.*

[20] *Id.* at 26.

[21] *Id.*

[22] *See Top Ten Heartbreaking Moments of Hate in 2022 and How ADL Responded*, ANTI-DEFAMATION LEAGUE BLOG (Dec. 22, 2022), https://www.adl.org/resources/blog/top-ten-heartbreaking-moments-hate-2022-and-how-adl-responded.

[23] Ryan Kryska & Michael Balsamo, *FBI Warns of 'Broad' Threat to Synagogues in New Jersey*, ASSOCIATED PRESS (Nov. 3, 2022, 9:51 PM), https://apnews.com/article/new-jersey-newark-city-113055436513a7ac0f1d875cd5913e01.

[24] Hurubie Meko, Vimal Patel & McKenna Oxenden, *Two Men Arrested in Threat to New York's Jewish Community Are Charged*, N.Y. TIMES (Nov. 20, 2022), https://www.nytimes.com/2022/11/20/nyregion/new-york-jewish-synagogue-threat.html.

[25] *Id.*

[26] Press Release, Manhattan Dist. Att'y, D.A. Bragg Announces Indictments in Thwarted Terrorist Attack on Jewish Community (Dec. 7, 2022), https://manhattanda.org/d-a-bragg-announces-indictments-in-thwarted-terrorist-attack-on-jewish-community.

And in 2023, the ADL reported that antisemitic incidents rose sharply after the October 7 attacks in Israel, and included acts of vandalism, harassment, and violence.[27]

The upward trend—or at least steadily high rate in recent years—of antisemitic incidents and violence has understandably contributed to national anxiety about antisemitism generally, and particularly after October 7. Describing antisemitism as "surging," recent commentary has explained that antisemitism represents not just anti-Jewish prejudice but rather "functions more like an all-encompassing conspiracy theory, motivating hostility against a range of people, not just Jews, based on erroneous beliefs about Jewish power, influence, and exploitation."[28] Viewed in this way, then, the surge of antisemitism—disturbing enough when viewed independently—requires consideration of antisemitism's provocative place in the broader scheme of American domestic extremism and political violence.[29] This means viewing antisemitism within the broader lens of rising racial and ethnic extremism, and white supremacist extremism more specifically.[30] To its credit, the ADL leaders have for many years been calling for greater attention to the rising problem of "[w]hite [s]upremacist [t]errorism" and its national security implications.[31]

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[27] Press Release, Anti-Defamation League, ADL Reports Unprecedented Rise in Antisemitic Incidents Post-Oct. 7 (Dec. 11, 2023), https://www.adl.org/resources/press-release/adl-reports-unprecedented-rise-antisemitic-incidents-post-oct-7. Notably, the Council on American-Islamic Relations has also reported spikes in anti-Muslim incidents after October 7. *See* Chelsea Bailey, *Reports of Antisemitism, Anti-Arab and Anti-Muslim Bias Continue to Surge Across the US, New Data Shows*, CNN, https://www.cnn.com/2023/12/11/us/adl-cair-hate-crimes-bias-incidents-reaj/index.html (Dec. 11, 2023, 10:19 AM). Although this Article focuses on unlawful violence and threats against Jewish people, criminal law enforcement should vigorously pursue similar acts committed against Arabs and Muslims, and many of the observations in this Article apply with equal force in those contexts.

[28] Eileen B. Hershenov & Ryan B. Greer, *Antisemitism and Threats to American Democracy*, JUST SEC. (Jan. 26, 2023), https://www.justsecurity.org/84901/antisemitism-and-threats-to-american-democracy.

[29] *Id.* Indeed, as Hershenov and Greer explain, in a world where "great replacement" theory and "Deep State" conspiracies have blossomed, better understanding is necessary to appreciate "the role antisemitism plays in this deadly interplay between political violence, the conspiracy theories that motivate it, and anti-democratic schemes." *Id.*

[30] For an exploration of the connections between white supremacism and terrorism, see ARIE PERLIGER, AMERICAN ZEALOTS: INSIDE RIGHT-WING DOMESTIC TERRORISM (2020). For a global perspective on the problem of white supremacist terrorism, see Darin E.W. Johnson, *Homegrown and Global: The Rising Terror Movement*, 58 HOUS. L. REV. 1059 (2021).

[31] *See* Jonathan Greenblatt & George Selim, *Addressing the National Security Threat of White Supremacist Terrorism*, LAWFARE (Oct. 18, 2019, 2:52 PM), https://www.lawfareblog.com/addressing-national-security-threat-white-supremacist-terrorism. In 2023, a report on extremist killings by ADL's Center on Extremism, found that white supremacist extremists were overwhelmingly responsible for most extremist-related killings in America in 2022. MARK

Even in cases of white supremacist violence that do not involve Jewish victims, antisemitism often lurks in the minds and writings of perpetrators. Consider, for example, Dylann Roof and Payton Gendron, each a white supremacist mass shooter but neither of whom attacked Jews.[32] Roof received the death penalty for shooting and killing nine Black worshippers during Bible study at a historic Black church in Charleston, South Carolina.[33] Though his victims were all Black, his personal writings also revealed animus toward Jewish people.[34] Notably, too, Roof carried 88 hollow-point bullets with him to the church.[35] Gendron received a life sentence for killing 10 and wounding 3 others at a Buffalo supermarket in May 2022.[36] Although 11 of his victims were Black, Gendron reportedly posted a 180-page manifesto prior to the shooting that espoused the antisemitic "Great Replacement" theory, and praised other mass shooters like Roof, Earnest, and Bowers.[37]

Amidst this surge in antisemitism, the federal Government's attention to domestic terrorism and violent extremism has grown more serious. And though not

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PITCAVAGE, ANTI-DEFAMATION LEAGUE CTR. ON EXTREMISM, MURDER & EXTREMISM IN THE UNITED STATES IN 2022, at 5–6 (2023). The report notes the existence of, and potential for, violence from left-wing extremists as well, but notes that left-wing actors have not recently been responsible for extremist-based murders in significant numbers. *Id.* at 5; *see also* Jesse J. Norris, *Why Dylann Roof Is a Terrorist Under Federal Law, and Why It Matters*, 54 HARV. J. LEGIS. 259 (2017). But for a critical view of treating white supremacist violence within the terrorism framework, see Shirin Sinnar, *Hate Crimes, Terrorism, and the Framing of White Supremacist Violence*, 110 CALIF. L. REV. 489 (2022).

[32] *See* Alex Johnson, *Psychologist Tried to Intervene with S.C. Church Gunman Dylann Roof*, NBC NEWS (Feb. 2, 2017, 8:44 PM), https://www.nbcnews.com/news/us-news/psychologist-tried-intervene-s-c-church-gunman-dylann-roof-n716256; *Buffalo Shooter's Manifesto Promotes "Great Replacement" Theory, Antisemitism and Previous Mass Shooters*, ANTI-DEFAMATION LEAGUE BLOG (May 14, 2022), https://www.adl.org/resources/blog/buffalo-shooters-manifesto-promotes-great-replacement-theory-antisemitism-and-previous-mass-shooters.

[33] United States v. Roof, 10 F.4th 314, 331–32 (4th Cir. 2021).

[34] Keith O'Shea, Darran Simon & Holly Yan, *Dylann Roof's Racist Rants Read in Court*, CNN, https://www.cnn.com/2016/12/13/us/dylann-roof-murder-trial/index.html (Dec. 14, 2016, 10:28 AM) ("Roof's writings slammed not just blacks, but also Hispanics and Jews.").

[35] Roof carried eight magazines loaded with 11 hollow-point bullets, equaling 88 total bullets. *See* Indictment at 3, United States v. Roof, No. 15-472 (D.S.C. July 22, 2015); *Roof*, 10 F.4th at 332. The number 88 is a symbol for the phrase "Heil Hitler," as "H" is the eighth letter of the alphabet. *Hate Symbol: 88*, ANTI-DEFAMATION LEAGUE, https://www.adl.org/resources/hate-symbol/88 (last visited Dec. 8, 2023).

[36] Mark Morales, Eric Levenson & Kristina Sgueglia, *Buffalo Grocery Store Mass Shooter Pleads Guilty to Terrorism and Murder Charges in Racist Attack*, CNN, https://www.cnn.com/2022/11/28/us/buffalo-tops-grocery-shooting-payton-gendron-plea/index.html (Nov. 28, 2022, 7:03 PM).

[37] ANTI-DEFAMATION LEAGUE BLOG, *supra* note 32.

focused exclusively on antisemitism, those efforts—including intelligence community assessments of domestic extremist and terrorist threats—have included significant attention on antisemitic actors.

In March 2021, the Director of National Intelligence issued an unclassified report assessing that domestic violent extremists (DVEs) pose a heightened threat.[38] The most lethal threats come from racially and ethnically motivated violent extremists (RMVEs)—most notably those that advocate the superiority of the white race—and militia violent extremist (MVEs), with lone actors and small cells being the most likely to carry out violent attacks and RMVEs most likely to carry out mass-casualty attacks.[39] This assessment is consistent with an October 2022 Strategic Intelligence Assessment on domestic terrorism, published by the FBI and the Department of Homeland Security (DHS).[40] That report, the second such report in as many years,[41] once again concluded that lone actors and small groups remained the primary source of concern because they "pose significant mitigation challenges due to their capacity for independent radicalization and mobilization and preference for easily accessible weapons."[42] This second assessment also demonstrates that domestic terrorism investigations nearly doubled between 2020 and 2021.[43] And, again in late 2022, a DHS National Terrorism Advisory Bulletin indicated that the country remains in a "heightened threat environment," citing recent incidents of extremist violence and noting that lone actors and small cells represent a "persistent and lethal threat."[44] The Bulletin also noted an "enduring threat to faith-based communities, including the Jewish community."[45] It cited at least one earlier incident of antisemitic threats and reminded that, in July, DHS reconstituted its Faith-based Security Advisory Council to assist in countering threats against religious communities and places of worship.[46]

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[38] OFF. OF THE DIR. OF NAT'L INTEL., DOMESTIC VIOLENT EXTREMISM POSES HEIGHTENED THREAT IN 2021 (2021).

[39] *Id.*

[40] *See* FBI & U.S. DEP'T OF HOMELAND SEC., STRATEGIC INTELLIGENCE ASSESSMENT AND DATA ON DOMESTIC TERRORISM, at 2 (2022) [hereinafter 2022 INTELLIGENCE ASSESSMENT].

[41] *See* FBI & U.S. DEP'T OF HOMELAND SEC., STRATEGIC INTELLIGENCE ASSESSMENT AND DATA ON DOMESTIC TERRORISM (2021).

[42] 2022 INTELLIGENCE ASSESSMENT, *supra* note 40, at 6.

[43] *Id.* at 20.

[44] U.S. DEP'T OF HOMELAND SEC., NATIONAL TERRORISM ADVISORY SYSTEM BULLETIN (2022), https://www.dhs.gov/sites/default/files/ntas/alerts/22_1130_S1_NTAS-Bulletin-508.pdf. The incidents cited included a mass shooting at an LGBTQI+ bar in Colorado and an attack on Paul Pelosi, the husband of then-House Speaker Nancy Pelosi, at the couple's San Francisco home. *See id.*

[45] *Id.*

[46] *Id.*

In other instances, the Government has identified domestic terrorism, and antisemitism, as significant administration priorities.

In June 2021, The Biden White House released a first-of-its-kind National Strategy on Domestic Terrorism.[47] That document referred specifically to violence against particular religions, including Jews, and noted both the Pittsburgh and Poway tragedies as among the recent examples of domestic terrorism.[48] More recently, in May 2023, the White House also released a National Strategy to Counter Antisemitism, focused on improving education about antisemitism, safety for the Jewish community, reversing normalization, and building coalitions to counter anti-Jewish hatred.[49] This followed on the heels of significant gatherings during the Trump Administration that focused on antisemitism as a federal law enforcement priority. For example, the Justice Department convened a Summit on Combating Antisemitism, where Attorney General William Barr noted his concerns about rising hate crimes and political violence, as well as the special perniciousness of antisemitic violence.[50] And at a State Department conference on antisemitism and the Internet, Deputy Attorney General Jeffrey Rosen explained that the Justice Department would "not hesitate" to prosecute antisemitic acts—particularly Internet threats—that fit federal criminal law.[51]

These concerns about domestic terrorism, and antisemitism's place in it, have not just been the focus of executive branch efforts. In 2022, for example, two notable congressional hearings focused on hate crimes and violence against minority institutions.[52] Those hearings included testimony on antisemitic violence.[53] And in

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[47] *See* WHITE HOUSE & NAT'L SEC. COUNCIL, NATIONAL STRATEGY FOR COUNTERING DOMESTIC TERRORISM (2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/National-Strategy-for-Countering-Domestic-Terrorism.pdf.

[48] *Id.* at 8, 30.

[49] THE WHITE HOUSE, THE U.S. NATIONAL STRATEGY TO COUNTER ANTISEMITISM (2023), https://www.whitehouse.gov/wp-content/uploads/2023/05/U.S.-National-Strategy-to-Counter-Antisemitism.pdf.

[50] William Barr, Att'y Gen., U.S. Dep't of Just., Keynote Speech at the U.S. Department of Justice's Summit on Combatting Anti-Semitism (July 15, 2019), https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-keynote-speech-us-department-justices-summit.

[51] Jeffrey A. Rosen, Deputy Att'y Gen., U.S. Dep't of Just., Remarks at U.S. Department of State Conference on "Ancient Hatred, Modern Medium: A Conference on Internet Anti-Semitism" (Oct. 21, 2020), https://www.justice.gov/opa/speech/prepared-remarks-deputy-attorney-general-jeffrey-rosen-us-department-state-conference.

[52] *See Combating the Rise in Hate Crimes: Hearing Before the Senate Comm. on the Judiciary*, 117th Cong. (2022) [hereinafter *Hate Crimes Hearing*]; *The Rise in Violence Against Minority Institutions*: *Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Sec.*, *H. Comm. on the Judiciary*, 117th Cong. (2022) [hereinafter *Rise in Violence Hearing*].

[53] *See Hate Crimes Hearing*, *supra* note 52, at 3–4 (statement of Kristen Clarke, Assistant Att'y Gen., Civil Rights Division, U.S. Department of Justice) (citing instances of violence against Jewish people and synagogues); *Rise in Violence Hearing*, *supra* note 52, at 79 (statement of Rabbi

2020, the House Subcommittee on Intelligence and Counterterrorism held multiple hearings specifically concerning the rise in antisemitic violence.[54] Subcommittee Chair Max Rose of New York identified incidents of antisemitic violence, and linked it to both transnational networks peddling hate as well as to hateful speech disseminated online.[55] Importantly, Chairman Rose referred to "anti-Semitic domestic terrorism" as the focus of the hearing.[56] Moreover, FBI Assistant Director for Counterterrorism Jill Sanborn explained the threat posed by DVEs, specially noting the threats posed by lone actors who are radicalized online, and by racially and ethnically motivated violent extremists.[57] These lone actors, she assessed, "will likely continue to pose a threat to the Jewish community."[58] Notably, she described recent high-profile attacks on the Jewish community as "anti-Semitic terrorism."[59] More recently, there has been support for new legislation that would designate a Justice Department official to review antisemitic hate crimes and require regular reporting by the Attorney General on antisemitic hate crime investigations and prosecutions.[60]

Episodes of antisemitic violence, and of domestic extremism that threatens Jewish people and institutions, reveal a connection between antisemitic criminality and antisemitic terrorism, a connection that others have noted and for which federal criminal law should now more robustly account. Building on previous work in the area of domestic terrorism more generally,[61] this Article explores that connection. Surveying selected recent prosecutions and indictments, it examines the approach to antisemitic violence under federal criminal law. It then gives special attention

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Charlie Cytron-Walker) (describing January 2022 hostage-taking at Congregation Beth Israel in Colleyville, Texas and threat of antisemitism generally); *see also id.* at 7–9 (statement of Jonathan Greenblatt, CEO, Anti-Defamation League) (describing rise in hate crimes and antisemitic violence).

[54] *See Confronting the Rise in Anti-Semitic Domestic Terrorism: Hearing Before the H. Subcomm. on Intel. & Counterterrorism*, *H. Comm. on Homeland Sec.*, 116th Cong. (2020); *Confronting the Rise in Anti-Semitic Domestic Terrorism, Part II: Hearing Before the H. Subcomm. on Intel. & Counterterrorism*, *H. Comm. on Homeland Sec.*, 116th Cong. (2020) [hereinafter *Anti-Semitic Terrorism Hearing, Pt. II*].

[55] *Anti-Semitic Terrorism Hearing, Pt. II*, *supra* note 54, at 2 (statement of Rep. Max Rose, Chairman, H. Subcomm. on Intel. & Counterterrorism).

[56] *Id.*

[57] *Id.* at 7–8 (statement of Jill Sanborn, Assistant Director, Counterterrorism Division, FBI).

[58] *Id.* at 7.

[59] *Id.* at 8.

[60] *See* Preventing Anti-Semitic Hate Crimes Act, H.R. 3515, 117th Cong. (2021). The bill was introduced but received no action in the 117th Congress. Since the October 7 terrorist attacks in Israel, numerous resolutions have been agreed to in the House and Senate condemning antisemitism. *See, e.g.*, S. Res. 437, 118th Cong. (2023); H. Res. 894, 118th Cong. (2023); H. Res. 927, 118th Cong. (2023).

[61] *See* J. Richard Broughton, *Activist Extremist Terrorist Traitor*, 96 ST. JOHN'S L. REV. 295 (2022).

to—and urges a rethinking of—antisemitic acts that, because of the special purpose or motive of the actor, venture beyond ordinary crime and into the world of political violence, which is the special domain of the criminal law of terrorism. The Article notes a few potential reforms to help spur this rethinking of the crime-terrorism nexus, including new legislation and enforcement action that coordinates the Justice Department's criminal, civil rights, and national security apparatuses. This Article also notes, and addresses, the concerns about expanding criminal law's domestic terrorism tools. Ultimately—and recognizing that not all antisemitic acts qualify as domestic terrorism—this Article concludes that, whether treated as terrorism or as another form of criminality, antisemitic violence should be, and remain, a significant law enforcement and national security priority.

II. ANTISEMITIC VIOLENCE AND FEDERAL CRIMINAL LAW

Notwithstanding the rhetorical and political value of connecting antisemitic violence to terrorism, the conventional terrorism offenses in federal criminal law often are not implicated in cases of antisemitic violence.[62] Instead, the most directly relevant—and most commonly employed—statutes are not conventional terrorism statutes at all; they are, rather, civil rights statutes, weapons offenses, and crimes involving threats (though, in some circumstances, prosecutors will use these latter offenses in combination with the civil rights statutes). So even though Congress has thus far resisted calls to expand its counterterrorism arsenal to include an offense of domestic terrorism that could cover antisemitic violence,[63] federal prosecutors still have ample criminal law weapons for punishing such conduct as substantive, non-terrorism offenses. The adequacy of the criminal law specific to terrorism in these cases, however, is another matter (and is explored next). But before exploring antisemitic violence as terrorism using federal criminal law, it is important first to understand the substantive federal crimes that antisemitic violence typically offends.[64]

A. Antisemitic Violence and Federal Civil Rights Crimes

The most notable federal offenses for combatting antisemitic violence are the hate crimes enforcement statute (18 U.S.C. § 249, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act), the statute criminalizing obstruction of or interference with religious exercise (§ 247), and the statute criminalizing forcible interference with federally protected activities based on religious animus (§ 245).

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[62] *See infra* Section III.B.

[63] *See infra* Section III.A.

[64] Although the focus here will be federal criminal law, state criminal law analogues can also be valuable tools for punishing antisemitic acts. *See, e.g.*, FLA. STAT. §§ 775.30, 775.085 (2023); MICH. COMP. LAWS §§ 750.147b, 750.543b (2023); N.J. STAT. ANN. § 2C:16-1 (West 2023); N.Y. PENAL LAW §§ 485.05, 490.20, 490.28 (McKinney 2023).

Section 249 (the Shepard-Byrd Act) requires proof that the defendant willfully caused bodily injury, or attempted to do so "through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device," "because of the actual or perceived . . . religion . . . of any person."[65] One provision of the statute, § 249(a)(2), also requires proof of a jurisdictional element demonstrating a nexus to interstate or foreign commerce or travel "across a State line or national border";[66] the other provision, § 249(a)(1), does not.[67] Animus based on religion appears in both § 249(a)(1) and 249(a)(2); therefore, if the Government charges an act of antisemitic violence pursuant to § 249(a)(1), it need not prove the jurisdictional element.[68]

Recently, federal courts have found that this does not create constitutional infirmity in § 249(a)(1), either facially or as applied to cases of antisemitic violence.[69] For purposes of a facial challenge, subsection (a)(1) is based on Congress's enforcement powers pursuant to § 2 of the Thirteenth Amendment, and thus targets the badges and incidents of servitude.[70] Moreover, multiple courts, including the Supreme Court, have recognized that Jews were considered racially distinctive during the Reconstruction period, when the Thirteenth Amendment and other major civil rights legislation were adopted.[71] Courts have therefore rejected the claim that Jews were not subjected to enslavement prior to the Thirteenth Amendment's enactment and thus would not be among the class of persons that § 2 enforcement power would protect through legislation.[72] Courts specifically employed this reasoning on as-applied challenges to the statute in both the Poway synagogue case (*Earnest*) and the case of the Pittsburgh synagogue shooter (*Bowers*).[73] Of course, even if § 249(a)(1) did not apply to cases of antisemitic violence, § 249(a)(2) could still apply, but would require proof of the nexus to commerce or travel.[74]

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[65] 18 U.S.C. § 249(a)(1).

[66] *Id.* § 249(a)(2)(B).

[67] *See id.* § 249(a)(1).

[68] *See id.* § 249(a)(2)(A).

[69] *See* United States v. Earnest, 536 F. Supp. 3d 688, 718 (S.D. Cal. 2021); United States v. Bowers, 495 F. Supp. 3d 362, 370 (W.D. Pa. 2020).

[70] *See* United States v. Metcalf, 881 F.3d 641, 644 (8th Cir. 2018) (citing Jones v. Alfred H. Mayer Co., 392 U.S. 409, 337–440 (1968)).

[71] *See* Saint Francis College v. Al-Khazraji, 481 U.S. 604, 611–12 (1987); Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617–18 (1987); United States v. Nelson, 277 F.3d 164, 178 (2d Cir. 2002); *Earnest*, 536 F. Supp. 3d at 718; *Bowers*, 495 F. Supp. 3d at 370 (quoting *Nelson*, 277 F.3d at 178).

[72] *See, e.g.*, *Nelson*, 277 F.3d at 178.

[73] *See Earnest*, 536 F. Supp. 3d at 718; *Bowers*, 495 F. Supp. 3d at 370.

[74] 18 U.S.C. § 249(a)(2)(B).

Section 247, by contrast, does not require proof of religious animus as a motive when the offending conduct is obstruction of free exercise.[75] Rather it prohibits intentionally obstructing, by force or threats of force, "any person in the enjoyment of that person's free exercise of religious beliefs."[76] The conduct must occur in, or affect, interstate or foreign commerce.[77]

Finally, § 245 makes it a crime to use force or the threat of force to interfere with, intimidate, or injure another person in the enjoyment of enumerated federally protected activities (e.g., enrolling in a public school or college, employment, voting, jury service, use of a public accommodation, etc., as enumerated) because of the person's religion.[78]

A review of the Justice Department's approach in recent cases of antisemitic violence—including the Earnest prosecution, in which Earnest pleaded guilty to federal hate crimes and religious obstruction crimes,[79] and the Bowers prosecution, which resulted in convictions for federal hate crimes and religious obstruction[80]—demonstrates that the Department often prosecutes these cases pursuant to these three statutes.

Two additional cases in which the Government has obtained convictions and sentences are also especially notable.

In a case of antisemitic violence that arose out of the infamous "Unite the Right" rally in Charlottesville, Virginia in 2017, James Fields killed Heather Heyer after he drove his car into a crowd of counter-protesters.[81] Fields admitted that he

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[75] *See id.* § 247(a)–(c). The statute contains a religious obstruction provision (subsection (a)) but also two distinct property damage provisions. One of those provisions requires that the damage be done "because of" the property's religious character, 18 U.S.C. § 247(a)(1); the other requires animus based on "race, color, or ethnic characteristics" of any person associated with the religious property. *Id.* § 247(c); *see also* United States v. Roof, 10 F.4th 314, 382–89 (4th Cir. 2021) (rejecting argument that § 247(a)(2) requires proof of religious "hostility").

[76] 18 U.S.C. § 247(a)(2).

[77] *Id.* § 247(b); *see also Roof*, 10 F.4th at 382–89 (upholding § 247(a)(2) against Commerce Clause challenges).

[78] 18 U.S.C. § 245(b)(2)(A)–(F).

[79] *See* Press Release, U.S. Att'y's Off., S.D. Cal., John Earnest Pleads Guilty to 113-Count Federal Hate Crime Indictment in Connection with Poway Synagogue Shooting and Mosque Arson (Sept. 17, 2021), https://www.justice.gov/usao-sdca/pr/john-earnest-pleads-guilty-113-count-federal-hate-crime-indictment-connection-poway.

[80] *See* Guilt Phase Verdict Form, *supra* note 13, at 1, 3; *see also* Press Release, U.S. Dep't of Just., Jury Recommends Sentence of Death for Pennsylvania Man Convicted for Tree of Life Synagogue Shooting (Aug. 2, 2023), https://www.justice.gov/opa/pr/jury-recommends-sentence-death-pennsylvania-man-convicted-tree-life-synagogue-shooting.

[81] Press Release, U.S. Dep't of Just., Ohio Man Sentenced to Life in Prison for Federal Hate Crimes Related to August 2017 Car Attack at Rally in Charlottesville, Virginia (June 28, 2019), https://www.justice.gov/opa/pr/ohio-man-sentenced-life-prison-federal-hate-crimes-related-august-2017-car-attack-rally.

did so because of his animus, that he supported Hitler and the Nazis, and that he supported violence against Black and Jewish people in promoting white supremacy.[82] The Government obtained an indictment alleging a violation of § 249(a)(1) and § 245(b)(2) for the death of Heyer, and 28 counts pursuant to § 249(a)(1) related to the other victims of the attack.[83] Fields pleaded guilty to 29 violations of § 249(a)(1) and received a life sentence.[84]

In February 2021, Neo-Nazi Richard Holzer was sentenced to over 19 years in prison after pleading guilty to charges under § 247.[85] Holzer planned to set off an explosive device at Temple Emanuel, a historic synagogue in Pueblo, Colorado.[86] Holzer had regularly espoused white supremacist views via social media.[87] After being contacted by an undercover federal agent, he indicated that he was planning a RAHOWA (racial holy war).[88] He then discussed with federal agents his plans to attack Temple Emanuel, saying he wanted to "get that place off the map."[89] He brought a copy of *Mein Kampf* to the meeting where undercover agents provided him with inert explosives, saying after his arrest that he wanted to be seen "as a person who would die for his people."[90]

Also of note are two cases awaiting trial, but for which the Government has obtained indictments.

In December 2021, the Government charged Brandon "Whitey" Simonson and Kristopher "No Luck" Martin with murder and hate crimes after they allegedly beat to death a fellow inmate at the United States Penitentiary Thomson in Illinois.[91] According to the indictment, the two men were members of the Valhalla Bound Skinheads, a white supremacist group.[92] Matthew Phillips, the victim, was Jewish.[93] News reports indicated that Phillips was beaten about the face so badly

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[82] *Id.*

[83] Indictment at 4–6, United States v. Fields, No. 18-00011 (W.D. Va. June 27, 2018).

[84] *See* Press Release, U.S. Dep't of Just., *supra* note 81.

[85] Press Release, U.S. Dep't of Just., Southern Colorado Man Sentenced to More Than 19 Years for Plotting to Blow Up Synagogue (Feb. 26, 2021), https://www.justice.gov/opa/pr/southern-colorado-man-sentenced-more-19-years-plotting-blow-synagogue; *see also* Indictment at 3, United States v. Holzer, No. 19-00488 (D. Colo. Nov. 21, 2019) (describing alleged offense).

[86] Press Release, U.S. Dep't of Just., *supra* note 85.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] Indictment at 1, 3–5, United States v. Simonson, No. 21-50064 (N.D. Ill. Dec. 7, 2021).

[92] *Id.* at 2.

[93] *Id.* at 2–3.

that his father could not identify him at first, but eventually recognized the Star of David tattoo that Phillips bore over his heart.[94]

And in April 2022, the Government obtained a hate crimes indictment against Dion Marsh for allegedly carrying out an antisemitic rampage in New Jersey.[95] The Government alleges that Marsh identified an Orthodox Jewish man, assaulted him, and drove away in the man's car.[96] Five hours later, the Government claims, Marsh drove a different car into another Orthodox Jewish man.[97] Less than an hour later, Marsh drove the first stolen vehicle into yet another Orthodox Jewish man and then stabbed him the chest.[98] Finally, about an hour-and-a-half later, Marsh used the same stolen vehicle to strike yet another Orthodox Jewish man.[99] All of the victims sustained injuries and two were left in critical condition.[100] The Government has specifically alleged that Marsh committed the attacks because the victims were Jewish.[101]

On occasion, of course, federal prosecutors may present a case that implicates both the hate crimes statutes *and* a conventional terrorism offense. For example, Damon Joseph pleaded guilty in May 2021 to both an attempted hate crime and an attempted material support offense after communicating plans with undercover federal agents to commit a mass shooting at a synagogue in Toledo, Ohio.[102] Joseph expressed support for the Islamic State of Iraq and al-Sham (ISIS) and possessed ISIS recruiting propaganda.[103] During his communications with the undercover agents, Joseph also stated his desire to kill a rabbi and identified the synagogue that he wished to attack.[104] Although he already possessed weapons, Joseph eventually

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[94] *See* Erik Ortiz, *Skinheads Allegedly Killed His Son in Prison. Is the Government Accountable?*, NBC (May 5, 2022, 10:52 PM), https://www.nbcnews.com/news/us-news/skinheads-allegedly-killed-son-prison-government-accountable-rcna26907.

[95] *See* Press Release, U.S. Dep't of Just., New Jersey Man Charged with Federal Hate Crimes for String of Violent Assaults on Members of Orthodox Jewish Community (April 20, 2022), https://www.justice.gov/opa/pr/new-jersey-man-charged-federal-hate-crimes-string-violent-assaults-members-orthodox-jewish.

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *See id.*

[102] Press Release, U.S. Dep't of Just., Man Sentenced to 20 Years in Prison for Attempting to Provide Material Support to ISIS and Attempting to Commit a Hate Crime (Sept. 13, 2021), https://www.justice.gov/opa/pr/man-sentenced-20-years-prison-attempting-provide-material-support-isis-and-attempting-commit. The relevant material support statute, 18 U.S.C. § 2339B(a)(1), is discussed more fully *infra* Section III.A.

[103] *Id.*

[104] *Id.*

accepted a bag containing two (inoperable) semi-automatic rifles from the undercover agents prior to his arrest.[105]

B. Antisemitic Violence and Federal Weapons Offenses

When antisemitic violence moves beyond threats and into the world of at least an attempt, if not completion, of a violent act, it often implicates federal criminal law's regime of weapons regulation. This body of law is relevant when the actor uses an explosive or a firearm.

The conventional terrorism offenses listed in § 2332b(g)(5) include several weapons offenses.[106] But these are narrowly circumscribed, and many would not apply in the context of antisemitic violence that has been perpetrated in the cases surveyed here. They include, for example, crimes related to the use of biological, chemical, and nuclear weapons; exporting or importing plastic explosives without a detecting agent; use of a fire or explosive against federal property or property used in foreign or interstate commerce; attacks on a federal facility using a dangerous weapon; use of weapons of mass destruction; and use of weapons against flight crews and aircraft.[107]

Among these, the most likely to apply in the context of antisemitic violence would be the crime of using an explosive against property *used in* interstate commerce (§ 844(i)) as applied, for example, to a synagogue. In many cases, however, this would present questions about proof of the statute's jurisdictional element.[108] The Supreme Court's decision in *Jones v. United States* requires that courts consider the building's function and whether that function affects interstate commerce.[109] Although federal courts have applied *Jones* to include some kinds of churches, other federal courts have held that, absent specific evidence showing such a nexus or where only a passive connection to interstate commerce exists, churches generally are not used in and do not engage in activities with a sufficient nexus to interstate commerce.[110] Section 249 would therefore be the preferred statute in such a case, so as

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[105] *Id.*

[106] 18 U.S.C. § 2332b(g)(5)(B).

[107] *Id.*

[108] *See id.* § 844(i).

[109] *See* Jones v. United States, 529 U.S. 848, 854–55 (2000) (quoting United States v. Ryan, 9 F.3d 660, 675 (8th Cir. 1993) (Arnold, C.J., concurring in part and dissenting in part)).

[110] *See* United States v. Lamont, 330 F.3d 1249, 1254 (9th Cir. 2003) (holding that a church "generally does not function in a manner that places it in any significant relationship with commerce, let alone interstate commerce"); *see also* United States v. Rea, 300 F.3d 952, 962 (8th Cir. 2002) (finding that although a church annex was involved in commerce, it was not involved in *interstate* commerce because it did not have out-of-state visitors and was not used in any larger, interstate commercial markets, such as childcare or tutoring); United States v. Odom, 252 F.3d 1289, 1296–97 (11th Cir. 2001) (finding church that had out-of-state donors and used books purchased from out of state lacked sufficient connection to interstate commerce).

to avoid the jurisdictional problem, at least where circuit precedent after *Jones* would cast some doubt on whether the church satisfied the requisite commercial nexus.[111]

Nevertheless, courts have found § 844(i)'s jurisdictional element satisfied where, for example, the church operated a daycare facility,[112] or where the church rented its facilities to outside groups, provided funeral services, and operated a daycare center that charged tuition.[113] Courts have also found the jurisdictional element satisfied where the church used regular interstate radio broadcasts to evangelize, was in the market for local goods, and collected substantial sums of money each week.[114] Consequently, courts have found some attacks on synagogues to satisfy § 844(i). In *United States v. Renteria*, for example, the Ninth Circuit found that Congregation Beth Am in San Diego satisfied the jurisdictional element because it operated a daycare center and a gift shop.[115] *Renteria*, in turn, relied upon *United States v. Gillespie*, where the Tenth Circuit found an Oklahoma City synagogue satisfied the jurisdictional element because it operated a preschool and a gift shop.[116] And most recently, Franklin Sechriest—who kept journals with "virulent antisemitic statements and views" and possessed "decals and stickers expressing antisemitic messages"—pleaded guilty to a federal hate crime and to a federal arson charge after he set fire to an Austin synagogue on Halloween night 2021, admitting he did so "because of his hatred of Jews."[117]

Very often, though, the weapon of concern is a firearm, as in the Bowers and Earnest prosecutions. Federal criminal law provides a comprehensive scheme for regulating firearms and criminalizing both possession and use.[118] The weapon of mass destruction statute is relevant here, because firearms are included in the statutory definition of such a weapon.[119] Pursuant to this statute, however, the firearm

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[111] *See* 18 U.S.C. § 249(a)(1); *see also* United States v. Ballinger, 395 F.3d 1218, 1228 (11th Cir. 2005) (holding that defendant's church arsons were "in commerce" for purposes of § 247 when he used interstate highways and crossed four state borders).

[112] United States v. Gillespie, 452 F.3d 1183, 1188 (10th Cir. 2006); United States v. Terry, 257 F.3d 366, 371 (4th Cir. 2001).

[113] United States v. Torres, 8 F.4th 413, 417 (5th Cir. 2021).

[114] United States v. Rayborn, 312 F.3d 229, 234–35 (6th Cir. 2002).

[115] United States v. Renteria, 557 F.3d 1003, 1010 (9th Cir. 2009).

[116] *Gillespie*, 452 F.3d at 1188.

[117] Press Release, U.S. Dep't. of Just., Texas Man Pleads Guilty to Hate Crime and Arson for Setting Fire to Synagogue (Apr. 7, 2023), https://www.justice.gov/opa/pr/texas-man-pleads-guilty-hate-crime-and-arson-setting-fire-synagogue. In addition to the statutes already discussed, a threat to use an explosive against a synagogue is governed by § 844(e), which requires the use of "mail, telephone, telegraph, or other instrument of interstate or foreign commerce" to communicate the threat. 18 U.S.C. § 844(e). This statute requires that the means of communication, not the synagogue at issue, have a nexus to interstate commerce. *See* United States v. Corum, 362 F.3d 489, 493 (8th Cir. 2004).

[118] *See, e.g.*, 18 U.S.C. §§ 922, 924.

[119] *See id.* § 2332a(c)(2)(A) (referring to § 921(a)(4), which defines a "destructive device").

must possess a barrel with a bore greater than one-half inch in diameter.[120] Consequently, unless a firearm possesses this design, § 2332a will not apply.[121]

Prosecutors must therefore look outside of these conventional terrorism statutes for applicable weapons offenses in most cases of antisemitic violence. The best candidate would be the firearm enhancement at § 924(c), which provides a penalty enhancement—including, potentially, the death penalty—where the defendant uses or carries a firearm during or in relation to a federal crime of violence, or possesses a firearm in furtherance of such a crime.[122] This statute does not require that the firearm in question bear any particular design hallmarks (other than the general characteristics of a firearm as defined).[123] Moreover, the statute, though it creates an offense, requires a predicate federal violent crime to trigger the penalty enhancement.[124] This is where the statute can become tricky to apply in real cases, and could be a source of frustration for federal prosecutors seeking to enhance punishments in cases of antisemitic violence involving a firearm.

The relevant portion of the statute, § 924(c)(3), contains two distinct provisions: the elements clause and the residual clause.[125] A federal "crime of violence," for purposes of this statute, is either a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" (the elements clause, subsection (3)(A)), or a felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense" (the residual clause, subsection (3)(B)).[126] In *United States v. Davis*, the defendant and an accomplice were charged with Hobbs Act robbery and conspiracy after brandishing a short-barreled shotgun; the Supreme Court held that the residual definition of a "federal crime of violence" was unconstitutionally vague.[127] Although the gun enhancement could be sustained pursuant to the elements clause for the underlying robbery, the

[120] 18 U.S.C. § 921(a)(4)(B). Even if the firearm possesses this design element, the statute contains exceptions for firearms used for sport. *Id.* § 921(a)(4).

[121] *See* Robert Chesney, *Should We Create a Federal Crime of 'Domestic Terrorism'?*, LAWFARE (Aug. 8, 2019, 11:31 AM), https://www.lawfaremedia.org/article/should-we-create-federal-crime-domestic-terrorism.

[122] 18 U.S.C. § 924(c)(1)(A); *see also id.* § 924(j).

[123] *See id.* § 921(a)(3).

[124] *See id.* § 924(c)(1)(A). The statute also applies if the predicate is a federal drug trafficking crime. *Id.*

[125] *See id.* § 924(c)(3).

[126] *Id.* § 924(c)(3)(A); *id.* § 924(c)(3)(B), *declared unconstitutional by* United States v. Davis, 139 S. Ct. 2319 (2019).

[127] 139 S. Ct. 2319 (2019).

lower court held that the Government needed to rely on the residual clause to enhance the punishment for the conspiracy.[128] This violated due process and the separation of powers, which vagueness doctrine serves to safeguard.[129] The Court agreed with the Fifth Circuit and held that the statute requires sentencing courts to guess at the degree of risk created by an imagined "ordinary case."[130] Employing the well-worn categorical approach to the statute, the Court rejected the Government's efforts to justify a different approach, including its efforts to invoke the doctrine of constitutional avoidance, which Justice Gorsuch, writing for the majority, said would sit uneasily with the rule of lenity in this case.[131]

The Court recognized that Congress could create a statute that uses a case-by-case approach, rather than the categorical one that the Court employed, following its precedents in cases invalidating other similar statutes.[132] But as Congress has not yet done so, after *Davis*, § 924(c)'s enhancement would be unavailable for any offense that does not fit the elements clause.[133]

The Court followed *Davis* with two cases interpreting different elements-clause provisions of § 924. In *Borden v. United States*, decided in 2021, the Court held that a crime of recklessness cannot qualify as a "violent felony" for purposes of the elements clause of the Armed Career Criminal Act.[134] The Court followed *Borden* with *United States v. Taylor*, asking whether an attempted Hobbs Act robbery qualifies under § 924(c)(3)(A).[135] The Court answered in the negative, emphasizing that the inquiry is a categorical one, and not an as-applied one: does the predicate felony always—*in every hypothetical case*—require the government to prove the use, attempted use, or threatened use of force?[136] In other words, if it is even hypothetically possible to commit the offense *without* the use, attempted use, or threatened use of force, then the offense is categorically *not* a crime of violence.[137]

In the factual context of antisemitic violence, then, the question that could often arise is whether the defendant used or carried a firearm during or in relation to one of the civil rights offenses, and, then, whether that offense is a "crime of violence," as understood in cases like *Davis*, *Borden*, and *Taylor*.[138] If so, then

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[128] *Id.* at 2325.

[129] *Id.*

[130] *Id.* at 2326.

[131] *Id.* at 2333.

[132] *Id.* at 2336.

[133] *Id.*

[134] Borden v. United States, 141 S. Ct. 1817, 1821–22 (2021).

[135] *See* United States v. Taylor, 142 S. Ct. 2015, 2018 (2022).

[136] *Id.* at 2017, 2020.

[137] *Id.* at 2020.

[138] *See, e.g.*, United States v. Bowers, No. 18-292, 2022 WL 17718686, at *1 (W.D. Pa. Dec. 15, 2022).

§ 924(c)'s enhancement applies.[139] But lower courts lately have been inconsistent about how the "crime of violence" jurisprudence applies to civil rights offenses, particularly the Shepard-Byrd Act.

Pre-*Davis*, the District Court in South Carolina considered the due process problem in Roof's prosecution.[140] The court there determined that both the Shepard-Byrd hate crimes statute (§ 249) and the Church Arson Act (§ 247) qualify as predicate crimes of violence for purposes of the elements clause of § 924(c)(3).[141] Post-*Davis* and *Borden*, but pre-*Taylor*, the Fourth Circuit on Roof's appeal agreed, finding that the "death results" provisions of § 249(a)(1) and § 247(a)(2) were crimes of violence as understood in § 924(c)(3).[142] And in *Earnest*, the District Court for the Southern District of California determined—post-*Davis* but pre-*Borden* and *Taylor*—that both the Shepard-Byrd statute and the religious obstruction statute fit the definition of a "crime of violence."[143] Earnest therefore could be subject to enhanced punishments because he used a gun to shoot the Poway synagogue victims.[144]

More recently, however, the District Court in Pittsburgh reached a contrary result on a pre-trial motion in the Bowers prosecution.[145] Bowers argued that after *Borden* and *Taylor*, the portions of his indictment alleging a violation of § 924(c) had to be dismissed because the predicate felonies—once again, § 249(a)(1) and 247(a)(2)—were not crimes of violence as that term is now understood in the gun enhancement statute.[146] The District Court agreed in part, holding that § 249(a)(1) was not a crime of violence.[147] Citing pre-*Taylor* Third Circuit authority, but acknowledging a circuit split on the question, the district court determined that the hate crime statute could be violated by an omission.[148] Therefore, circuit precedent holds, it is not categorically a crime of violence because the "use, attempted use, or threatened use of physical force" is not a necessary element of the offense if the resulting harm could be caused by omission.[149] The court also held, however, that

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[139] This would include imposition of capital punishment, because even though the death penalty is not available under the Shepard-Byrd Act, it is available under § 924(j), which, in turn, depends upon proof of § 924(c). 18 U.S.C. § 924(c) & (j). Notably, §§ 245 and 247 each permit the death penalty, without resort to § 924(c) and (j). *See id.* §§ 245(b)(5), 247(d)(1).

[140] United States v. Roof, 225 F. Supp. 3d 438, 455–60 (D.S.C. 2016).

[141] *Id.* at 458–60.

[142] United States v. Roof, 10 F.4th 314, 397–405.

[143] *See* United States v. Earnest, 536 F. Supp. 3d 688, 722 (S.D. Cal. 2021).

[144] *Id.* at 719–22.

[145] *See* United States v. Bowers, No. 18-292, 2022 WL 17718686, at *9 (W.D. Pa. Dec. 15, 2022).

[146] *Id.* at *1.

[147] *Id.* at *9.

[148] *Id.* at *5–9.

[149] *Id.*

§ 247(a)(2) *was* a crime of violence and could therefore serve as a predicate for the Government's invocation of 924(c)'s enhancement scheme.[150]

Federal courts continue to grapple with the interpretive problems created by the Supreme Court's "crime of violence" jurisprudence, especially with respect to the elements clause of § 924(c)(3).[151] Particularly if more courts follow the lead of the *Bowers* court, this issue could substantially affect the Government's efforts to enhance punishments for antisemitic violence perpetrated with firearms. Congress could, of course, better protect prosecutors in these cases by amending the statute to permit a case-by-case approach to the "crime of violence," rather than a categorical one, permitting application of the statute where the underlying crime was *in fact* committed violently.[152] To date, however, Congress has not done so.[153]

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[150] *Id.* at *9–14.

[151] *See, e.g.*, United States v. Worthen, 60 F.4th 1066, 1070–71 (7th Cir. 2023) (refusing to apply *Taylor* to Hobbs Act robbery); United States v. Baker, 49 F.4th 1348 (10th Cir. 2022) (discussing *Taylor's* application in post-conviction review); United States v. Eldridge, 63 F.4th 962, 963 (2d Cir. 2023) (holding that second degree kidnapping in aid of racketeering is not crime of violence after *Taylor*); United States v. Howald, No. 21-04, 2023 WL 402509, at *3 (D. Mont. Jan. 25, 2023) (refusing to extend *Taylor* to hate crime under § 249(a)(2)). *Compare also* United States v. Morris, 61 F.4th 311, 317 n.9 (2d Cir. 2023) (citing judicial discontent with the Court's crime of violence jurisprudence), *with id.* at 321 (Lohier, J., concurring) ("I agree that the categorical approach is complicated, and I sympathize with the concerns of my judicial colleagues who have called for its reform or total elimination. But there is some wisdom in the current system.").

[152] Amending the statute is but one option. Admittedly, another possibility—the one that Justice Thomas suggests in *Taylor*—is to overrule *Davis*, because the residual clause of § 924(c)(3)(B) would likely capture most of the violent conduct that is otherwise left uncaptured after *Taylor*. *See* United States v. Taylor, 142 S. Ct. 2015, 2031 (2022) (Thomas, J., dissenting). Yet another possibility rests in Justice Alito's *Taylor* dissent, in which he would adopt a still different interpretive approach. *See id.* at 2036 (Alito, J., dissenting). But a change in the Court's view on this matter seems a tenuous thing upon which to rely. *Taylor*, after all, was a 7–2 decision. Congress could eliminate the need for further litigation through the entire federal court system by simply amending the statute and allowing courts to decide that a particular felony was *in fact* committed violently. It could, in doing so, emphasize its rejection of the categorical approach, and further emphasize that its purpose is to enhance penalties for those who *violently commit* crimes with firearms, including those—indeed, especially, those—who do so in the course of *violently committing* a crime accompanied by a proscribed form of animus, such as antisemitism.

[153] *See* OFF. OF THE GEN. COUNS., U.S. SENT'G COMM'N, PRIMER ON CATEGORICAL APPROACH 1–2 (2023).

C. *Antisemitic Violence and Interstate Threats Offenses*

In early 2023, the Government arrested and charged a man with using Twitter to engage in death threats against Jewish governmental officials in Michigan, including the State's Attorney General and a member of Congress.[154] According to the criminal complaint, the suspect, using the Twitter handle @tempered_reason, made interstate electronic threats and threatened to "carry out the punishment of death to anyone that is jewish in the Michigan govt if they don't leave, or confess."[155] Although he had not yet carried out any acts of violence and he was arrested in Texas, the Government alleges that he possessed multiple firearms and was under investigation for theft of another.[156]

Despite stopping short of actual violence, threats against Jewish people and institutions can also cause significant harm and terrorize Jewish communities.[157] As in the Michigan case, those communities have often been the target of violent threats.[158] Multiple federal statutes punish such conduct and, in appropriate cases, are a part of the existing toolbox for addressing against domestic extremism and terrorism.

Sections 875 and 876 punish threatening communications.[159] Section 875(c) proscribes any transmission of any communication in interstate or foreign commerce that contains a threat to kidnap or injure another person.[160] Although the statute does not proscribe mens rea, the Supreme Court held in *Elonis v. United States* that the statute requires proof of subjective culpability, including intent or knowledge, but declined to address whether recklessness would suffice.[161] In *Counterman v. Colorado*, the Court recently held that the First Amendment requires that a "true threat" be supported at least by a showing of recklessness.[162] When combin-

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[154] *See* Press Release, U.S. Att'y's Off., E.D. Mich., Michigan Resident Uses Twitter to Threaten to Kill Jewish Government Officials (Mar. 2, 2023), https://www.justice.gov/usao-edmi/pr/michigan-resident-uses-twitter-threaten-kill-jewish-government-officials; *see also* Charlie Langton & David Komer, *Michigan Man Arrested for Anti-Semitic Death Threats Against State Officials*, FOX 2 DETROIT (Mar. 2, 2023), https://www.fox2detroit.com/news/michigan-man-arrested-for-anti-semitic-death-threats-against-state-officials.

[155] *See* Criminal Complaint at 1–2, United States v. Carpenter, No. 23-30076 (E.D. Mich. Feb. 18, 2023).

[156] *See* Press Release, U.S. Att'y's Off., E.D. Mich., *supra* note 154.

[157] *See Analysis: Recent Threats to Jewish Institutions*, ANTI-DEFAMATION LEAGUE BLOG (Dec. 9, 2022), https://www.adl.org/resources/blog/analysis-recent-threats-jewish-institutions.

[158] *See infra* text accompanying notes 167–74.

[159] 18 U.S.C. §§ 875, 876.

[160] *Id.* § 875(c).

[161] Elonis v. United States, 575 U.S. 723, 740–41 (2015).

[162] Counterman v. Colorado, 143 S. Ct. 2106 (2023). *Counterman* rejected an objective standard for true threats, which would depend only upon the perceptions of a reasonable observer

ing *Elonis* (a federal statutory interpretation case) with *Counterman* (a First Amendment case involving a *state* threats statute), § 875(c) is satisfied and constitutionally compliant if the Government proves at least intent, purpose, or knowledge.[163] Section 876(c), by comparison, proscribes the same kind of threat when it is made knowingly, by using the United States Postal Service, and enhances punishments for threats mailed to federal judges, federal law enforcement officers, or other high-ranking officials.[164] Both sections also punish extortionate threats.[165] The federally protected activities statute, § 245(b), also contains a provision criminalizing threats of force that result in intimidating or interfering with a person in a protected activity.[166]

Federal prosecutors have used these statutes multiple times in recent years, often, though not always, in cases where the interstate threats statute and a civil rights offense converge.

For example, Kaleb Cole, a leader of the Neo-Nazi group Atomwaffen Division, was convicted and sentenced to seven years in prison for mailing threatening communications and for interference with a federally protected activity.[167] Cole and others targeted employees of the ADL and journalists who had reported on antisemitism by either mailing them threats or gluing threatening posters at the victims' location.[168] The posters said, "you have been visited by your local Nazis."[169]

In August 2021, Christopher Rascoll received a three-year sentence after, over the course of seven months, he threatened a Jewish woman via text, voicemail, and

or listener. *Id.* at 2114–17. This would undo federal court precedent that relied upon the objective standard for determining a true threat for First Amendment purposes. *See* United States v. White, 810 F.3d 212, 220–21 (4th Cir. 2016).

[163] Recklessness, then, would suffice for First Amendment purposes, but it is unclear whether it would suffice for purposes of satisfying the statute. *See, e.g.*, United States v. Howard, 947 F.3d 936, 944, 946 (6th Cir. 2020) (upholding § 875(c) conviction, after *Elonis*, where jury was instructed as to purpose and knowledge).

[164] 18 U.S.C. § 876(c).

[165] *Id.* §§ 875(d), 876(b), 876(d).

[166] *See id.* § 245(b).

[167] *See* Press Release, U.S. Dep't. of Just., Leader of Neo-Nazi Group Sentenced for Plot to Target Journalists and Advocates (Jan. 11, 2022), https://www.justice.gov/opa/pr/leader-neo-nazi-group-sentenced-plot-target-journalists-and-advocates.

[168] *Id.*; Press Release, U.S. Att'y's Off., W.D. Wash., Leader of 'Atomwaffen' Hate Group Convicted of Five Federal Felonies for Conspiracy to Threaten Journalists and Anti-Defamation League Employees (Sept. 29, 2021), https://www.justice.gov/usao-wdwa/pr/leader-atomwaffen-hate-group-convicted-five-federal-felonies-conspiracy-threaten.

[169] Press Release, U.S. Dep't of Just., *supra* note 168.

Facebook.[170] His messages to the victim included one sent on the first day of Hanukkah—in which he told the victim, "It would be a shame if your house were used to light the menorah. Or turned [into] a gas chamber"—and the first day of Passover, in which Rascoll said, "[On] Easter weekend I'm going to stick you in an oven. Or I'm going to shoot you . . . . I should send you to a concentration camp."[171] He, too, was convicted for sending threatening communications and interference with a federally protected activity.[172]

And in one standalone case pursuant to § 875, Corbin Kauffman was sentenced to 18 months in prison for posting numerous threatening images on social media, including a video of the Pittsburgh synagogue shooting, support for the shooter, and an image of Kauffman's own arm aiming an AR-15 rifle at a group of Jewish men praying.[173] The images also included photos of vandalism that Kauffman perpetrated at a Jewish Center in Maryland, where he placed white supremacist and antisemitic stickers on a display case.[174]

These cases, and those described previously in this Section, demonstrate the powerful criminal law tools at the Government's disposal in pursuing and punishing antisemitic violence. Those tools are not unlimited, of course: *Counterman,* for example, imposes new First Amendment constraints on prosecutions for threatening communications, and the Court's evolving "crime of violence" jurisprudence has potentially limited the reach of the firearm enhancements. Still, even without a domestic terrorism statute, federal criminal law is—as others have argued—ample.[175] The question remains, however, whether antisemitic violence should simply be

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[170] *See* Press Release, U.S. Att'y's Off., D. Conn., New York Man Sentenced to 3 Years in Federal Prison for Hate Crime Offenses (Aug. 25, 2021), https://www.justice.gov/usao-ct/pr/new-york-man-sentenced-3-years-federal-prison-hate-crime-offenses.

[171] *Id.*

[172] *Id. See also* Press Release, U.S. Att'y's Off., D. Md., Federal Superseding Indictment Charges Man for Making Threats Against a Maryland Synagogue (Jan. 16, 2020), https://www.justice.gov/usao-md/pr/federal-superseding-indictment-charges-man-making-threats-against-maryland-synagogue (announcing indictment pursuant to both § 875 and § 247 of man who allegedly threatened by telephone to kill members of synagogue congregation and burn the synagogue).

[173] Press Release, U.S. Att'y's Off., M.D. Pa., Lehighton Man Sentenced to 18 Months' Imprisonment for Internet Threats Against the Jewish Community (July 14, 2021), https://www.justice.gov/usao-mdpa/pr/lehighton-man-sentenced-18-months-imprisonment-internet-threats-against-jewish.

[174] *Id.*

[175] *See, e.g.*, Rachael Hanna & Eric Halliday, *Discretion Without Oversight: The Federal Government's Powers to Investigate and Prosecute Domestic Terrorism*, 55 LOY. L.A. L. REV. 775 (2022); Mike German, *Learning from Our Mistakes: How Not to Confront White Supremacist Violence*, 12 J. NAT'L. SEC. L. & POL'Y 169 (2021); *see also* MICHAEL GERMAN & SARA ROBINSON, BRENNAN CTR. FOR JUST., WRONG PRIORITIES ON FIGHTING TERRORISM 5 (2018), https://www.brennancenter.org/our-work/research-reports/wrong-priorities-fighting-terrorism.

treated as ordinary crime (pursuant to an admittedly ample criminal law) or whether it should ever trigger criminal law's counterterrorism tools. Those tools may be less robust, but are amenable to strengthening if they are to be useful in imposing distinctive punishments for these distinctive harms to Jewish people and institutions.

III. FROM ANTISEMITIC VIOLENCE TO ANTISEMITIC TERRORISM

The use of hate crimes legislation, civil rights offenses that protect the exercise of religion, weapons and threats statutes, and other criminal laws have—rightly—emerged as valuable tools for combatting violent antisemitic acts and other political violence. But thinking of this violence in terms of ordinary crime seems unsatisfactory. Violence against Jewish people in America poses a threat to civil social order, religious freedom, national unity, and security. The question, then, is not simply whether federal criminal law *generally* is adequate to punish violent antisemitism. It is. Rather, the question is whether criminal law's unique tools of counterterrorism should also be brought to bear in cases of antisemitic violence. They should. This requires a rethinking about the criminal law of terrorism. As we have seen, the Justice Department has rightly used the *rhetoric* of terrorism in connection with antisemitic violence.[176] But the *legal*—as opposed to merely rhetorical—connections to terrorism have been too attenuated from the cases. Absent a new federal domestic terrorism statute, Congress and federal prosecutors should more aggressively pursue those links in other ways. This could be accomplished by other potential legislation that cures the underinclusiveness of existing terrorism definitions, and, in appropriate cases, by adopting enforcement guidelines that highlight the nexus between antisemitic violence and domestic terrorism.

A. Domestic Terrorism in Existing Federal Criminal Law

Both state and federal criminal law in America define and punish terrorism, including both domestic and international terrorism.[177] But they do so under very specific and carefully circumscribed conditions.[178] Many recent instances of violent extremism, particularly those against Jewish people, implicate this criminal law of terrorism.[179] At the federal level, however, establishing the legal connection between

[176] *See* JOINT COUNTERTERRORISM ASSESSMENT TEAM, THREAT OF TERRORISM AND HATE CRIMES AGAINST JEWISH COMMUNITIES IN THE UNITED STATES 1 (2020).

[177] *See* 18 U.S.C. § 2331(1), (5).

[178] *See* PETER G. BERRIS, MICHAEL A. FOSTER, & JONATHAN M. GAFFNEY, CONG. RSCH. SERV., R46289, DOMESTIC TERRORISM: OVERVIEW OF FEDERAL CRIMINAL LAW AND CONSTITUTIONAL ISSUES 2 (2021); *see also* Francesca Laguardia, *Considering A Domestic Terrorism Statute and Its Alternatives*, 114 NW. U.L. REV. ONLINE 212, 231–32 (2020).

[179] *See infra* text accompanying notes 189–98.

antisemitic violence and terrorism is complicated by the absence of a specific criminal offense for domestic terrorism and by the underinclusiveness of current statutory approaches to punishing terrorism crimes.

Federal criminal law does not specifically criminalize domestic (or even international) terrorism. Some statutes are described as "crime[s] of terrorism,"[180] and Title 18 includes several offenses listed in a chapter entitled "Terrorism."[181] But many offenses commonly associated with terrorism do not actually require a nexus to any specific definition of terrorism as an element of the offense, nor to any mental state that forms a part of our understanding of the terrorist purpose or motive.[182] "Terrorism transcending national boundaries," for example, requires no such nexus.[183] Neither does the offense for using a weapon of mass destruction.[184] The nuclear terrorism statute provides for a jurisdictional element that covers an act that attempts to "compel the United States to do or abstain from doing any act," but this is merely one possible jurisdictional basis in a statute that otherwise does not refer to terrorism specifically.[185] One of the two material support statutes requires a nexus to a foreign terrorist organization;[186] the other material support statute, requires no such nexus.[187] And yet, all those statutes (and many others) are regarded as "federal crime[s] of terrorism,"[188] not because "terrorism" is always an element of the offense but because of the contexts in which those crimes are committed.

Rather than specifically enumerate domestic terrorism as an offense, then, federal criminal law defines it. Section 2331(5) defines domestic terrorism as an act "dangerous to human life" that is a state or federal crime; appears to be intended "to intimidate or coerce a civilian population[,]" "influence the policy of a government by intimidation or coercion[,]" or "affect the conduct of government by mass destruction, assassination, or kidnapping;" and "occurs primarily within the territorial jurisdiction of the United States."[189]

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[180] *See, e.g.*, 18 U.S.C. § 2332b(g)(5).

[181] *Id.* §§ 2331–2339D.

[182] *See* NORMAN ABRAMS, ANTI-TERRORISM AND CRIMINAL ENFORCEMENT 53–54 (5th ed. 2018) (discussing the absence of special terrorist purpose or motive in the so-called terrorism offenses).

[183] 18 U.S.C. § 2332b(a)–(b).

[184] *Id.* § 2332a(a).

[185] *Id.* § 2332i(b)(2)(C).

[186] *Id.* § 2339B.

[187] *Id.* § 2339A. Indeed, § 2339A requires no direct nexus to "terrorism" at all. *Id.*

[188] *Id.* § 2332b(g)(5).

[189] *Id.* § 2331(5). Although not particularly applicable in the antisemitic violence context that this Article explores, there has been considerable attention of late for the crime of seditious conspiracy. *Id.* § 2384. This statute, too, punishes conduct that might fall within federal criminal law's understanding of domestic terrorism. *See* Alan Z. Rozenshtein, *Seditious Conspiracy Is the*

But the *definition* of "domestic terrorism" is distinct from the definition of a "federal *crime* of terrorism," which includes domestic terrorism and is explained in the statute criminalizing terrorism transcending national boundaries. Section 2332b(g)(5) provides that a "[f]ederal crime of terrorism" means an "offense that . . . is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," and is a violation of one of 57 enumerated offenses.[190] Those offenses cover a broad range of federal crimes typically associated with, and enforced in the context of, terrorism: for example, use of a weapon of mass destruction, destruction of aircraft, certain political assassinations, arson and bombing in interstate commerce, among others.[191]

In addition to this statute, § 2339A—the material support statute that does not require a nexus to a foreign terrorist organization, and thus could apply in the domestic terrorism context—only applies if the material support or resources are used in "preparation for, or in carrying out," an enumerated offense.[192] That enumeration is similar to the enumeration in § 2332b(g)(5), but, predictably, does not include the hate crimes statutes or other civil rights offenses, nor does it include § 924(c) or the interstate threats offenses.

In addition to these definitions, federal criminal law allows for sentencing enhancements based on a nexus to terrorism. A (precious) few statutes—criminalizing false statements and obstruction of federal departments, agencies, or committees in Congress—specifically provide for an additional three years atop the statutory maximum of five years (so, an eight-year maximum with the enhancement) if the offense involves domestic or international terrorism as defined in § 2331.[193] And the Federal Sentencing Guidelines contain a terrorism enhancement at section 3A1.4 that increases the offense level if the offense is "a felony that involved, or was intended to promote, a federal crime of terrorism," as defined in § 2332(b)(g)(5).[194] Note that this enhancement, then, does not apply if the conduct simply satisfies § 2331.

Real Domestic Terrorism Statute, LAWFARE (Apr. 7, 2022 10:48 AM), https://www.lawfareblog.com/seditious-conspiracy-real-domestic-terrorism-statute.

[190] 18 U.S.C. § 2332b(g)(5)(A).

[191] *Id.* § 2332b(g)(5)(B).

[192] *Id.* § 2339A(a).

[193] *Id.* §§ 1001(a), 1505.

[194] U.S. SENT'G GUIDELINES MANUAL § 3A1.4(a), § 3A1.4 cmt. n.1 (U.S. SENT'G COMM'N 2021). For valuable commentary on this enhancement, see Wadie E. Said, *Sentencing Terrorist Crimes*, 75 OHIO ST. L.J. 477 (2014); George D. Brown, *Punishing Terrorists: Congress, the Sentencing Commission, the Guidelines, and the Courts*, 23 CORNELL J.L. & PUB. POL'Y 517 (2014); Stephen Floyd, Note, *Irredeemably Violent and Undeterrable: How Flawed Assumptions Justify a Broad Application of the Terrorism Enhancement, Contradict Sentencing Policy, and Diminish U.S. National Security*, 109 GEO. L.J. ONLINE 142 (2021).

Rather, as described in § 2332(b)(g)(5), it must "involve[]" or be "intended to promote" one of the 57 enumerated offenses[195]—an enumeration that is, this Article contends, underinclusive, notwithstanding its long list of existing predicates.[196] Two Comments to this provision are notable, however. First, the enhancement also applies to those who conceal or harbor someone who has committed a federal crime of terrorism, or who obstructs a federal crime of terrorism investigation.[197] And second, though the Guidelines enhancement would not apply, an upward departure is appropriate if: (1) the underlying offense is one other than one enumerated in § 2232b(g)(5) but only if that offense "was calculated to influence or affect the conduct of government by intimidation or coercion, or retaliate against government conduct"; or (2) the offense is one enumerated in § 2332b(g)(5) but "the terrorist motive was to intimidate or coerce a *civilian population*."[198]

New domestic terrorism legislation could fill some of these, and other, gaps in federal criminal law and make it more effective as a domestic counterterrorism tool by making it more inclusive of violent crimes that fit our understanding of domestic terrorism more generally.[199] In recent years, calls have increased for a distinct federal crime of domestic terrorism.[200] None have yet succeeded in both chambers of Congress.[201]

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[195] U.S. SENT'G GUIDELINES MANUAL, *supra* note 194, § 3A1.4 cmt. n.1.

[196] *See infra* Section III.B.

[197] U.S. SENT'G GUIDELINES MANUAL, *supra* note 194, § 3A1.4 cmt. n.2.

[198] *Id.* § 3A1.4 cmt. n.4 (emphasis added).

[199] *See* Broughton, *supra* note 61, at 323–25. For an explanation of some such gaps, see Chesney, *supra* note 121; Michael Molstad, Note, *Our Inner Demons: Prosecuting Domestic Terrorism*, 61 B.C. L. REV. 339, 344–45 (2020); Courtney Kurz, Comment, *Closing the Gap: Eliminating the Distinction Between Domestic and International Terrorism Under Federal Law*, 93 TEMP. L. REV. 115 (2020); Nichole Anderson, Note, *Exploring the Viability of a Federal Domestic Terrorism Statute*, 55 GONZ. L. REV. 475, 486–94 (2020); Katie Dilts, Comment, *One of These Things Is Not Like the Other: Federal Law's Inconsistent Treatment of Domestic and International Terrorism*, 50 U. PAC. L. REV. 711 (2019); *see also* Barbara L. McQuade, *Not a Suicide Pact: Urgent Strategic Recommendations for Reducing Domestic Terrorism in the United States*, TEX. NAT'L SEC. REV., Spring 2022, at 110 (identifying inadequacies in White House domestic terrorism strategy and suggesting additional reforms).

[200] *See, e.g.*, Jimmy Gurulé, *Criminalizing Material Support to Domestic Terrorist Organizations: A National Security Imperative*, 47 J. LEGIS, no. 2, 2021, at 8, 25–28; Micah Millsaps, Comment, *Terrorism: An Evolving Threat*, 50 U. BALT. L. REV. 335, 349–54 (2021); Molstad, *supra* note 199, at 345; Mary B. McCord, *It's Time for Congress to Make Domestic Terrorism a Federal Crime*, LAWFARE (Dec. 5, 2018, 9:13 AM), https://www.lawfareblog.com/its-time-congress-make-domestic-terrorism-federal-crime. *Cf.* Broughton, *supra* note 61, at 323–25 (discussing proposals favorably and suggesting amended legislation that focuses on protection of institutions and institutional actors); Rozenshtein, *supra* note 189 (suggesting the possibility that parts of 2331(5) be incorporated into the seditious conspiracy statute).

[201] *See* Laguardia, *supra* note 178, at 215; BERRIS ET AL., *supra* note 178, at 1.

Proposed federal domestic terrorism statutes have encompassed a range of approaches. One proposal would have created a domestic version of § 2332b, the statute punishing acts of terrorism transcending national boundaries.[202] Another proposal would create a domestic version of the material support statutes.[203] Still others have proposed—rather than a new criminal offense of domestic terrorism—legislation that would require more fulsome reporting on domestic terrorism and hate crime incidents, and create domestic terrorism units in various federal agencies.[204] In addition to recommending a new domestic terror offense statute,[205] Mary McCord has proposed new federal legislation with criminal penalties and civil enforcement mechanisms to address unauthorized paramilitary activity by private "militias."[206] And Barbara McQuade has suggested, in addition to a new domestic terror statute, improved efforts to combat recruitment and online radicalization, as well as the private possession of military weaponry.[207] Despite the persuasive arguments and commentary suggesting the need for more prosecutorial and investigative tools for combatting domestic terrorism, Congress has not enacted any of these proposals.[208]

While there are compelling arguments in favor of new prosecutorial and investigative authorities,[209] there are also compelling arguments against them; arguments that could explain the congressional inaction. These would include, for example, a federalism claim that seeks to limit the scope of new federal criminal authority,[210] as well as arguments about the overbreadth of terrorism authorities, the dangers of

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[202] *See* Confronting the Threat of Domestic Terrorism Act, H.R. 4192, 116th Cong. § 2 (2019); Domestic Terrorism Penalties Act of 2019, H.R. 4187, 116th Cong. § 2.

[203] *See* Gurulé, *supra* note 200, at 25; *see also* Kurz, *supra* note 199, at 140 (suggesting amendment of the existing material support provisions).

[204] *See* Domestic Terrorism Prevention Act of 2021, S. 964, 117th Cong. § 3. This bill's House companion was the Domestic Terrorism Prevention Act of 2021, H.R. 350, 117th Cong. § 3 (2022).

[205] Mary McCord & Jason M. Blazakis, *A Road Map for Congress to Address Domestic Terrorism,* LAWFARE (Feb. 27, 2019, 8:00 AM), https://www.lawfareblog.com/road-map-congress-address-domestic-terrorism; *see also* McCord, *supra* note 200.

[206] Mary McCord, *Congress Can and Should Address the Threat from Unauthorized Paramilitary Activity*, JUST SEC. (Jan. 24, 2022), https://www.justsecurity.org/79951/congress-can-and-should-address-the-threat-from-unauthorized-paramilitary-activity; *see also* Barbara McQuade, *'A Well-Regulated Militia': The Laws That Can Counter Domestic Terrorism*, WAR ON THE ROCKS (Feb. 28, 2022), https://warontherocks.com/2022/02/a-well-regulated-militia-the-laws-that-can-counter-domestic-terrorism (reviewing McCord's proposal favorably and suggesting legal obstacles to address).

[207] McQuade, *supra* note 199, at 116–19.

[208] BERRIS ET AL., *supra* note 178, at 62, 64–65; Laguardia, *supra* note 178, at 215.

[209] *See* Chesney, *supra* note 121; McCord, *supra* note 200; McQuade, *supra* note 199, at 119–20.

[210] *See, e.g.*, Chesney, *supra* note 121.

expanding the national security state, and the potential risks to civil liberties.[211] But perhaps the most compelling argument against new federal criminal legislation is the asserted adequacy of existing federal criminal law.[212] Indeed, some commentators have argued that federal law is not only adequate, it already gives *too much* authority to the Government to ferret out, name, and punish domestic terrorism.[213] Even without a domestic terrorism offense statute, the likes of the Pittsburgh synagogue shooter, the Poway synagogue shooter, and others remain subject to criminal law and prosecution—even to serious punishments such as the life sentence for Earnest[214] and the Government's invocation of the death penalty in the Pittsburgh case.[215] This argument overlaps with the federalism claim, as well, leaving room for state criminal prosecutions even with already robust federal authorities in place. Indeed, several states have their own domestic terrorism laws,[216] and have employed them effectively in recent high-profile cases.[217]

Whatever its explanation, this record of congressional inaction even after high-profile instances of domestic political violence, combined with recent electoral developments and outcomes, suggests that there is likely not an overwhelming appetite in Congress for new substantive domestic terrorism authorities.

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[211] *See* Sinnar, *supra* note 31, at 493; Anderson, *supra* note 199, at 499–501; GERMAN & ROBINSON, *supra* note 175, at 2; Laguardia, *supra* note 178, at 229–33; Brian Michael Jenkins, *Five Reasons to Be Wary of a New Domestic Terrorism Law*, RAND BLOG (Feb. 24, 2021), https://www.rand.org/blog/2021/02/five-reasons-to-be-wary-of-a-new-domestic-terrorism; *see also* Greenblatt & Selim, *supra* note 31 (noting potential for a domestic terrorism statute but raising concerns about civil liberties and suggesting consideration of a "rights-protecting domestic terrorism statute"); Shirin Sinnar, *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, 117 MICH. L. REV. 1333, 1342 (2019) (suggesting better civil liberties oversight of terrorism law, rather than creating new criminal authorities).

[212] *See* German, *supra* note 175, at 171; GERMAN & ROBINSON, *supra* note 175, at 5; Anderson, *supra* note 199, at 499–501; *see also* Rozenshtein, *supra* note 189 (suggesting that the substance of domestic terrorism is already covered by the seditious conspiracy statute).

[213] *See* Hanna & Halliday, *supra* note 175, at 835. Hanna and Halliday also agree that these significant existing powers are amenable to abuse in ways that put civil liberties at risk. *Id.* at 835–36.

[214] *See* Press Release, U.S. Att'y's Off., S.D. Cal., *supra* note 14.

[215] *See* Notice of Intent to Seek the Death Penalty at 1, United States v. Bowers, No. 18-292 (W.D. Pa. Aug. 26, 2019).

[216] *See, e.g.*, MICH. COMP. LAWS § 750.147b (2023); Michigan Anti-Terrorism Act, MICH. COMP. LAWS § 750.543a–z (2023); N.J. STAT. ANN. §§ 2C:16-1(a), 2C:38-2 (West 2023); N.Y. PENAL LAW §§ 485.05, 490.20, 490.28 (McKinney 2023).

[217] *See, e.g.*, Morales et al., *supra* note 36 (describing sentencing for Payton Gendron under New York domestic terrorism law); Lauren del Valle, Holly Yan, Yon Pomrenze & Jean Casarez, *Teen Pleads Guilty to Terrorism and Murder Charges After Michigan School Shooting that Killed 4 Students*, CNN, https://www.cnn.com/2022/10/24/us/ethan-crumbley-plea-oxford-michigan-shooting-monday (Oct. 24, 2022, 6:10 PM) (describing guilty plea of Ethan Crumbley on state terrorism charges after mass shooting at Oxford High School).

If it is desirable, then, to treat antisemitic violence as terrorism in appropriate cases, how would the Government do so through a criminal law with no domestic terrorism offense statute?

B. Applying Antisemitic Violence to the Existing Federal Criminal Law of Terrorism

A number of antisemitic violence cases appear to fit federal criminal law's general understanding of domestic terrorism, per the authoritative definitions in § 2231(5) and § 2332b(g)(5). In many cases, however, the Government's treatment of antisemitic violence as terrorism is largely rhetorical, based on these definitions.

1. Domestic Terrorism Actus Reus

Of course, not just any antisemitic incident, or even act of violence or use of unlawful force against a Jewish person, will do for purposes of terrorism definitions. The term "antisemitic terrorism" is not all-encompassing. Assaults and other acts of violence against Jewish persons do not fit § 2331(5)'s definition of domestic terrorism unless they are also dangerous to human life.[218] So, while a shooting or use of an explosive device would typically satisfy the definition, a punch to the face, while still likely criminal, would not. And that is true even if the punch to the face would violate the Shepard-Byrd Act. Notwithstanding the substantial overlap between hate crimes and domestic terrorism, not every hate crime is domestic terrorism.

That said, the Pittsburgh and Poway shootings would appear to fit the actus reus of the authoritative definitions of domestic terrorism.[219] In addition, federal officials explicitly described the Fields case as a case of domestic terrorism.[220] The Justice Department also explicitly described Holzer's planned attack on Temple Emanuel in Pueblo as domestic terrorism.[221] And although the federal government has not yet described the allegations against Dion Marsh as domestic terrorism, New Jersey has charged Marsh with state terrorism offenses, and the local ADL has described the case as such.[222] Damon Joseph's planned attack of the Toledo synagogue was, among the cases discussed here, most obviously terrorism, given the underlying material support conviction.[223] Justice Department officials described it as an act of

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[218] *See* 18 U.S.C. § 2331(5).

[219] *See* McCord, *supra* note 200.

[220] Press Release, U.S. Dep't of Just., *supra* note 81 (quoting Justice Department and FBI leaders describing the case as one of domestic terrorism).

[221] Press Release, U.S. Dep't of Just., *supra* note 85.

[222] *See Alleged NJ Carjacker Now Faces Terrorism Charge in Crime Spree*, NBC, https://www.nbcnewyork.com/news/local/crime-and-courts/alleged-carjacker-in-nj-antisemitic-attacks-faces-terrorism-charge (Apr. 14, 2022, 1:34 PM); Trish Hartman, *ADL: Man Made Anti-Semitic Remarks Before Violent Rampage, Carjacking in New Jersey*, ABC (Apr. 11, 2022), https://6abc.com/dion-marsh-arrested-lakewood-new-jersey-attempted-murder-carjacking/11738120 (quoting an ADL spokesperson as describing acts as "terrorism").

[223] *See* Press Release, U.S. Dep't of Just., *supra* note 102.

domestic terrorism.[224] Moreover, though the Justice Department has not yet labeled the alleged threats against Jewish officials in Michigan as domestic terrorism, Michigan's Attorney General stated publicly her "hope that the federal authorities take this offense just as seriously as my Hate Crimes & Domestic Terrorism Unit takes plots to murder elected officials."[225]

Threat crimes, however, present yet another problem. Section 2331(5) defines criminal activities that "involve acts dangerous to human life."[226] One potential reading of this language is that a threat to do an act dangerous to human life "involves" such an act, even if the threat is not carried out, but could be. There are reasons to support such a reading. True threats, like attempted and completed acts, can be tools for terrorism. They instill fear, intimidate and coerce, paralyze action, and subject people to "the many kinds of 'disruption that fear engenders.'"[227] Threats can stifle a political community and bend a community, and those who govern it, to the will of the coercer. In this sense, threats, if true and serious enough, can thus serve the same terroristic ends as actions that pass beyond a preparatory stage.[228] The legal question, then, is whether "involves"—to the extent that it means "includes"—embraces a *threat* to do an act dangerous to human life that would be a state or federal crime, with the requisite mental state among those in the 2331(5) definition.[229] True threats—as the Supreme Court has described the concept, "'serious expression[s]' conveying that a speaker means to 'commit an act of unlawful violence'"[230]—would seem to suffice. So, too, then, would the kinds of threats that tend to arise in the antisemitic violence cases: for example, threatening via email to

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[224] *Id.* Query whether the connection to an FTO makes it "homegrown" terrorism, as opposed to domestic terrorism.

[225] *See* Elisha Fieldstadt, *'Heavily Armed' Man Who FBI Said Targeted Jewish Michigan Officials Was After State Attorney General Dana Nessel, She Says*, NBC, https://www.nbcnews.com/politics/politics-news/heavily-armed-man-targeted-michigan-attorney-general-dana-nessel-says-rcna73048 (Mar. 2, 2023, 8:24 AM) (quoting Dana Nessel).

[226] 18 U.S.C. § 2331(5)(A).

[227] Counterman v. Colorado, 143 S. Ct. 2106, 2114 (2023) (quoting Virginia v. Black, 538 U.S. 343, 360 (2003)); *see also* John T. Nockleby, *Hate Speech in Context: The Case of Verbal Threats*, 42 BUFF. L. REV. 653, 663–64 (1994); Jeremy D. Feinstein, Note, *Are Threats Always "Violent" Crimes?*, 94 MICH. L. REV. 1067, 1079–80 (1996).

[228] *See* Nockleby, *supra* note 227, at 663–64; *see also* Feinstein, *supra* note 227, at 1090 (analyzing threats through risk assessment framework).

[229] The Seventh Circuit has held that nearly identical language in § 2331(1)—which defines international terrorism—meant that "involves" includes aiding and abetting. *See* Boim v. Quranic Literary Inst. & Holy Land Found., 291 F.3d 1000, 1020–21 (7th Cir. 2002). The Seventh Circuit has also found that the use of the word "involved" in Sentencing Guideline 3A1.4 means "to include," so that an act "involved" a "federal crime of terrorism" only where the crime of conviction is itself a "crime of terrorism." United States v. Arnaout, 431 F.3d 994, 1002–03 (7th Cir. 2005).

[230] *Counterman*, 143 S. Ct. at 2114 (2023) (quoting *Black*, 538 U.S. at 359).

kill a Jewish person, or threatening to set fire to a synagogue during Shabbat services, or threatening a mass shooting during Yom Kippur, would arguably "involve" an act dangerous to human life that is a federal crime (though whether those acts would satisfy the terrorism mens rea is a separate matter, discussed next).

Satisfying § 2332b(g)(5) is even more challenging, as the underlying criminal offense must be one that is enumerated there.[231] The hate crimes offenses, the acts required to apply the gun enhancement, the religious obstruction statute, and the threats statutes are not enumerated. Therefore, an act of antisemitic violence will only satisfy the definition of a "federal crime of terrorism" if it is among the 57 listed offenses.[232] Earnest's killing at the Poway synagogue and Bowers's killings at the Tree of Life would not qualify.

2. Domestic Terrorism Mens Rea

Perhaps most challenging, however, is not proof of the relevant act, but proof of the perpetrator's mental state. For either of these criminal law provisions to apply, the instance of antisemitic violence must not only satisfy the relevant act requirement, it must also encompass the relevant terrorism purpose or motive.[233] Terrorism is political, and the perpetrator must not merely intend to do the prohibited act, they must also do the act with the motivation (or apparent motivation) to instill fear in a target population or bring grievances to bear through alteration of the state's institutions and policies.[234] This is the key element that distinguishes the terrorist from the garden-variety criminal, just as the bias motive is what distinguishes a federal hate crime from a garden-variety assaultive crime.[235] Threats against a single individual, or even significant acts of violence, even if motivated by personal animus, may be insufficient to satisfy the distinctive state of mind that terrorism requires.[236]

Accordingly, then, to implicate § 2331(5) the Government must prove that the perpetrator appeared to intend "to intimidate or coerce a civilian population," or "to influence the policy of a government by intimidation or coercion," or "to

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[231] *See* 18 U.S.C. § 2332b(g)(5)(B).

[232] *Id.*

[233] *Compare id.* § 2331(5)(B), *with id.* § 2332b(g)(5)(A).

[234] *See* PERLIGER, *supra* note 30, at 152; *see also* Gérard Chaliand & Arnaud Blin, *Introduction* to THE HISTORY OF TERRORISM: FROM ANTIQUITY TO ISIS 5–6 (Gérard Chaliand & Arnaud Blin eds., 2016 ed.) (describing terrorism as a "technique" among political phenomena).

[235] *See* Broughton, *supra* note 61, at 315–16; *see also* PERLIGER, *supra* note 30, at 151–52 (comparing hate crimes and terrorism). There may be some question as to the invocation of a terrorism motive in a hate crimes case, where the Government would be required to prove the bias motive. If the Government also alleges that the act was done with the terrorism motive, does the mixed motive doom the hate crimes charge? *See, e.g.*, United States v. Miller, 767 F.3d 585, 594 (6th Cir. 2014) (holding that Shepard-Byrd Act's "because of" element requires proof of but-for causation, such that the result happened because of the defendant's bias motivation).

[236] *See* Laguardia, *supra* note 178, at 232–33.

affect the conduct of a government by mass destruction, assassination, or kidnapping."[237] And to invoke § 2332b(g)(5)—assuming, of course, that the Government can also establish commission of one of the 57 underlying predicates—the Government must prove that the predicate offense was "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct."[238]

These mens rea provisions are, and should remain, robust. These provisions help to limit the scope of domestic terrorism—and thus government power—by ensuring that application of domestic terrorism labels is consistent with the underlying distinctions between terrorism and other criminality. The mens rea requirement can help to confine the use of this concept to instances of violent conduct that target the state, its institutions, its policies, and its wider political communities. Personal animus alone, then, should be insufficient to trigger the domestic terrorism definitions in federal criminal law, which ought to be reserved for serious, purposeful political violence. In this way, tying penal law to the unique terrorism motive helps accord the punishment with the defendant's culpability and the unique harms that terrorism causes.

3. Special Problems in the Sentencing Enhancements

The sentencing enhancement problem further illuminates the difficulties of punishing violent antisemitic actors as terrorists.

Terrorism sentencing enhancements embedded in the offense statute are exceedingly rare in federal criminal law.[239] And the Government's use of the terrorism enhancement pursuant to the Guidelines, while powerful and used on occasion,[240] remains inadequate for purposes of much domestic terrorism, particularly in cases that appear to otherwise satisfy the general understanding of terrorism in § 2331(5) but do not involve one of the enumerated "federal crimes of terrorism."[241] This is true even though federal courts have recognized that the enhancement's language extends beyond actual commission of an underlying "federal crime of terrorism," to conduct that simply involves or was "intended to promote" one of those offenses, even if the defendant did not personally possess the required terrorism motive or commit a predicate terrorism offense.[242] Notwithstanding that this language actu-

[237] 18 U.S.C. § 2331(5)(B).

[238] *Id.* § 2332b(g)(5)(A).

[239] *See, e.g.*, *id.* §§ 1001(a), 1505.

[240] *See* Hanna & Halliday, *supra* note 175, at 833–34.

[241] 18 U.S.C. § 2332b(g)(5)(B). *Cf.* Norris, *supra* note 31, at 279–80 (explaining how Roof could be subject to the terrorism enhancement).

[242] *See* United States v. Hasson, 26 F.4th 610, 624–25 (4th Cir. 2022); United States v. Fidse, 862 F.3d 516, 522–23 (5th Cir. 2017); United States v. Awan, 607 F.3d 306, 313–14 (2d Cir. 2010); United States v. Arnaout, 431 F.3d 994, 1001–02 (7th Cir. 2005).

ally makes the enhancement broader than the definition of a "federal crime of terrorism" itself, the enhancement nonetheless requires a nexus to one of those 57 listed offenses.[243]

Moreover, even with the Commentary to Guideline 3A1.4 that permits an upward sentencing departure for unenumerated predicate offenses accompanied by a motive to intimidate or retaliate against the government, or for those predicate offenses done with a motive "to intimidate or coerce a civilian population,"[244] Comment 4 likely would not extend to most of the cases of antisemitic violence identified here. In most such cases, the actor's motive is directed toward Jewish people as a class of citizens rather than against the Government or its conduct. In such a case, the underlying offense would still have to be one of those enumerated in § 2332b(g)(5) (and therefore could not be a violation of, for example, §§ 249, 247, or 245). Rather, commission of one of the enumerated offenses that typically arise in the cases of antisemitic violence—say, a hate crime or religious obstruction crime—could trigger the upward departure only if the underlying motive was to affect government conduct by intimidation or coercion, or to retaliate against the government. In other words, if the antisemitic conduct is directed at government officials, the terrorism enhancement could theoretically apply.[245] Consider the pending case involving threats against Jewish officials from Michigan,[246] or a hypothetical case in which the actor attacked a synagogue in order to force government actors to change policies with respect to Israel.

So although application of a terrorism enhancement is possible in some cases under existing law, these sentencing options would still be unavailable in a wide range of cases involving domestic antisemitic violence, including most of those described previously in Part II of this Article.

C. Rethinking the Criminal Law of Terrorism in Light of Antisemitic Violence

The problem, then, is this: if an act of antisemitic violence constitutes a federal crime, and if the act also fits the general criminal law definition of domestic terrorism, but federal criminal law does not distinctly criminalize domestic terrorism, how do we create a nexus between the violent antisemitic crime and domestic terrorism that has legal significance and is not simply rhetorical? A few options are possible. But even assuming that new legislative and enforcement-side efforts are possible, the first step toward a better and more effective criminal law of terrorism is a rethinking of it. That is, policymakers and law enforcement should better appreciate how criminal laws that ordinarily exist outside of the terrorism context can be used to connect

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[243] *See* U.S. SENT'G GUIDELINES MANUAL, *supra* note 194, § 3A1.4(a) cmt. n.1.

[244] *Id.* § 3A1.4 cmt. n.4.

[245] *See* Hanna & Halliday, *supra* note 175, at 833–34 (describing cases).

[246] *See* Press Release, U.S. Att'y's Off., E.D. Mich., *supra* note 154.

antisemitic violence (and other forms of violent extremism) to domestic terrorism. The Justice Department has taken meaningful steps that reflect this rethinking; Congress needs to catch up.

1. Modest Legislative Reforms

Existing legislative definitions are underutilized or underinclusive. Modest changes to existing legislation could expand the scope of federal terrorism law enough to allow its use in the cases of antisemitic violence where it appears to be most needed, based on the way the Government typically charges defendants in these cases: those involving civil rights offenses, firearms, and interstate threats. As noted earlier, a fair amount of literature has developed—mine included—that proposes a variety of legislative approaches to gap-filling in this area,[247] and a recounting of all those proposals is unnecessary here. I reiterate only a few of them to highlight the underinclusiveness problem I have identified.

As I have suggested elsewhere, Congress could expand the list of 2332b(g)(5) predicates.[248] More precisely, it could include §§ 245, 247, and 249, as well as § 924(c), and §§ 875 and 876 in that list. This would ensure that cases which may well fit the definition of domestic terrorism could be punished as a federal crime of terrorism using the existing Guidelines enhancement without resorting to the complicated applications of Comment 4, as previously discussed. As others have noted, some cases of antisemitic violence could have been punished as terrorism had hate crimes been among the enumerated statutes.[249]

And as I have also previously suggested, Congress could employ the § 2331(5) definition of domestic terrorism as a statutory sentencing enhancement, just as Congress has done in the obstruction statute.[250] This could include, for example, adding the sentencing enhancement to the Shepard-Byrd Act, § 924(c), and the interstate threats statutes. Doing so would enable § 2331(5) to serve as more than just a rhetorical device or point of reference for the Justice Department in filings and press releases; it would give the statute greater applicability in actual cases. Its limited employment in § 1505 renders it virtually unused in criminal litigation.

If Congress chose to employ the § 2331(5) definition as a statutory enhancement, Congress could also simultaneously resolve the interpretive problem with respect to whether threats are sufficient to satisfy that definition. In so doing, Congress could create uniformity in the inclusion of threats across terrorism statutes. In the

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[247] *See infra* Section III.A and text accompanying notes 199–206.

[248] Broughton, *supra* note 61, at 328; *see also* Laguardia, *supra* note 178, at 241–45 (also suggesting expansion of the 2332b(g)(5) list, but including §§ 249, 924(c), as well as the riot, destruction of motor vehicles, and the racketeering statutes); Dilts, *supra* note 199, at 730–31 (suggesting additions to the list).

[249] *See, e.g.*, Laguardia, *supra* note 178, at 242 (asserting that Fields could have been treated as a terrorist).

[250] Broughton, *supra* note 61, at 326–27.

2331(5) context, for example, Congress could amend the statutory definition of the actus reus to state that domestic terrorism is: "activities *that are, or that threaten acts,* dangerous to human life that are a violation of the criminal laws of the United States or of any State."[251]

Other suggestions are also notable. Darin E.W. Johnson, for example, focuses on designation of white supremacist groups as FTOs, disrupting white supremacists online, and imposing sanctions on white supremacist groups and actors.[252] Also of note are McQuade's suggestions for targeting online radicalization and recruitment,[253] and Alan Rozenshtein's compelling suggestion that Congress could amend the seditious conspiracy statute to incorporate elements of the domestic terrorism definition.[254] These proposals reflect the kind of rethinking about the crime-terrorism nexus that accounts for the distinctive nature of today's domestic terrorism and violent extremism, and the threats they pose.

2. Adapting Inside the Justice Department

On the enforcement side, the Justice Department has already acknowledged the connections between antisemitic violence and domestic terrorism.[255] But its ability to punish antisemitic violence as terrorism is limited by the underinclusive nature of federal criminal law's definitional and punishment scheme with respect to terrorism, as discussed above.

Nonetheless, and with its understanding that domestic violent extremism and domestic terrorism poses "one of the most significant threats to our nation,"[256] the Department has moved in the right direction. The Department recently created a new Domestic Terrorism Unit within the National Security Division (NSD).[257] Placing the Unit within the NSD, rather than the Criminal and Civil Rights Divisions, has both operational and symbolic significance, signaling that the Department views the domestic terror threat as a security matter and not a matter of mine-run criminal law or civil rights enforcement.[258] That is an important step in the type of

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[251] Consider the analogous language in the Racketeering Influenced and Corrupt Organizations Act, which defines racketeering activity as "any act *or threat* involving" a comprehensive list of predicate state and federal crimes. *See* 18 U.S.C. § 1961(1) (emphasis added).

[252] Johnson, *supra* note 30, at 1113–17.

[253] McQuade, *supra* note 199, at 116–18.

[254] Rozenshtein, *supra* note 189. Of course, as Rozenshtein acknowledges, Congress would have to determine whether to retain the conspiracy element of the crime, as this element would exclude lone actors. *Id.*

[255] *See infra* Section III.B.

[256] U.S. Dep't of Just., Just. Manual § 9-2.137(A) (2022).

[257] Matthew G. Olsen, Assistant Att'y Gen., U.S. Dep't of Just., Keynote Address at George Washington University Program on Extremism (June 15, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-matthew-g-olsen-delivers-keynote-address-george-washington.

[258] *See* U.S. Dep't of Just., Just. Manual, *supra* note 256, § 9-2.137(A).

rethinking of federal criminal law that this Article envisions—one where crimes, including civil rights offenses, are distinguishable when they meet the law's understanding of terrorism. To make that distinction and rethinking more meaningful, Congress could adopt the aforementioned reforms that tie certain forms of criminality to terrorism, even if it does not create a new federal crime.

But even without those reforms, given its public statements and internal policies expressing seriousness about domestic violent extremism, the Department can deploy its own resources to forge a meaningful connection between antisemitic violence and domestic terrorism. The Justice Manual shows that it has taken some meaningful steps to do so.

Public information about the new Unit is scant, beyond news reports and public announcements about the Unit's creation in 2021.[259] And national security cases, including those involving terrorism, are already addressed in the Justice Manual.[260] But the Manual was updated in November 2022, and specifically addresses the process for "matters involving domestic violent extremism, including domestic terrorism."[261] Those guidelines require that the Department have a "robust and coordinated approach" to domestic terrorism, and sets forth extensive notification and approval requirements for cases implicating domestic terrorism.[262] This coordination process includes communication between the NSD and the Civil Rights Division in cases involving criminal violations of civil rights offenses. Nonetheless, although the Justice Manual does not require approval from the Assistant Attorney General for the NSD in those cases, the Civil Rights Division must obtain such approval for "any decision" regarding application of Sentencing Guideline 3A1.4.[263]

These are important new additions to the Manual. They help ensure that cases could only be identified as, and possibly punished as, domestic terrorism with the approval of executive-level ("Front Office") management within the Department, upon the recommendation of career officials with the Unit. It is critical that the Department create and safeguard public confidence that the Unit's work is serious and objective, and that its involvement in any case, including public designations and sentencing recommendations that connect a case to domestic terrorism, is based on the facts and applicable law and is free of any partisan or electoral considerations.

Still, in addition to these reforms in the Justice Manual, the Unit could track cases of antisemitic violence that fit the definition of domestic terrorism in

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[259] *See, e.g.*, Vera Bergengruen & W.J. Hennigan, *Prosecuting Domestic Terrorism is Notoriously Difficult. This New Team of Lawyers Has a Mounting Caseload*, TIME (Jan. 24, 2021, 8:00 AM), https://time.com/6140308/domestic-terrorism-justice-department-unit-joe-biden.

[260] *See* U.S. Dep't of Just., Just. Manual, *supra* note 256, § 9-90.010–640, 9-2.137.

[261] *Id.* § 9-2.137(A).

[262] *Id.* § 9-2.137(A)–(E).

[263] *Id.* § 9-2.137 (D), (F). The non-approval provision only applies to "category 1" DVE-related offenses. *Id.*; *see also id.* § 9-2.137(C) (defining category 1 DVE case).

§ 2331(5). The Manual could also be amended to require federal prosecutors to include language in indictments that indicates a particular instance of antisemitic violence fits the § 2331(5) definition.[264]

3. Evaluating the Rethinking

None of these reforms, though, seem necessary, or even important, if the Government is not serious about treating—and punishing—domestic antisemitic violence as domestic terrorism. Perhaps there are sound reasons to avoid doing so, reasons not unlike those that would counsel against a new domestic terrorism statute—federalism and the adequacy of existing federal criminal laws.[265] Opponents of using terrorism law to combat hate crimes and other criminal offenses are also rightly concerned about civil liberties, and the effects that expansion of the national security state would have on vulnerable or marginalized communities.[266]

But whatever force the arguments against expanding federal counterterrorism tools into the domestic sphere may have, there are counterarguments.

By focusing legislative reforms on the punishment of existing federal offenses, rather than creation of a new domestic terror offense, Congress could avoid the contention that it is unnecessarily expanding the scope of federal criminal law. And none of these proposed reforms would thwart or otherwise interfere with any state's ability to enforce its own domestic terrorism (or other criminal) law. Of course, in some cases the sentencing enhancements might not matter (such as where the defendant receives the death penalty or a life sentence).[267] But making these options more widely available would ensure that, where applied, the law has formally treated the defendant as a domestic terrorist where, based on his culpability, he has earned that distinction. In other words, the community's moral condemnation could be expressed in terms specific to terrorism.

Moreover, the argument about the adequacy of existing federal criminal law is compelling but ultimately, perhaps, illusory. Existing federal criminal law is adequate only if one does not take seriously the unique harms of terrorism and thus the distinction between terrorism and ordinary or other criminality.[268] Criminal law should account for the unique harms that terrorism causes and the unique threats that it creates for social order, institutional preservation, and the stability of the political community. To the extent that any particular act of antisemitic violence fits

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[264] There is precedent for this. *See, e.g.*, Superseding Indictment at 2, United States v. Fox, et al., No. 20-00183 (W.D. Mich. Apr. 28, 2021) (in case involving alleged plot to kidnap Governor Gretchen Whitmer of Michigan, alleging the defendants "engaged in domestic terrorism" and citing § 2331(5)).

[265] *See* Hanna & Halliday, *supra* note 175, at 840–41; German, *supra* note 175, at 171; GERMAN & ROBINSON, *supra* note 175, at 5.

[266] *See* Hanna & Halliday, *supra* note 175, at 836–41; Sinnar, *supra* note 31, at 493.

[267] *See* Hanna & Halliday, *supra* note 175, at 852–53.

[268] *See infra* Section III.B.

within this understanding of political violence (and not all will), criminal law should punish it as such so as, again, to reflect the more specific form of moral condemnation *that* punishment expresses. Punishment specifically for terrorism, if appropriate on the facts, would thus be better fitted to the defendant's culpability. And it would better and more accurately reflect the nature of harms done to Jewish people and institutions.

Finally, though some argue that domestic terrorism labeling can exacerbate existing political divisions,[269] sensible reforms should not be thwarted by mere partisan talking points designed to stigmatize domestic counterterrorism as a tool of the contemporary Left. Republicans now control the House, and although Republicans have supported—even sponsored—new domestic terror legislation in the recent past,[270] members of the party have not demonstrated support for recent measures. For example, on the 2022 vote to pass the Domestic Terrorism Prevention Act in the House, 203 House Republicans voted against the measure; only 1 voted for it.[271] Every Democrat voted in favor, it received the support of the Biden White House,[272] and the measure passed,[273] but received no vote on the merits in the Senate.[274]

It is justifiable to resist new domestic terror authorities based on concerns about the consequences of expanding federal power or the national security state, or the fear that federal law enforcement will abuse new authorities by targeting unpopular groups or dissenting speech.[275] But this Article has explained why existing legal authorities are inadequate. And targeting violent action is not the same as targeting unpopular speech. Moreover, improving the power of prosecutors to seek enhanced

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[269] *See* Jenkins, *supra* note 211.

[270] *See, e.g.*, Domestic Terrorism Penalties Act of 2019, H.R. 4187, 116th Cong. (sponsored by Rep. Michael McCaul and Rep. Randy Weber, both Republicans from Texas; *see also* Bill to Penalize Acts of Domestic Terrorism, OLL19717, 116th Cong. (2019) (discussion draft, proposed by Sen. Martha McSally (Rep-AZ)). Although not distinctly a domestic terrorism bill, Republicans sponsored the Preventing Anti-Semitic Hate Crimes legislation alluded to earlier. *See supra* note 60 and accompanying text.

[271] *See* CLERK OF H.R., ROLL CALL 221, H.R. 350, 117TH CONG. (May 18, 2022), https://clerk.house.gov/Votes/2022221. The sole Republican voting in favor of the bill was Rep. Adam Kinzinger of Illinois. *Id.*

[272] *Id.*; OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, H.R. 305 – DOMESTIC TERRORISM PREVENTION ACT OF 2022 1 (May 18, 2022).

[273] CLERK OF H.R., ROLL CALL 221, H.R. 350, 117TH CONG. (May 18, 2022), https://clerk.house.gov/Votes/2022221.

[274] *See* CLERK OF S., ROLL CALL 210, H.R. 350, 117TH CONG. (May 26, 2022), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1172/vote_117_2_00210.htm.

[275] *See* Alexander Bolton, *Republicans Vow to Kill Domestic Terrorism Bill in Senate*, THE HILL (May 22, 2022, 5:42 AM), https://thehill.com/homenews/senate/3496328-republicans-vow-to-kill-domestic-terrorism-bill-in-senate.

punishment for violent criminals who pose serious threats to the state and its institutions—and to Jewish people and their institutions, specifically—hardly seems a model for the promotion of modern Leftism. Rather, such a policy would recognize that terrorism—and antisemitic terrorism, in particular—poses risks to American security that warrant special attention in the law: it differs from ordinary criminality, it aggravates the offense conduct, and is deserving of punishment fitted to the unique culpability of the terrorist and the unique harms done to victims, notably Jewish people and institutions.

IV. CONCLUSION

Though instances of antisemitic violence have long implicated our understanding of terrorism, those cases also reveal how federal criminal law must now understand the nexus between the two. The conventional focus on foreign terror organizations, hijackings, bombings of public buildings, and other acts that have been lodged in our consciousness and understanding about terrorism remain sources of concern. But today, we must better appreciate the rise of domestic political violence by extremist and hate groups, small cells, and lone actors who are often influenced by online sources of radicalization—driven by grievance, animus, and rage against institutions and civilian communities, including Jewish ones. This development in American political violence requires a rethinking of the criminal law of terrorism and of prosecutive counterterrorism tools. Antisemitic acts often, though not always, fit squarely within contemporary threat assessments regarding political violence and its relationship to national security. Antisemitic violence ought therefore to be viewed, and treated by federal criminal law, through a broader lens. It should, in appropriate cases, be treated as we have been inclined to treat it in rhetoric: as a component of today's proliferating domestic terrorism, which the criminal law should be better equipped to more accurately identify, distinguish, and punish.