Terrorism, Not Treason: The Rise and Fall of Criminal Charges

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ABSTRACT

Two decades into the global war on terror, the United States has a vast legal and institutional architecture for prosecuting "international" terrorism. A sprawling global intelligence network, thousands of informants in U.S. communities, and a highly permissive legal regime feed the prosecution of hundreds of Muslim defendants. Despite this intense state response and the panoply of charges brought, the U.S. government has charged treason in these cases on only one occasion, over fifteen years ago. Given the prominence of treason charges as a response to political violence in earlier eras, commentators have periodically asked why the treason charge has now virtually disappeared.

This Article advances both legal and sociocultural explanations for the near absence of treason charges in the "war on terror" and the implications for addressing political violence. On the legal side, terrorism charges have replaced treason because they enable the government to do almost everything that it once sought to accomplish with treason charges: they impose extraordinary stigma, they reach speech and advocacy, and they trigger severe penalties. At the same time, terrorism charges face fewer limits than treason charges: they criminalize conduct far removed from actual plots, they require a lesser showing of intent, and they dispense with treason's constitutionally imposed evidentiary restriction. As a result, terrorism prosecutions bypass the constraints adopted to prevent abuse of treason prosecutions. These legal explanations exist alongside a likely sociocultural explanation for treason's disuse in terrorism cases: as severe as it is, a treason accusation presupposes shared belonging in a political community. But many view U.S. Muslims as racial and religious outsiders rather than as members of the nation, facilitating treatment as "international" terrorists and "enemy combatants" rather than as citizens guilty of betrayal.

The broader lesson is that, after particular criminal charges decline in use because of legal or political constraints, new charges emerge that can replicate the concerns that caused older charges to recede. That is true of terrorism charges,

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which replicate some of the abuses feared in treason prosecutions decades earlier. But in time, a similar displacement could potentially occur even with respect to terrorism, as new charges appear (or reappear) to counter other emerging threats. Reimagining national security requires vigilance regarding the shape-shifting nature of responses to political violence.

I. INTRODUCTION

For over twenty years now, the United States has aggressively prosecuted terrorism cases against mostly Muslim defendants. By one count using federal government data, the Justice Department has prosecuted nearly 1,000 people for material support to terrorism, criminal conspiracy, and other charges since 9/11, with a majority of defendants having no direct relationship with terrorist groups.[1] Human rights groups and legal scholars have criticized many aspects of these prosecutions: the widespread use of informants and undercover agents to prod individuals towards criminal action, the sweeping scope of material support to terrorism charges, the introduction of dubious expert testimony and inflammatory evidence at trial susceptible to juror prejudice, and the harsh sentences and extreme conditions of confinement meted out after convictions.[2] These measures have singularly affected Muslims—as opposed to white supremacists, anti-government paramilitary groups, or others classified as "domestic" terrorists—in part because law enforcement agencies routinely investigate Muslims as "international" terrorists, even when they are U.S. citizens who have not left the United States.[3]

Despite this surpassing attention to prosecuting the war on terror and the sheer variety of charges brought, federal prosecutors have only once sought to charge treason in these cases. Treason charges had fallen into disuse several decades before the war on terror: until its most recent treason indictment in 2006, the federal government had last

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[1] *Trial and Terror*, THE INTERCEPT (last updated June 14, 2023), https://trial-and-terror.theintercept.com/ [https://perma.cc/W9MW-GJ8X] (describing 992 prosecutions for "international terrorism").

[2] *See generally*, WADIE E. SAID, CRIMES OF TERROR: THE LEGAL AND POLITICAL IMPLICATIONS OF TERRORISM PROSECUTIONS (2015); Amna Akbar, *Policing "Radicalization,"* 3 U.C. IRVINE L. REV. 809 (2013); HUMAN RIGHTS WATCH, ILLUSION OF JUSTICE: HUMAN RIGHTS ABUSES IN US TERRORISM PROSECUTIONS (2014); ALLARD K. LOWENSTEIN INT'L HUMAN RIGHTS CLINIC & CTR. FOR CONST. RIGHTS, THE DARKEST CORNER: SPECIAL ADMINISTRATIVE MEASURES AND EXTREME ISOLATION IN THE FEDERAL BUREAU OF PRISONS (2017).

[3] For more on the categorization of "international" and "domestic" terrorism, the influence of race and identity in shaping the application of these two categories, and the implications of disparities between the two, *see generally* Shirin Sinnar, *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, 117 MICH. L. REV. 1333 (2019) [hereinafter Sinnar, *Separate and Unequal*].

brought such charges shortly after World War II.[4] But the virtual absence of the charge over the last two decades is especially striking given that treason addresses political violence against the government, and federal authorities have forcefully prosecuted political violence in the post-9/11 war on terror.

The sole treason indictment since the mid-twentieth century came in a 2006 case against Adam Gadahn, a Southern California man who appeared in propaganda videos for al Qaeda in the early 2000s.[5] The Justice Department accused Gadahn of giving "aid and comfort" to the enemy by praising the 9/11 attacks and calling for American soldiers to join al Qaeda.[6] The government justified the treason charge by appealing to its symbolic value: treason was a crime "against America itself" and the prosecution would send the message that the United States would "use every tool" to protect the country.[7] Ultimately, the prosecution never moved forward; Gadahn was in hiding abroad at the time of his indictment, and the U.S. military killed him nine years later in a drone strike.[8] No one has been charged with treason since, though political and legal commentators occasionally argue for it.

This Article argues that the virtual absence of treason charges in the "war on terror" likely stems from both legal and sociocultural explanations. On the legal side, terrorism charges allow the government to achieve the potent effects of treason charges without the same constitutional constraints. Terrorism convictions impose extraordinary stigma, reach speech and advocacy, and trigger severe penalties, but with a broader reach, less demanding showing of intent, and lower evidentiary requirements. On the sociocultural side, an additional likely reason for treason's disuse in the war on terror is that treason accusations presuppose membership in the political community, but many Americans view U.S. Muslims as religious and racial outsiders rather than members of the nation. As a result, political voices calling for harsh treatment of Muslim suspects often cast them as "enemy

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[4] Press Release, U.S. Dep't of Just., U.S. Citizen Indicted on Treason, Material Support Charges for Providing Aid and Comfort to al Qaeda (Oct. 11, 2006), https://www.justice.gov/archive/opa/pr/2006/October/06_nsd_695.html [https://perma.cc/V8SZ-MLQV] (describing defendant Adam Gadahn as "the first person to be charged with treason against the United States since the World War II era").

[5] *Id.*

[6] *Id.*

[7] Paul McNulty, Remarks at Press Conference Announcing Indictment of U.S. Citizen for Treason and Material Support Charges for Providing Aid and Comfort to al Qaeda (Oct. 11, 2006), https://www.justice.gov/archive/dag/speeches/2006/dag_speech_061011.html [https://perma.cc/2HQF-JZE2] [hereinafter Press Conference].

[8] Eric Schmitt, *Adam Gadahn Was Propagandist for Al Qaeda Who Sold Terror in English*, N.Y. TIMES (Apr. 23, 2015), https://www.nytimes.com/2015/04/24/world/middleeast/adam-gadahn-propagandist-for-al-qaeda-who-sold-terror-in-english.html [https://perma.cc/43RB-PPKK]. The U.S. government did not say that it was specifically targeting Gadahn.

combatants" or "international" terrorists rather than citizens who could be guilty of betraying the country to which they belonged.

Like other explanations for the rarity of treason charges after the mid-twentieth century, this Article's legal analysis starts from the Constitution's Treason Clause, especially as interpreted by the Supreme Court towards the end of World War II. The Constitution made treason charges deliberately difficult. The Treason Clause establishes both a substantive and procedural limit on the offense. Substantively, treason "shall consist only in levying War" against the United States "or in adhering to their Enemies, giving them Aid and Comfort."[9] This provision restricted treason to two distinct offenses originating in the 1351 English Statute of Treasons—levying war against the king and adhering to the king's enemies by giving them aid and comfort—while ruling out treason charges for mere political opposition or dissent, which the 1351 statute had enabled.[10] Procedurally, the Constitution's Treason Clause premises conviction on "the testimony of two Witnesses to the same overt Act, or on Confession in open Court."[11]

As others have argued, the Supreme Court's interpretation of the Treason Clause in *Cramer v. United States*, a 1945 case arising out of a citizen's association with an attempt to sabotage U.S. industry, has shaped the government's subsequent reluctance to charge treason.[12] The Court observed that "the basic law of treason in this country was framed by men who . . . were taught by experience and by history to fear abuse of the treason charge almost as much as they feared treason itself."[13] As the majority described it, the Framers feared two dangers: the use of treason charges to "repress peaceful political opposition" and "conviction of the innocent as a result of perjury, passion, or inadequate evidence."[14] They addressed these dual concerns by limiting treason to cases where people had acted, rather than merely thought or expressed disloyal ideas, and by imposing the novel requirement that two witnesses testify to the same overt act.[15]

The *Cramer* court went on to interpret the Treason Clause in two significant respects. First, the Court stringently interpreted the overt

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[9] U.S. CONST. art. III, § 3, cl. 1.

[10] CARLTON F.W. LARSON, ON TREASON: A CITIZEN'S GUIDE TO THE LAW 2–3, 6–7 (2020); JAMES WILLARD HURST, THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS 5–6 (1971). The 1351 statute defined treason to include "compassing" the death of the king, which had allowed for the "suppression of political opposition or the expression of ideas or beliefs distasteful to those in power." *Id.* at 5.

[11] U.S. CONST. art. III, § 3, cl. 1.

[12] 325 U.S. 1 (1945). *See* Paul T. Crane, *Did the Court Kill the Treason Charge?* 36 FLA. ST. U. L. REV. 635 (2009).

[13] *Cramer*, 325 U.S. at 21.

[14] *Id.* at 27–28.

[15] *Id.* at 28 ("[I]t must consist of doing something.").

act requirement to require that "[e]very act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses."[16] It invalidated the conviction of a man who had socialized with two Nazi saboteurs, despite evidence that he knew of their plans and agreed to hold money for one, because the government lacked two witnesses who could testify to those facts.[17] Second, while establishing a high threshold for proving treason, *Cramer* sanctioned the government's use of alternative charges to punish security crimes. The Court noted that Congress could enact other laws prohibiting "specified acts thought detrimental to our wartime safety," and observed that such laws already prohibited the disclosure of sensitive information, seditious acts in wartime, and trading with the enemy.[18]

Law professor Paul Crane has argued that *Cramer* is as important for the second point as for the first: not only did the decision make treason more difficult to prove, but it also explicitly endorsed Congress' creation of other security crimes apart from treason.[19] The decision did not make treason charges impossible, but it made them more difficult *relative* to other charges that Congress could—and did—enact after the decision.[20]

This explanation for the absence of treason charges after *Cramer*—focused on the relative difficulty of prosecuting treason compared with other security offenses—rings true in the war on terror context. As this Article shows at length, terrorism charges allow the government to stigmatize and punish individuals with most of the force of treason charges and few of the limits. Comparing treason and terrorism charges head-to-head shows the severity and scope of terrorism charges and the relatively easier burden of proving them.

The Article then moves from this legal explanation of treason's disuse in the past two decades to a second, novel sociocultural explanation. The leading sociocultural theory is jurisprudence professor George Fletcher's claim that treason charges declined after World War II because their focus on the abstract harm of betrayal seemed out of step with liberal approaches to criminal law.[21] I argue that this explanation may have some purchase in explaining *liberal* reservations with treason and preferences for terrorism law's ostensible focus on violence, rather than betrayal. But that theory does not account for the endurance of

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[16] *Id.* at 34–35.

[17] *Id.* at 37–45.

[18] *Id.* at 45–46, 45 n.53.

[19] Crane, *supra* note 12, at 680–81.

[20] *Id.*

[21] George P. Fletcher, *Ambivalence about Treason*, 82 N.C. L. REV. 1611, 1621, 1628 (2004) (describing the "anti-liberal features of treason") [hereinafter Fletcher, *Ambivalence*].

illiberal, and specifically racialized, dynamics in the war on terror. Treason is a betrayal of allegiance to the nation.[22] But to betray the nation, one must first belong to it. Many Americans, however, including leading congressional Republicans, never viewed U.S. Muslims as belonging in the first place. Pilloried as enemy combatants and international terrorists, Muslims were seen as external enemies, not internal traitors. Adam Gadahn may have represented a partial exception to this assumption of foreignness because he was a white convert to Islam, marking him as a "traitor" in the public imagination more so than typical Black and Brown Muslims of immigrant origins. Though difficult to prove, I argue racial and religious conceptions of belonging and betrayal may have rendered treason an unintuitive accusation for nonwhite Muslim defendants.

In explaining the expansive prosecution of terrorism alongside the rarity of treason charges, this Article does not simply address an intellectual puzzle. Rather, it offers a cautionary note for efforts to rein in national security abuses simply by curtailing or reforming the use of specific criminal charges that have attracted the greatest concern.

If the constitutional Framers feared abuse of treason charges because of their "passion-rousing potentialities," courts have nonetheless interpreted the law to allow for other charges that can inflame passion and readily net convictions.[23] In *Cramer*, the Court left open the possibility that other security crimes might raise constitutional concerns if their elements came too close to treason. "Of course, we do not intimate that Congress could dispense with the two-witness rule merely by giving the same offense another name," the Court stated.[24] But courts have rejected later defendants' arguments that other offenses—whether espionage or seditious conspiracy—come too close to treason by another name.[25] In fact, not long after *Cramer*, the Court refused to stay the execution of Julius and Ethel Rosenberg for espionage, despite their argument that they should have received treason's constitutional protections.[26]

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[22] 18 U.S.C. § 2381 (providing "[w]hoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than $10,000; and shall be incapable of holding any office under the United States").

[23] *Cramer*, 325 U.S. at 45.

[24] *Id.*

[25] *See* United States v. Rosenberg, 195 F.2d 583, 609–11 (2d Cir. 1952) (denying petition for rehearing based on the argument that defendants should have received constitutional protections accorded in treason trials); United States. v. Rahman, 189 F.3d 88, 114 (2d Cir. 1999) (rejecting a constitutional challenge to the seditious conspiracy statute).

[26] *See* Rosenberg v. United States, 346 U.S. 273 (1953) (vacating stay of the Rosenbergs' execution); *id.* at 300 (Black, J., dissenting) (noting that Justice Black had previously voted to grant

Regardless of whether other security crimes, including terrorism, actually violate the Treason Clause, they raise concerns when they replicate the dangers of treason charges without analogous restrictions. This Article argues both that terrorism prosecutions in the past two decades demonstrate that risk, and that the need for caution extends even beyond terrorism. In response to the January 6 assault on the Capitol and broader threats to democracy, prosecutors have returned to rarely used federal charges such as seditious conspiracy. These charges may seem, or even be, an apt response to some of the political violence that has occurred, particularly the organized, militant resistance to the 2020 election certification by groups like the Proud Boys or Oath Keepers. But the same reasons that have led many civil rights organizations and legal scholars to reject new "domestic" terrorism charges should also generate caution about other security offenses. This Article doesn't take a position with respect to the value or legitimacy of charges like seditious conspiracy, but advises greater critical appraisal.

II. LEGAL EXPLANATIONS

This Part explains the dearth of treason charges since 9/11 as the consequence of the relatively potent and unconstrained set of terrorism charges at the government's disposal. Chapter 119B, the terrorism section of the U.S. criminal code, contains many separate offenses, including two important prohibitions against the provision of material support to terrorists and foreign terrorist organizations, both enacted in the 1990s.[27] The legal infrastructure for U.S. counterterrorism is frequently traced to the early 1970s, when the U.S. government directed attention to political violence by Palestinian nationalists and established the first domestic surveillance programs targeting Arab Americans.[28] From the 1970s onward, the federal government adopted new laws and surveillance programs to respond to a threat increasingly framed as terrorism. After the 9/11 attacks, the United States dramatically expanded its investigative and surveillance programs and use of terrorism charges, espousing the idea that the gravity of the threat required departures from the ordinary rule of law and a shift from prosecution to prevention.[29]

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certiorari based on the Rosenbergs' argument that they should be tried according to the constitutional limits applicable to treason).

[27] 18 U.S.C. ch. 113B §§ 2331–2339D ("Terrorism"); 18 U.S.C. § 2339A; 18 U.S.C. § 2339B; *see also* Sinnar, *Separate and Unequal*, *supra* note 3, at 1352–57 (explaining international terrorism laws including material support offenses).

[28] *See* Shirin Sinnar, *Hate Crimes, Terrorism, and the Framing of White Supremacist Violence*, 110 CAL. L. REV. 489, 515–516 (2022) [hereinafter Sinnar, *Hate Crimes*].

[29] *See id.* at 518–20.

Section A explains how terrorism charges replicate the most potent aspects of treason charges; Section B shows how, in key respects, they have even more power.

A. The Stigma, Scope, and Severity of Terrorism Prosecutions

In the years after 9/11, terrorism charges have eclipsed treason because they enable the government to do nearly everything that it once sought to accomplish with treason charges: they impose extraordinary stigma, they reach speech and advocacy, and they trigger severe penalties.

1. Stigma

The terrorism label has come to communicate much of the stigma that the treason charge historically conveyed. Supporters of treason prosecutions often argue that the charge has a unique potential to stigmatize.[30] George Fletcher, one of the most prominent contemporary defenders of the idea of loyalty and treason, wrote, "[t]he worst epithets are reserved for the sin of betrayal. Worse than murder, worse than incest, betrayal of country invites universal scorn."[31] Legal historian Carlton Larson recounts that English and U.S. law "historically viewed treason as the most horrific crime a person could commit," as demonstrated by the far more grisly punishments meted out to traitors in England compared to the "mere[]" hanging of murderers.[32] And the Justice Department press release announcing the treason indictment of Adam Gadahn described treason as "perhaps the most serious offense for which any person can be tried under our Constitution."[33]

It is conceivable that a treason charge would impose additional stigma at the margin, compared to terrorism, in part due to the very rarity of the charge over the past half-century. But it is unquestionable that the terrorism label communicates exceptional condemnation, at least in the post-9/11 United States, where the scale and horror of those

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[30] *See* B. Mitchell Simpson, III, *Treason and Terror: A Toxic Brew*, 23 ROGER WILLIAMS U. L. REV. 1, 5–10 (2018); *Rahman*, 189 F.3d at 112 (describing treason as a "particularly stigmatizing label"); *see also* Simpson, *supra*, at 51 (citing Chief Justice John Marshall's statement during Aaron Burr's trial that treason constitutes "the most atrocious offense which can be committed against the political body").

[31] GEORGE P. FLETCHER, LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS 41 (1993).

[32] Larson, supra note 10, at xii; *see also id.* at 10–11 (arguing that restrictions on treason matter, despite the availability of other crimes, because of the intense emotional reaction the treason charge generates).

[33] Press Release, U.S. Dep't of Just., U.S. Citizen Indicted on Treason, Material Support Charges for Providing Aid and Comfort to al Qaeda (Oct. 11, 2006), https://www.justice.gov/archive/opa/pr/2006/October/06_nsd_695.html [https://perma.cc/V8SZ-MLQV] (quoting Deputy Attorney General Paul J. McNulty).

attacks defined the term for generations of Americans. Popular and political discourse after 9/11 framed terrorism as essentially evil and irrational, drawing on "defining features of terrorism discourse since the 1970s" and creating a "politics of *anti-knowledge*, an active refusal of explanation itself."[34] The word "terrorist" became an epithet, a slur targeting those who were Muslim, Sikh, Brown, and Black from the schoolyard to the halls of Congress.[35] Empirical studies confirm that the label affects public perceptions; for instance, use of the terrorism label to describe nonviolent political actions increases centrists' support for responding with military force.[36]

The exceptional stigma of "terrorism" is part of the reason that some commentators now insist on calling acts of white supremacist violence "terrorism" rather than "only" hate crimes.[37] Terrorism, they argue, uniquely captures the stigma of an offense affecting society as a whole, not just individual victims or the communities that share their targeted identities.[38] Some have advocated a federal domestic terrorism charge for the same reason, arguing that the stigmatic value of a terrorism conviction justifies its enactment even if other charges are available to convict and sentence perpetrators.[39] And Republican state officials have realized the power of the label to chill protest, with Georgia prosecutors levying state terrorism charges against dozens of people protesting the building of a massive police training facility in Atlanta.[40]

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[34] LISA STAMPNITZKY, DISCIPLINING TERRORISM: HOW EXPERTS INVENTED "TERRORISM" 187 (2013) (emphasis in original).

[35] *See generally*, SIKH COALITION, "GO HOME, TERRORIST": A REPORT ON BULLYING AGAINST SIKH AMERICAN SCHOOL CHILDREN (2014), https://issuu.com/thesikhcoalition/docs/go-home-terrorist/3 [https://perma.cc/D5UE-C9KX]; PATRISSE KHAN-CULLORS & ASHA BANDELE, WHEN THEY CALL YOU A TERRORIST: A BLACK LIVES MATTER MEMOIR (2017); Benjamin Siegel, *Rep. Lauren Boebert Refuses to Publicly Apologize to Rep. Ilhan Omar for Anti-Muslim Remark*, ABC NEWS (Nov. 29, 2021), https://abcnews.go.com/Politics/rep-ilhan-omar-issues-statement-speaking-rep-lauren/story?id=81449896 [https://perma.cc/BXY5-5SEM].

[36] Avishay Ben Sasson-Gordis & Alon Yakter, *Is Terrorism Necessarily Violent? Public Perceptions of Nonviolence and Terrorism in Conflict Settings*, POL. SCI. RSCH. & METHODS 2, 10–11 (2023) (describing findings from survey experiments in Israel on Israeli Jews' perceptions and reactions to nonviolent Palestinian actions); *see also* Maggie Campbell-Obaid & Katherine Lacasse, *A Perpetrator by Any Other Name*, 13 PSYCH. VIOLENCE 425, 432–33 (2023) (reporting results of experimental survey of U.S. adults indicating that describing perpetrators as terrorists, versus lone wolves or mass shooters, increased support for surveillance and military responses and decreased support for mental health responses).

[37] *See, e.g.*, Jelani Cobb, *Terrorism in Charleston*, NEW YORKER (June 20, 2015), https://www.newyorker.com/magazine/2015/06/29/terrorism-in-charleston [https://perma.cc/PB6R-WX9E].

[38] *See, e.g.*, Jesse J. Norris, *Why Dylann Roof is a Terrorist Under Federal Law, and Why It Matters*, 54 HARV. J. ON LEGIS. 501, 531 (2017). On the hate crimes versus terrorism framing of political violence, *see generally* Sinnar, *Hate Crimes*, *supra* note 28.

[39] *See* Francesca Laguardia, *Considering a Domestic Terrorism Statute and Its Alternatives*, 114 NW. U. L. REV. 1061 (2020) (discussing proposals and arguments). To be clear, I oppose such an enactment.

[40] Deepa Kumar, *Why Media Conflation of Activism with Terrorism has Dire Consequences:*

Whether or not treason remains perceived as the most serious of all offenses, "terrorism" has acquired extraordinary symbolic power to cast out individuals from the community.

2. Speech and Advocacy

Terrorism laws criminalize advocacy for terrorist organizations in much the same way that treason charges historically were used to prosecute propagandists for enemy nations. Some of the last U.S. prosecutions for treason targeted individuals accused of broadcasting for Axis powers during World War II, including the poet Ezra Pound (accused of supporting fascist Italy) and Iva Toguri (dubbed "Tokyo Rose" for her radio segments from Japan).[41] When the United States last brought treason charges in 2006, it also explained its decision as a way of countering propaganda efforts. Federal prosecutors said they had no information suggesting that the defendant, Adam Gadahn, was involved in plotting attacks, only a series of video appearances in which he glorified terrorism and exhorted Americans to join al Qaeda.[42] But, as the Deputy Attorney General explained, the government viewed such propaganda efforts as dangerous and treason prosecutions as a historically important response:

> The significance of the propaganda part should not be underestimated. If you look at the cases in this area going back to the World War II era, the broadcast cases, which was a category of cases in itself, about five of them, this is a very significant piece of the way an enemy does business, to demoralize the troops, to encourage the spread of fear. And in fact, when you add terrorism to this equation, in contrast to the World War II enemy, where terrorism by its nature seeks to intimidate in order to affect government policy, the propaganda portion is especially significant.[43]

Yet terrorism laws also reach propaganda efforts in support of foreign terrorist organizations, at least when such efforts are coordinated with the organizations. In fact, this use of terrorism charges is more clearly constitutional now than it was at the time of Gadahn's indictment in 2006. In 2010, the Supreme Court upheld the criminal law prohibition on material support to foreign terrorist groups, even as applied

The Case of Cop City, WATSON INST. INT'L & PUB. AFFS., BROWN UNIV. (Nov. 7, 2023), https://watson.brown.edu/costsofwar/files/cow/imce/papers/2023/Cop%20City%20and%20Terrorism_.pdf [https://perma.cc/4B83-TH9Z].

[41] Larson, *supra* note 10, at 156–163.

[42] Press Conference, *supra* note 7.

[43] *Id.*

to speech supporting the peaceful activities of those groups.[44] U.S. citizens and nonprofit organizations in that case wished to support the lawful activities of Kurdish and Tamil groups designated as foreign terrorist organizations by advocating on their behalf and teaching them how to use international legal channels to resolve disputes and obtain humanitarian relief.[45] The Court ruled that the First Amendment did not bar the government from prosecuting these forms of speech, even if that speech supported only lawful activities, so long as it was coordinated with the foreign terrorist groups.[46] Relying on that decision, the government charged a Massachusetts man with material support to terrorism for translating writings on jihad for a website allegedly associated with al Qaeda.[47]

The government has not often pushed the theory to its limits by prosecuting speech alone. But it has regularly deputized undercover agents and confidential informants to coax people to move from hostile speech to real-world plots of the government's creation.[48] Thus, individuals who praise violence online frequently become targets for government sting operations seeking to convince people to agree to actions ostensibly aiding terrorist organizations, like buying a ticket to Syria with the goal of joining ISIS, which can then be charged as material support to terrorism.[49] And material support charges remain available for speech alone where the government can show the speech was coordinated with foreign terrorist groups. Thus, material support to terrorism charges provide a broad basis for penalizing speech and advocacy, at least with respect to designated foreign terrorist organizations.

3. Severity of Penalties

Terrorism charges have led to severe penalties over the past twenty years, rivaling the seriousness of treason charges with respect to the potential for death sentences, lengthy imprisonment, and denaturalization. To be clear, the severity of treason charges is undeniable. Even without a showing that lives were lost, the federal treason statute

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[44] Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).

[45] *Id.* at 14–15.

[46] *Id.* at 39.

[47] United States v. Mehanna, 735 F.3d 32, 41 (1st Cir. 2013) (upholding material support conviction on separate theory).

[48] Sahar F. Aziz, *Race, Entrapment, and Manufacturing "Homegrown Terrorism,"* 111 GEO. L.J. 381, 388–93 (2023); Jesse J. Norris & Hanna Grol-Prokopczyk, *Estimating the Prevalence of Entrapment in Post-9/11 Terrorism Cases*, 105 J. CRIM. L. & CRIMINOLOGY 609 (2015).

[49] See Aziz, *supra* note 48, at 399, 433, 448 (describing frequent use of material support charges in informant-based cases and attempts by undercover agents/informants to convince targets to travel to Syria).

makes the crime potentially punishable by death.[50] The press release announcing Gadahn's 2006 indictment referred to these high stakes, noting that treason carried a potential death sentence while material support to foreign terrorist organizations, the second charge brought against Gadahn, could lead only to a fifteen-year sentence.[51] Even now, the potential capital sentence for treason distinguishes it from a material support to foreign terrorist organizations charge; the latter imposes a maximum twenty-year sentence except where a death resulted, in which the sentence can extend to "any term of years or for life."[52] There is one other key difference, as U.S. law allows for the stripping of U.S. citizenship for individuals convicted of committing an act of treason "with the intention of relinquishing United States nationality."[53]

Despite the possibility that treason charges might inflict more severe penalties than terrorism charges in some contexts, the gap in punitive potential has narrowed as a result of restrictions on the former and aggressive use of the latter. Beginning with capital punishment, there are limited circumstances in which a treason charge could result in a death sentence, but a terrorism charge could not. First, acts of terrorism that kill people can lead to a death sentence under numerous statutes: for instance, a federal grand jury indicted Boston Marathon bomber Dzhokhar Tsarnaev on seventeen capital charges, the trial jury recommended a death sentence for six of those crimes, and the Supreme Court upheld his death sentence.[54] Second, with respect to treason, the Federal Death Penalty Act's list of aggravating factors for consideration suggests an intent to limit the death penalty to particularly serious cases or repeat offenders.[55] And third, the constitutional limits on executions for political crimes not resulting in death remain unclear. In an Eighth Amendment case prohibiting the death penalty for the rape of a child, the Court held that, with respect to "crimes against individuals,"

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[50] 18 U.S.C. § 2381 (providing that a person convicted of treason "shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than $10,000").

[51] Press Release, U.S. Dep't of Just., U.S. Citizen Indicted on Treason, Material Support Charges for Providing Aid and Comfort to al Qaeda (Oct. 11, 2006), https://www.justice.gov/archive/opa/pr/2006/October/06_nsd_695.html [https://perma.cc/V8SZ-MLQV]. At the time of Gadahn's indictment, as now, material support to a foreign terrorist group carried a potential death sentence but only if prosecutors could prove that a death had resulted; *see* USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (amending 18 U.S.C. § 2339B to include potential capital punishment).

[52] 18 U.S.C. § 2339B(a)(1).

[53] 18 U.S.C. § 1481(a)(7).

[54] United States v. Tsarnaev, 595 U.S. 302, 324 (2022).

[55] 18 U.S.C. § 3592(b) (listing three aggravating factors: 1) a defendant's prior conviction for "an offense involving espionage or treason for which a sentence of either life imprisonment or death was authorized by law"; 2) the defendant's knowing creation of a "a grave risk of substantial danger to the national security"; and 3) the defendant's knowing creation of a "grave risk of death to another person"). The jury is allowed to consider whether other aggravated factors exist.

capital punishment "should not be expanded to instances where the victim's life was not taken."[56] The decision reserved the question of whether the same rule would apply to "crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State."[57] Thus, the constitutional acceptability of capital punishment for treason without loss of life remains an open question.

Ultimately, the availability of a death sentence matters less than the punishments meted out in the mine run of cases. After all, the U.S. government has executed a person for treason only once since the adoption of the U.S. Constitution, and that happened in 1847.[58] Death sentences aside, the government has prosecuted and punished Muslims aggressively over two decades. New research shows that "international terrorism defendants" between 2014 and 2019 "received average prison sentences that were more than double those given to domestic extremists," with disparities in all categories of crime, including those crimes that injured victims and those that were foiled.[59] The federal terrorism sentencing enhancement, used in many of these cases,[60] appears to reflect a judgment that those subject to the enhancement are virtually irredeemable: it assigns individuals with no criminal record the same

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[56] Kennedy v. Louisiana, 554 U.S. 407, 437 (2008).

[57] *Id.* After the decision, the Court refused to rehear the case to consider whether the availability of the death penalty for child rape committed by military service members should change its Eighth Amendment analysis, stating that that authorization did not "draw into question our conclusions that there is a consensus against the death penalty for the crime in the civilian context and that the penalty here is unconstitutional." Kennedy v. Louisiana, 554 U.S. 945 (2008) (amending opinion and denying rehearing). It may be that the Court would approve the death penalty in military cases on the theory that such offenses constitute "offenses against the State." *See* Richard Ré, *Can Congress Overturn* Kennedy v. Louisiana*?* 33 HARV. J. LAW & PUB. POL'Y 1031, 1035 n.12 (2013) (suggesting that military crimes might constitute "offenses against the state"); *see also* Sarah Frances Cable, *An Unanswered Question in* Kennedy v. Louisiana*: How Should the Supreme Court Determine the Constitutionality of the Death Penalty for Espionage?* 70 LA. L. REV. 995, 1013 (2010) (arguing that the Kennedy v. Louisiana test should be applied to determine the constitutionality of the death penalty for espionage); James G. Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason,* 45 U. PITT. L. REV. 99, 101 (1983) (arguing for interpreting the Constitution to prohibit the death penalty for treason except where the defendant also committed aggravated murder).

[58] Larson, *supra* note 10, at 102. The last execution for treason in the United States was the 1859 execution of John Brown. Wilson, *supra* note 57, at 156. Brown was prosecuted and sentenced by the state of Virginia, not the federal government. *See* Larson, *supra* note 10, at 57–59.

[59] Michael A. Jensen et. al, *Prosecuting Terror in the Homeland*, U. MD. NAT'L CONSORTIUM FOR STUDY OF TERRORISM AND RESPONSES TO TERRORISM (START) (Sept. 2023), at 3 https://www.start.umd.edu/sites/default/files/publications/local_attachments/Prosecuting%20Terror%20in%20the%20Homeland%20Research%20Brief.pdf [https://perma.cc/5AYZ-KBZB].

[60] The same researchers at the University of Maryland National Consortium for the Study of Terrorism and Responses to Terrorism (START) concluded in 2023 that "prosecutors sought a sentencing enhancement under § 3A1.4 in approximately 60% of international terrorism cases, while they only requested similar penalties in 15.4% of domestic terrorism cases." *Id.* at 2.

criminal history rating as someone with a lifetime of convictions, even for nonviolent offenses.[61]

Applying terrorism charges and the enhancement, the Eleventh Circuit upheld life without parole—the harshest sentence available short of death—for a twenty-four-year-old with no criminal history who procured a fake bomb from an undercover FBI agent posing as an ISIS sympathizer.[62] Before the FBI contacted him, the defendant had posted pro-ISIS messages and expressed interest in bomb-making on Facebook, but had taken no steps toward making a bomb or engaging in violence.[63] Rejecting the young man's claims that he had no record and that no one had actually been at risk of harm from a plot controlled by the FBI, the appeals court upheld the lifelong confinement as reasonable.[64]

In a different case, a federal court condemned the government's "manufacture[]" of a terrorist plot that carried a mandatory minimum twenty-five-year term for conspiracy to use weapons of mass destruction and other charges: the judge noted that the government had "used an unscrupulous operative to inveigle four impoverished men . . . in agreeing to commit serious terrorism offenses that they never could have dreamed up on their own, and then manipulated the facts of the offense so that the men had to be sentenced to at least 25 years in prison."[65] In a rare move for terrorism cases, the judge ordered the "compassionate release" of three of the men, but only after they had spent over a decade in prison.[66] Thus, as a general matter, terrorism cases have often resulted in lengthy sentences that call into question any assumption that treason convictions would necessarily be more severe.

Beyond the direct sentences that would result from convictions, treason charges are also harsh because of their potential to result in loss of citizenship. But even here, the gap between treason and terrorism is less significant than it might appear, both because of constitutional limits on formal denationalization and because the government has effectively stripped citizenship from individuals deemed terrorists through other means. Current law provides that U.S. nationals who commit "an act of treason" voluntarily and with the "intention of relinquishing United States nationality" "shall" lose their nationality where

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[61] Sinnar, *Hate Crimes*, *supra* note 38, at 530–31.

[62] United States v. Suarez, 893 F.3d 1330 (11th Cir. 2018).

[63] *Id.* at 1332–33.

[64] *Id.* at 1338.

[65] United States v. Williams, No. 09 CR 558 (CM), 2023 WL 4785286 at *3, *5, *8–9 (S.D.N.Y. July 27, 2023).

[66] *Id.* at *13–14.

a conviction results from the act.[67] Legislative proposals introduced since 2014 to add support for terrorism as an additional predicate for stripping citizenship have failed.[68] Thus, on its face, the law makes treason more susceptible to denationalization. But Supreme Court decisions requiring proof that a person specifically intended to relinquish citizenship have made it exceedingly difficult to strip citizenship against a person's will.[69] Thus, some legal scholars have proclaimed denationalization impossible even after a treason conviction.[70]

Meanwhile, even without the legal option of denationalizing a person directly for a terrorism conviction, the government has effectively stripped citizenship from at least some individuals deemed terrorists. In 2004, the Bush administration released and deported Yaser Hamdi, a young American citizen held for almost three years as an enemy combatant, on the condition that he renounce his U.S. citizenship.[71] The Trump administration aggressively sought to identify legal bases for undermining the citizenship of individuals it labeled terrorists, such as by accusing individuals of fraud in their naturalization applications or of lacking birthright citizenship rights.[72] Most famously, after Hoda Muthana, an American-born woman who had joined ISIS, sought to return to the United States with her young son following the group's collapse, President Trump tweeted that he had ordered his administration to bar her from re-entry.[73] The D.C. Circuit dismissed Muthana's challenge to the move, reasoning that Muthana's father had diplomatic immunity when she was born, thus disentitling her to the U.S. citizenship that both her family and the State Department had earlier assumed she had.[74] In other words, even without a formal denationalization statute

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[67] 8 U.S.C. § 1481(a)(7).

[68] Jonathan David Shaub, *Expatriation Restored*, 55 HARV. J. ON LEGIS. 363, 365 n.6 (2018) (listing bills).

[69] Vance v. Terrazas, 444 U.S. 252, 261 (1980).

[70] *See e.g.*, Schaub, *supra* note 68, at 415 ("[E]xpatriation without the cooperation of the individual citizen is effectively inert under the current law."); David Cole, *No, You Can't You Can't Strip Americans of their Citizenship, Senator Cruz: The Folly of the Expatriate Terrorists Act,* JUST SECURITY (Sept. 17, 2014), https://www.justsecurity.org/15147/no-cant-strip-americans-citizenship-senator-cruz-folly-expatriate-terrorists-act/ [https://perma.cc/QM3T-4CL4] ("We cannot, as a constitutional matter, strip citizenship from people convicted of treason, much less people who do nothing more than affiliate in some unspecified way with a group we have labeled terrorist . . . .").

[71] Eric Lichtblau, *U.S., Bowing to Court, to Free 'Enemy Combatant'*, N.Y. TIMES (Sept. 23, 2004), https://www.nytimes.com/2004/09/23/politics/us-bowing-to-court-to-free-enemy-combatant.html [https://perma.cc/WY7X-RU88].

[72] Josh Gerstein, *Trump Officials Pushing to Strip Convicted Terrorists of Citizenship*, POLITICO (June 8, 2019), https://www.politico.com/story/2019/06/08/trump-convicted-terrorists-citizenship-1357278 [https://perma.cc/MF69-GSEG].

[73] Saul Elbein, *The Un-American*, NEW REPUBLIC (Mar. 23, 2020), https://newrepublic.com/article/156793/isis-american-hoda-muthana-trump-birthright-citizenship [https://perma.cc/8X3E-CLXM].

[74] Muthana v. Pompeo, 985 F.3d 893, 909 (D.C. Cir. 2021). Muthana had been issued U.S.

for terrorism, the U.S. government has found ways to banish individuals it brands terrorists.[75]

In sum, terrorism charges and related legal authorities have enabled the federal government to do nearly everything it historically set out to do with treason charges: stigmatize individuals as committing the worst offenses imaginable against the nation, criminalize advocacy and speech in support of states or groups designated national enemies, and punish crimes with the severest of sentences. Like treason charges, terrorism charges often have the intent and effect of casting out individuals from the national or political community, whether through the stigma of the label or as the consequence of legal actions related to the accusation.

B. The Fewer Constraints on Terrorism Prosecutions

While terrorism charges have allowed the federal government to do most of what it might have once sought to do with treason charges, they also permit the government to circumvent key limits on treason charges designed to prevent their abuse. Most significantly, terrorism charges enable prosecution for acts far removed from actual plots of violence, and they dispense with treason's exacting and constitutionally imposed evidentiary requirement. While the Treason Clause and the Supreme Court's interpretation of it imposed substantive and procedural constraints on treason, abuses have reappeared in the application of other charges, especially material support to terrorism.

1. The Substantive Sweep of "Preventative" Terrorism Prosecutions

In the weeks after 9/11, the federal government embraced an aggressively "preventative" approach to terrorism, both abroad and at home. Abroad, the United States announced a doctrine of "pre-emption" that justified invading countries to prevent attacks, even if they were not imminent.[76] At home, the Justice Department explicitly shifted from a focus on prosecuting attacks after the fact to preventing them

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passports on two prior occasions, since she was born in the United States and her father had ceased to be a diplomat before she was born. Elbein, *supra* note 73. But because the U.S. government had not been *informed* that her father's diplomatic status had terminated until after her birth, the D.C. Circuit ruled that he retained diplomatic immunity at the time of her birth and that she therefore was not entitled to U.S. citizenship. *Muthana*, 985 F.3d at 903–906.

[75] The denaturalization examples noted here are in addition to a larger category of passport revocations of Americans overseas that other legal scholars have argued amount to de facto denaturalization. *See generally* Ramzi Kassem, *Passport Revocation as Proxy Denaturalization: Examining the Yemen Cases*, 82 FORDHAM L. REV. 2099 (2014).

[76] STAMPNITZKY, *supra* note 34, at 173–75.

from occurring.[77] While appealing in theory, in practice this meant broad-based surveillance of Muslim communities, racial and religious profiling, interrogation through immigration programs and terrorist watchlists, sting operations to coax people into committing crimes, and aggressive use of criminal charges like material support to terrorism.[78]

In particular, material support to terrorism charges facilitated this preventative posture by criminalizing acts multiple steps removed from violence. Material support charges, especially 18 U.S.C. § 2339B, are among the most common charges in terrorism prosecutions.[79] Section 2339B criminalizes knowingly providing "material support or resources" to an organization designated by the Secretary of State as a foreign terrorist organization.[80] In the years after 9/11, prosecutors netted convictions—and lengthy sentences—for acts such as providing medical treatment, creating social media accounts, and sending socks and blankets to members of terrorist groups.[81] The FBI's preventative approach often consisted of deputizing confidential informants and undercover agents to prod individuals voicing angry sentiments about U.S. foreign policy towards actions that could then be quashed as material support for terrorism.[82]

Like material support charges, treason charges can apply to individuals who provide "aid and comfort" to U.S. "enemies."[83] And like material support charges, qualifying acts of aid and comfort do not have to be violent on their face or inherently of a military nature. In the 1947 decision *Haupt v. United States*, the Supreme Court sustained the treason conviction of a man who had helped his son, a Nazi saboteur, shelter at his home, buy a car, and get a job at a military manufacturing plant to assist his sabotage plans.[84] The Court found those acts sufficient to provide aid and comfort to the enemy.[85]

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[77] Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. LEGIS. 1, 26–28 (2005).

[78] *See, e.g.*, Akbar, *supra* note 2, at 845–68.

[79] Sinnar, *Separate and Unequal*, *supra* note 3, at 1354–56.

[80] 18 U.S.C. § 2339B.

[81] Laguardia, *supra* note 39, at 1073–74. In one case, a man was convicted and sentenced for 15 years for storing "socks, ponchos, and sleeping bags" in his apartment for a friend and then lending $300 to the friend to send them to al Qaeda. Colin Moynihan, *U.S. Man Draws 15 Years for Plot to Supply Al Qaeda*, N.Y. TIMES (June 9, 2010), https://www.nytimes.com/2010/06/10/nyregion/10hashmi.html [https://perma.cc/S7KJ-8WC8].

[82] *See* Aziz, *supra* note 48, at 388–93 (2023); Norris & Grol-Prokopczyk, *supra* note 48.

[83] U.S. CONST. art. III, § 3, cl. 1; 18 U.S.C. § 2381.

[84] 330 U.S. 631 (1947).

[85] *Id.* at 635 ("[T]here can be no question that sheltering, or helping to buy a car, or helping to get employment is helpful to an enemy agent, that they were of aid and comfort to Herbert Haupt in his mission of sabotage.").

But in several respects, the charge of material support to foreign terrorist organizations sweeps more broadly than treason. First, the list of foreign terrorist organizations designated by the Secretary of State contains dozens of organizations,[86] while the "enemies" referred to in the treason statute are defined in much narrower terms. The Secretary of State can designate a foreign group engaging in terrorism that "threatens the security of United States nationals or the national security of the United States," and the law broadly defines national security to include "the national defense, foreign relations, or economic interests of the United States."[87] The list includes not just groups that target the U.S. government or Americans, but others engaged in national or regional conflicts that are listed to placate foreign governments.[88] By contrast, Professor Carlton Larson concludes, an "enemy under the Treason Clause only exists if there is a declaration of war between the United States and a foreign nation, open hostilities between the United States and a foreign nation, or open hostilities between the United States and a foreign person or group."[89] While al Qaeda and ISIS likely meet this definition, given open hostilities,[90] the same cannot be said for any number of designated terrorist groups that are not involved in military conflicts with the United States, even if they arguably threaten U.S. allies or U.S. foreign relations. In that respect, the notion of terrorism is more expansive than that of treason; while treason involves disloyalty to the nation itself, terrorism serves to protect "national security," in line with a post-World War II understanding of the term that is implicated by far-flung developments around the world.[91]

Second, to establish a violation of § 2339B, the government need not prove that the defendant had a specific intent to further an organization's terrorist activities, even for organizations that engage in a wide variety of lawful social and political activities in addition to unlawful violence. Instead, a person can be convicted of providing material support to a designated foreign terrorist organization so long as they know that the organization is designated or that it engages in, or has engaged

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[86] Wadie E. Said, *Material Support Prosecutions and their Inherent Selectivity*, 27 MICH. J. RACE & L. 163, 165 (2021) (counting seventy-three foreign terrorist organizations, all but twelve of which were "Arab or Muslim").

[87] 8 U.S.C. § 1189(a)(1)(C), (d)(2).

[88] Wadie E. Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L.J. 543, 568–70 (2011); Holder v. Humanitarian Law Project, 561 U.S. 1, 32–33 (2010) (describing diplomatic concerns motivating designations and bans on material support).

[89] Larson, *supra* note 10, at 135–36.

[90] *Id.* at 141–43.

[91] *See* Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1016 (describing how the idea of "national security" that emerged after World War II reflected a new understanding that "allowed a wide range of actions far afield in the world to count as direct threats to the United States").

in, terrorism.[92] This lesser mens rea requirement contrasts with treason, which requires an actual intent to betray the country. As the Court stated in *Cramer*, treason consists of both providing aid and comfort to the enemy and "adhering" to the enemy: "if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason."[93] Had the father of the Nazi saboteur in *Haupt* provided shelter to his son only to support him as an individual, without intending to advance the son's sabotage, he could not have been convicted of treason.[94]

Third, the government often wins convictions for attempts and conspiracies to provide material support, whereas treason law involves unresolved questions related to attempt and conspiracy. Given the heavy role of undercover agents and informants in terrorism investigations, the government often charges defendants who have attempted or conspired to provide material support—such as through buying a ticket to go to Syria or seeking to participate in a government-controlled plot—but who have not actually provided support.[95]

By contrast, the contours of conspiracy and attempt in treason law remain unsettled. With respect to conspiracy, the Court held long ago—in the trial of former Vice President Aaron Burr for allegedly assembling a group of armed men to take over New Orleans—that conspiracies to levy war do not constitute treason *itself* without an actual levying of war.[96] But the government has successfully prosecuted people for conspiracies to commit treason, including in cases where juries acquitted on treason.[97] It is less clear whether *attempts* can be prosecuted either as treason or as a separate crime of attempted treason, especially after the Court appeared to cast doubt on the former and reserved the latter question in *Cramer*.[98] Applying the Court's admonition to avoid treason

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[92] 18 U.S.C. § 2339B(a)(1).

[93] Cramer v. United States, 325 U.S. 1, 29 (1945).

[94] *See* Larson, *supra* note 10 at 180, 183. Larson suggests that the line between purpose and knowledge is not entirely clear, and that courts haven't resolved when acting with the knowledge that one's acts would aid the enemy crosses the line into intent. *Id.* at 179.

[95] Sinnar, *Separate and Unequal*, *supra* note 3, at 1356.

[96] *Ex parte* Bollman, 8 U.S. 75, 112 (1807); *see also* Larson, *supra* note 10, at 44–48.

[97] *See e.g.*, Eric L. Muller, *Betrayal on Trial: Japanese American "Treason" In World War II*, 82 N.C. L. REV. 1759, 1785 (2004).

[98] Larson, *supra* note 10, at 170–73. Larson notes a long history of prosecuting attempted treason, but also observes that *Cramer* requires that a treason case "show sufficient action by the accused . . . to sustain a finding that the accused *actually gave aid and comfort to the enemy*," which may suggest a different rule. *Id.* at 172 (citing *Cramer*, 325 U.S. at 34). In a footnote, the Court refuses to comment on "whether there may be an offense of attempted treason." 325 U.S. at 34 n.44. In its very last case addressing treason, the Court notes that an overt act "may be an abortive attempt" or "a casual and unimportant step," but "if it gives aid and comfort to the enemy at the immediate moment of its performance, it qualifies as an overt act within the constitutional standard of treason." Kawakita v. United States, 343 U.S. 717, 738 (1952). *Kawakita* does not, however, depend on "abortive attempts" to sustain the treason conviction of a Japanese American convicted of abusing U.S. prisoners of war. *Kawakita*, 343 U.S. at 738.

charges in "doubtful cases,"[99] one commentator concludes that Americans who intended to travel abroad to join ISIS, but who were arrested before they left, could not be guilty of treason under either the "levying war" or "aid and comfort" clauses.[100] No such prohibition on "doubtful cases" applies to terrorism charges, and prosecutors and courts have applied them expansively to convict young people goaded by the government's own agents.

2. The Procedural Constraints of Treason's Two Witness Requirement

In addition to substantive constraints on the scope of treason, the Constitution famously imposed the evidentiary requirement of "the testimony of two Witnesses to the same overt Act" to limit prosecutions.[101] No case did more to interpret this provision than *Cramer*, the case involving a naturalized citizen who met and had drinks with two Nazi saboteurs sent to U.S. shores on submarines to disrupt the U.S. war effort.[102] In *Cramer*, the Court recounted the constitutional drafters' distrust of treason charges and their novel addition of a rule that two witnesses testify to the same overt act.[103] The heightened procedural requirement primarily addressed the drafters' fear that innocent people would be otherwise convicted "as a result of perjury, passion, or inadequate evidence."[104] The Court held that, while the testimony of two witnesses was not required to establish treasonous intent, it was required to prove "all acts of the defendant which are used to draw incriminating inferences that aid and comfort have been given."[105] Cramer's meeting with the two men was insufficient as an overt act, because two witnesses could not testify as to what was said in the meeting or whether Cramer assisted the saboteurs in any way.[106]

Legal commentators have long debated how exacting this requirement actually is, especially in light of the later *Haupt* decision upholding a treason conviction.[107] Professor Kristen Eichensehr has argued that technological developments have made it easier to establish the

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[99] *Ex parte Bollman*, 8 U.S. at 127.

[100] Stephen Jackson, *Treason in the Age of Terrorism: Do Americans Who Join ISIS 'Levy War' Against the United States?*, 9 AM. U. NAT'L SEC. L. BRIEF 155, 202–07 (2019).

[101] U.S. CONST. art. III, § 3, cl. 1.

[102] *Cramer*, 325 U.S. at 3–5.

[103] *Id.* at 24.

[104] *Id.* at 27.

[105] *Id.* at 31, 33.

[106] *Id.* at 37–38.

[107] Haupt v. United States, 330 U.S. 631, 635–40 (1947) (finding overt act requirement satisfied with two-witness proof of a father sheltering his son and aiding him in securing a job and car).

requirement; she suggests that prosecutors could have proven Adam Gadahn's role in making al Qaeda propaganda by offering two witnesses who could simply confirm his identity in the propaganda videos.[108] Nonetheless, it remains an open question whether two witnesses would have had to testify to seeing Gadahn make those videos, as opposed to merely appearing in them,[109] and few cases involve videotaped evidence of that kind.[110] The requirement is not insurmountable, perhaps especially in cases where multiple confidential informants or undercover agents witness a defendant's incriminating act. But the uncertain legal questions around the evidentiary requirement create a barrier simply not found in terrorism cases, which can be proven with the full range of testimonial, documentary, and other physical evidence ordinarily admissible to prove a crime.[111]

Thus, terrorism charges not only replicate treason's stigma, scope, and severity; in key respects, they go even beyond what treason law would have allowed. Terrorism prosecutions alongside the vast state infrastructure created to enable them—dragnet surveillance programs, networks of secret informants planted in communities, terrorist watchlists blacklisting thousands of people, and more—inflict treason's consequences without treason's constraints.

III. SOCIOCULTURAL EXPLANATIONS

The legal analysis above may sufficiently explain the virtual absence of treason charges in the war on terror: prosecutors have a ready set of criminal charges available that they have brought successfully against hundreds of defendants, without the extra burdens of proving treason. Even at the time of the 9/11 attacks, terrorism charges were available in the law and followed several decades of political attention directed at political violence framed as terrorism. By contrast, in 2001, treason charges had not been used in nearly half a century. This legal explanation for the prevalence of terrorism charges alongside treason's rarity has gained still more force with time. Now, after twenty years of

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[108] Kristen E. Eichensehr, *Treason in the Age of Terrorism: An Explanation and Evaluation of Treason's Return in Democratic States*, 42 VAND. J. TRANSNAT'L L. 1443, 1474–75 (2009).

[109] *Id.*

[110] The closest analogy to the videotape evidence used in the Gadahn prosecution would be recordings of other defendants appearing in, or narrating, propaganda videos for organizations such as ISIS. *See, e.g.*, Press Release, U.S. Dep't of Justice, ISIS Media Figure and Foreign Fighter Charged with Conspiring to Provide Material Support to a Terrorist Organization, Resulting in Death (Oct. 2, 2021) https://www.justice.gov/opa/pr/isis-media-figure-and-foreign-fighter-charged-conspiring-provide-material-support-terrorist [https://perma.cc/XPD3-4E3Z] (announcing terrorism charge stemming from defendant's alleged role in narrating fifteen ISIS recruitment videos).

[111] Crane, *supra* note 12, at 681 (concluding that the *Cramer* decision made it harder, but not impossible, to prove treason, and that the *relative* difficulty of proving treason versus other charges is a better explanation for treason's disuse than its impossibility).

regularly levying terrorism charges and netting long sentences, prosecutors and courts have obtained substantial experience (and favorable court decisions) that reinforce incentives to use these charges. And terrorism charges, rather than treason allegations, are a natural fit with the extensive global legal architecture the United States has established around counterterrorism over the past two decades.[112]

But there may be additional sociocultural explanations for treason's decline that have more to do with public perceptions than the law and legal institutions alone. In this part, I recap one prominent sociocultural explanation and then advance an original—and more pessimistic—explanation that sounds in race, religion, and "othering."

A. Liberalism in Criminal Law

The leading sociocultural explanation for treason's demise is George Fletcher's theory that treason strikes contemporary Americans as feudal in its focus on loyalty and betrayal. Fletcher attributed ambivalence towards treason not to the challenges of proving it, but to the fact that "treason no longer conforms to our shared assumptions about the liberal nature and purpose of criminal law."[113] Fletcher argued that many saw treason as inconsistent with the liberal principles of universality (the idea that crime should be defined in terms that apply to any victim and perpetrator, not only to those bound by obligations of loyalty) and harm (the idea that crimes should be focused on external harm, rather than internal thoughts).[114] As criminal law moved from a focus on symbolic "moral struggles between communities and the deviant" towards a focus on impersonal threats of physical harm, treason no longer resonated.[115]

There is probably something to Fletcher's argument. Treason focuses on breaches of loyalty in a way that may seem old-fashioned and illiberal to some, at least to those who question why nation-states deserve allegiance or who fear that demands for allegiance shade into the suppression of dissent. These liberal qualms about the idea of treason

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[112] *See, e.g.*, Kim Lane Scheppele, *The Migration of Anti-Constitutional Ideas: The Post-9/11 Globalization of Public Law and the International State of Emergency*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 347–373 (2009) (describing U.N. Security Council Resolution 1373 requiring state counterterrorism measures after 9/11); GAVIN SULLIVAN, THE LAW OF THE LIST (2020) (describing U.N. sanctions regime against Al Qaeda and ISIS). Given the understanding of treason as betraying a particular nation, it would be harder to operationalize international agreements or legal arrangements around such a state-specific concept, as opposed to the purportedly universal and objective concept of terrorism.

[113] Fletcher, *Ambivalence*, *supra* note 21, at 1612.

[114] *Id.* at 1620–21.

[115] *Id.* at 1628. For a view that Fletcher underestimates the importance of framing conflicts in symbolic terms and the likelihood of treason's return, *see* Eichensehr, *supra* note 108, at 1462–1470.

contrast with the notion of terrorism, which at least purports to address concrete political violence inflicted on identifiable victims, even if in reality terrorism charges criminalize conduct far removed from actual violence. Furthermore, the increasing preoccupation of U.S. criminal law with violence reinforces the supposed contrast between the two concepts.[116] Legal scholar David Sklansky has argued that "the sharp distinction between violent and nonviolent crimes, and the great weight placed on that distinction, are modern developments, roughly half a century old."[117] In view of the increasing emphasis on violence as a subject of criminal legal attention, it makes sense that terrorism's violence would seem, to some, a more natural target of regulation and condemnation than treason's relatively abstract harm of betrayal. From that perspective, society may have allowed counterterrorism laws and institutions to expand so widely over the last decades because they shed treason's uncomfortable preoccupation with loyalty and at least appear to focus on violence.

B. Treason, Loyalty, and Racial/Religious Outsiders

As plausible as these arguments are for explaining a *liberal* preference for terrorism over treason, there is also a more reactionary explanation for that preference: the enduring role of race, religion, and "othering" in shaping societal discourse. As harsh as a treason charge is, it presupposes membership in the political community subject to the betrayal. The very harshness of treason's stigma derives from the idea that those who betray their own nation are especially deserving of scorn. But if the targets of social condemnation are not seen as part of the community in the first place, it is more natural to consider them enemy combatants, enemy aliens, or various other epithets signifying their inherently "outsider" status—not traitors. And that is exactly how segments of society, especially Republicans, have viewed most Muslims throughout the war on terror, even when they are American.[118]

It was natural to view the 9/11 hijackers, in particular, as outsiders because they were noncitizens who had entered the United States for the purpose of attacking it.[119] Although even noncitizens temporarily

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[116] *See* DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIME AND WHAT IT MEANS FOR JUSTICE 3–5, 41 (2021).

[117] *Id.* at 45.

[118] Hannah Hartig & Carroll Doherty, *Two Decades Later, the Enduring Legacy of 9/11*, PEW RSCH. CTR. (Sept. 2, 2021), https://www.pewresearch.org/politics/2021/09/02/two-decades-later-the-enduring-legacy-of-9-11/ [https://perma.cc/YY5L-LLYM].

[119] *See* Larson, *supra* note 10, at 85–86; *see also* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 231–37 (2004), https://govinfo.library.unt.edu/911/report/911Report.pdf [https://perma.cc/9B9E-EQ9X] (identifying Mohamed Atta as Egyptian and describing the other hijackers).

living in a country can be prosecuted under U.S. treason law,[120] it made sense that many viewed the 9/11 perpetrators as foreign enemy combatants, rather than as disloyal members of the nation, given their purpose in entering the country and the brevity of their presence. But the association between Muslims, terrorists, and foreigners had actually developed over several decades preceding the 9/11 attacks, as opposed to originating in the identity of the 9/11 perpetrators.[121] And in the weeks after 9/11, that conflation encompassed American Muslims as a whole. As Leti Volpp argued in her seminal essay, "The Citizen and the Terrorist," American national identity coalesced after the attacks in opposition to those who society identified with the terrorists—those who appeared to be Middle Eastern, Arab, or Muslim:

> In the American imagination, those who appear 'Middle Eastern, Arab, or Muslim' may be theoretically entitled to formal rights, but they do not stand in for or represent the nation. Instead, they are interpellated as antithetical to the citizen's sense of identity. Citizenship in the form of legal status does not guarantee that they will be constitutive of the American body politic. In fact, quite the opposite: The consolidation of American identity takes place *against* them.[122]

In the ensuing years, the de-identification of American Muslims as citizens persisted. Prominent Republicans, in particular, routinely called on the federal government to interrogate U.S. citizen and permanent resident Muslims arrested within the United States as "enemy combatants," rather than treat them as criminal suspects.[123] Terrorists, they argued, did not deserve standard constitutional rights such as the

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[120] Carlisle v. United States, 83 U.S. 147, 155 (1873) (holding that noncitizens who sold supplies to the Confederate states during the Civil War were subject to U.S. treason laws because they were "domiciled aliens in the country prior to the rebellion" and therefore "under the obligation of fidelity and obedience to the government of the United States."). It's not clear how broadly *Carlisle* would apply beyond "domiciled aliens," though the decision does cite international law sources stating that even individuals "whose residence is transitory" and who had no intention to stay in a country owed "temporary allegiance" while in a sovereign's territory. Legal historian Carlton Larson argues that the 9/11 hijackers, had they survived, could have been prosecuted for treason under this reasoning. Larson, *supra* note 10, at 85–86.

[121] Sinnar, *Hate Crimes*, *supra* note 28, at 515–18.

[122] Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1594 (2002).

[123] *See, e.g.*, Charlie Savage, *G.O.P. Lawmakers Push to Have Boston Suspect Questioned as Enemy Combatant*, N.Y. TIMES (Apr. 21, 2013), https://www.nytimes.com/2013/04/22/us/gop-lawmakers-push-to-hold-boston-suspect-as-enemy-combatant.html [https://perma.cc/T5X6-JH66]; Tom Vanden Brook, *Senator Calls on Trump to Declare Terror Suspect an 'Enemy Combatant,'* USA TODAY (Nov. 1, 2017, 12:51 PM), https://www.usatoday.com/story/news/politics/2017/11/01/senator-calls-trump-declare-terror-suspect-enemy-combatant/821464001/ [https://perma.cc/S8DL-U48Z].

right to counsel.[124] Even when not viewed as enemy combatants, Muslim suspects within the United States were viewed as "international terrorists," regardless of citizenship and whether they had ever set foot outside the United States.[125] The distinction between "international" and "domestic" terrorist threats tracked ideological and racial lines rather than geography, allowing the federal government to surveil, investigate, and punish U.S. Muslims in ways that were off limits for white supremacists and others perceived as "domestic" threats.[126]

Sociocultural perceptions of foreignness and legal categories reinforce each other; while racialized judgments that Muslims do not belong contribute to their classification as enemy combatants and international terrorists, the legal classifications in turn reinforce those perceptions. I have argued elsewhere that the bifurcation in U.S. law between domestic and international terrorism, and the characterization of U.S. Muslims as "international" threats, "creates pernicious feedback loops, as differential legal treatment fuels social constructions of terrorists as Muslim and foreign that in turn reinforce punitive and discriminatory state policies."[127] Throughout the post-9/11 period, racial stereotypes and law operated together to construct U.S. Muslims as foreigners and terrorists. In this context, treason prosecutions against U.S. Muslims may have seemed unnatural to some, not because the idea of treason seemed illiberal, but because it first required conceptualizing U.S. Muslims as members of a shared nation.[128]

If that is so, then how might one explain the Adam Gadahn indictment for treason? It is possible that Adam Gadahn's whiteness—the fact that his parents were white and nonimmigrants and that he converted to Islam—made him fit popular conceptions of a "traitor" more so than most Muslim Americans who were Brown or Black and of immigrant origin. Media representations dwelled on Gadahn's American roots: news stories featured headlines like, "From California Farm Boy

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[124] Savage, *supra* note 123.

[125] Sinnar, *Hate Crimes*, *supra* note 28, at 518–24.

[126] *Id.* at 518; Sinnar, *Separate and Unequal*, *supra* note 3, at 1335–39. Wadie Said makes the further argument that, even outside the terrorism context, perceptions of the foreign geography of multiple nonwhite U.S. racial minority communities, like Black Americans in urban areas and Latinos in the border region, undergird U.S. criminal law enforcement practices and immigration measures. Wadie E. Said, *Law Enforcement in the American Security State*, WISC. L. REV. 819, 825–30 (2019).

[127] Sinnar, *Separate and Unequal*, *supra* note 3 at 1366.

[128] Note that Carlton Larson makes an even stronger claim that the possibility of treason prosecutions actually affords protection against treatment of a defendant as an enemy combatant. He contends that, under "the constitutional law of treason, any person who is potentially subject to an American treason prosecution," including noncitizens subject to allegiance to the United States, "must be tried in civilian court and may not be detained by the military as an enemy combatant or subjected to military tribunals." Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 867 (2006).

to Radical Jihadi," "Adam Gadahn: California Death Metal Fan Who Rose Quickly in Al-Qaida's Ranks," and "Azzam the American: the Making of an Al Qaeda Homegrown."[129] Articles opened with leads like, "Not so long ago, Adam Gadahn, who has both Jewish and Catholic ancestry, was growing up on a goat farm in Orange County, California."[130] They noted that Gadahn was a "a bright loner, a child raised by hippie parents on a remote, rustic Riverside County goat farm."[131] Media accounts appeared fascinated both by Gadahn's somewhat eclectic upbringing and the Americanness of the life that he rejected; the message is that Gadahn, before he became al Qaeda's mouthpiece, was "one of us."[132]

Media portrayals of Gadahn echoed much of the coverage of John Walker Lindh, another white man from California who had converted to Islam as a young person and fought with the Taliban before being captured in Afghanistan after 9/11.[133] Deemed the "American Taliban," Lindh was roundly denounced as a traitor, with legal commentators calling for him to be charged with treason.[134] Media stories dwelled on the white American from affluent Marin County, California, who had forsaken his liberal roots to become a "jihadist" and "holy warrior" abroad.[135] Ultimately, the government did not charge him with treason, a decision generally attributed to the difficulty of proving its legal requirements.[136] Lindh pled guilty to felony charges, including supporting

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[129] Jeanette Steele, *From Calif. Farm Boy to Radical Jihadi*, SAN DIEGO UNION-TRIB. (Apr. 23, 2015, 6:37 PM), https://www.sandiegouniontribune.com/military/sdut-adam-gadahn-al-qeada-drone-strike-killed-2015apr23-htmlstory.html [https://perma.cc/F39E-HPR5]; Jason Burke, *Adam Gadahn: California Death Metal Fan Who Rose Quickly in Al-Qaida's Ranks*, GUARDIAN (Apr. 23, 2015) https://www.theguardian.com/world/2015/apr/23/adam-gadahn-drone-strike-al-qaida [https://perma.cc/2Z8V-99RZ]; Raffi Khatchadourian, *Azzam The American: The Making of an Al Qaeda Homegrown*, NEW YORKER (Jan. 14, 2007), https://www.newyorker.com/magazine/2007/01/22/azzam-the-american [https://perma.cc/C7SP-Y9NN].

[130] Jennifer Hoar, *From Goat Farm to Treason Charge*, CBS NEWS (Oct. 12, 2006, 9:29 AM), https://www.cbsnews.com/news/from-goat-farm-to-treason-charge/ [https://perma.cc/P3LP-GU3Z].

[131] Steele, *supra* note 129.

[132] Of course, it is possible that these media accounts, written after Gadahn's indictment, were themselves influenced by the treason charge. In other words, while they reflect racialized perceptions that Gadahn was once "one of us," they may also reflect interpretations of betrayal to which the treason charge itself contributed. Here, too, racialization and law are mutually reinforcing, where racial stereotypes affect law, and law in turn affects those stereotypes.

[133] *See John Walker Lindh Profile: The Case of the Taliban American*, CNN, https://edition.cnn.com/CNN/Programs/people/shows/walker/profile.html [https://perma.cc/ME5N-YC8H].

[134] *See* Suzanne Kelly Babb, *Fear and Loathing in America: Application of Treason Law in Times of National Crisis and the Case of John Walker Lindh*, 54 HASTINGS L.J. 1721, 1722 (2003) (Note) (citing sources); *see also* Evan Thomas, *A Long, Strange Trip to the Taliban*, NEWSWEEK (Dec. 16, 2001, 7:00 PM), https://www.newsweek.com/long-strange-trip-taliban-148503 [https://perma.cc/6AG5-RXP5] (reporting that about 40% of Americans polled supported treason charges against Lindh).

[135] Thomas, *supra* note 134.

[136] *See id.* (noting the need for two witnesses to prove treason and the difficulty of relying on other Taliban fighters as witnesses); Babb, *supra* note 134, at 1735–36 (attributing difficulty of a treason charge to the need to prove that Lindh acted against the United States, with an intent to

the Taliban and carrying a grenade and rifle, and served seventeen years of his original twenty-year prison sentence.[137] But commentators contrasted his treatment—prosecution on criminal charges within the United States in an ordinary civilian court—with the treatment of Yaser Hamdi, a U.S. citizen captured in Afghanistan who was held as an enemy combatant for several years, including two years without access to a lawyer, before deportation to Saudi Arabia.[138] Lindh's whiteness and American upbringing may have simultaneously exposed him to calls for treason charges *and* accorded him rights denied a U.S. citizen of Arab ethnicity raised abroad.

In Gadahn's case, it is hard to say definitively how much of a role whiteness played in exposing him to treason charges, as opposed to nonwhite American Muslims who may have never been viewed as part of the nation to begin with. Certainly, there is an independent legal explanation for why Gadahn (and not others) faced treason charges: the fact that he appeared publicly in videotapes exhorting people to join al Qaeda may have made prosecutors more certain they could secure the testimony of two witnesses to convict him.

Moreover, as a historical matter, the U.S. government *has* prosecuted "racial outsiders" for treason, including Mexican residents of territories newly conquered in the Mexican-American war, Filipinos during the U.S. occupation of the islands, and Japanese Americans during World War II.[139] In some of these cases, it seems that treason charges were brought specifically because the defendants' race made it easy for white Americans, including jurors, to believe they would be disloyal. For example, Eric Muller has argued that both race and gender explain why three Japanese American sisters were convicted in 1944 of conspiracy to commit treason for helping their German lovers escape a prisoner-of-war camp.[140] Although there was no proof that they acted with an intent to betray the United States, as opposed to for romantic interests alone, Muller has argued that racialized and gendered assumptions led to their conviction.[141] "In the eyes of the twelve white men who judged them, it was their female susceptibility to seduction that

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betray the United States, and that his acts actually provided aid and comfort to U.S. enemies); Simpson, *supra* note 30, at 48 (arguing that there was "no clear evidence that [Lindh] levied war against the United States," as opposed to the Northern Alliance, and that he acted with the intent to betray the United States).

[137] Carol Rosenberg, *John Walker Lindh, Known as the 'American Taliban,' Is Set to Leave Federal Prison This Week*, N.Y. TIMES (May 21, 2019), https://www.nytimes.com/2019/05/21/us/politics/ american-taliban-john-walker-lindh.html [https://perma.cc/3AXA-52YV].

[138] *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Lichtblau, *supra* note 71. I thank Carlton Larson for flagging this comparison.

[139] Larson, *supra* note 10, at 87–90, 101–15, 149–61.

[140] Muller, *supra* note 97, at 1797.

[141] *Id.* at 1779, 1783–84, 1797.

unmoored them from their loyalty to America," Muller explained. "But it was their ethnicity—the 'undiluted racial strains' of affinity to Japan, as [the general who ordered the Japanese internment] had called them—that reattached their displaced loyalty to the cause of the Axis Powers."[142]

Just as nonwhite Americans in earlier eras were charged with treason, it is certainly possible to imagine a new administration deciding to charge treason against nonwhite or immigrant Americans specifically to stigmatize and exclude them. Indeed, a far-right member of Congress recently hurled treason accusations against Ilhan Omar, a Black and Muslim member of Congress, and called for her expulsion from the country.[143] Nonetheless, during the last two decades of the post-9/11 war on terror, the racial outsider status of U.S. Muslims may have made other labels—enemy combatants and international terrorists among them—more intuitive as a means to stigmatize and exclude. It is not that treason charges were, or are, literally inconceivable in the public imagination, but that the ready availability of terrorism charges may have captured societal othering of Muslims more so than treason. Ironically, and contra George Fletcher's theory, *illiberal* tendencies may thus partially explain the limited calls for treason charges to date in the war on terror.

IV. IMPLICATIONS FOR REIMAGINING NATIONAL SECURITY

The virtual absence of treason charges in the war on terror cautions against focusing exclusively on a single criminal frame in understanding the dangers of state responses to political violence. Whether treason or terrorism, particular charges for responding to political threats gain in prominence in particular contexts, alongside the growth of law enforcement, regulatory, and security infrastructure oriented towards that threat. When these responses become controversial for limiting rights or expanding too far, state responses may shift towards less tainted tools. But newer approaches may ultimately recreate the same problems, at least where historical patterns of "othering" nonwhite people continue to affect how the nation perceives and responds to threats. Reimagining national security requires awareness of the shape-shifting nature of state responses and the continuities that cut across contexts.

After more than twenty years of the global war on terror, many have called for it to end. The costs of that war are colossal: U.S. counterterrorism operations in seventy-eight countries, nearly a million

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[142] *Id.* at 1797.

[143] Philip Bump, *Greene Seizes on a Dubious Social Media Attack to Call for Omar's Deportation*, WASH. POST (Feb. 1, 2024, 3:34 PM), https://www.washingtonpost.com/politics/2024/02/01/omar-greene-somalia-censure-deportation/ [https://perma.cc/6GVD-993D].

deaths "in the post-9/11 wars due to direct war violence," and 38 million people displaced.[144] Within the United States, extensive state surveillance, racial and religious profiling, bloated terrorist watchlists, discriminatory immigration measures, the use of informants in FBI-orchestrated sting operations, and the broad use of material support to terrorism charges have curtailed rights and alienated communities for decades.[145]

At the same time, many rightly call for greater attention to white supremacist and anti-government violence of the kind that spawned the assault on the U.S. Capitol on January 6, 2021, and numerous mass shootings targeting racial and religious minorities. The Biden administration adopted a national strategy for countering domestic terrorism in 2021 and continues to prosecute defendants who heeded former President Trump's call to prevent the certification of Biden's electoral victory.[146] In this context, a debate continues over the value of enacting a new domestic terrorism charge and extending counterterrorism measures to other groups.

Like many civil rights advocates, I have argued against the enactment of new terrorism charges and cautioned against framing white supremacist violence as terrorism.[147] I argue that expanding the terrorism frame, even to white supremacists or others on the right, would

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[144] Costs of War, WATSON INST. INT'L & PUB. AFFS., BROWN UNIV., https://watson.brown.edu/costsofwar/ [https://perma.cc/4CCS-4L84].

[145] For a sample of the extensive literature by civil rights groups criticizing these and other policies on the twenty year anniversary of 9/11, *see* ASIAN AMERICANS ADVANCING JUSTICE - ASIAN LAW CAUCUS, UNCONSTITUTIONAL AND UNJUST: DISMANTLING 20 YEARS OF DISCRIMINATORY 'NATIONAL SECURITY' POLICY (2021), https://www.advancingjustice-alc.org/news-resources/guides-reports/unconstitutional-and-unjust-memo [https://perma.cc/48QP-YMVW]; BRENNAN CENTER FOR JUSTICE, 9/11 AT 20 (2021), https://www.brennancenter.org/series/911-20 [https://perma.cc/BT4K-RJMH] (compiling essays) Muzaffar Chishti & Jessica Bolter, *Two Decades after 9/11, National Security Focus Still Dominates U.S. Immigration System*, MIGRATION POL'Y INST. (Sept. 22, 2021), https://www.migrationpolicy.org/article/two-decades-after-sept-11-immigration-national-security [https://perma.cc/XD7Y-XEGB].

[146] Zolan Kanno-Youngs, *White House Unveils Strategy to Combat Domestic Extremism*, N.Y. TIMES (June 15, 2021), https://www.nytimes.com/2021/06/15/us/politics/biden-domestic-terrorism-extremists.html [https://perma.cc/Z644-E2LK]; Alan Feuer & Molly Cook Escobar, *The Jan. 6 Riot Inquiry So Far: Three Years, Hundreds of Prison Sentences*, N.Y. TIMES (Jan. 3, 2024), https://www.nytimes.com/interactive/2024/01/04/us/january-6-capitol-trump-investigation.html [https://perma.cc/D2K6-ANNK].

[147] Shirin Sinnar, *Rethinking our Counterterrorism Framework: How to Address Domestic Terrorism Twenty Years after 9/11*, AM. CONST. SOC'Y (Sept. 2021), https://www.acslaw.org/wp-content/uploads/2021/09/Sinnar-ACS-Issue-Brief-Final.pdf [https://perma.cc/C53U-LBG7]; Sinnar, *Hate Crimes*, *supra* note 28; Letter from Leadership Conf. on Civ. and Hum. Rts. to Members of Cong. (Jan. 19, 2021), https://civilrights.org/resource/135-civil-rights-organizations-oppose-a-new-domestic-terrorism-charge/ [https://perma.cc/T7PS-UV2U]; Letter from Vanita Gupta, President, Leadership Conf. on Civ. and Hum. Rts. (Sept. 6, 2019), https://civilrights.org/2023/12/14/the-leadership-conference-thanks-vanita-gupta-for-doj-service/ [https://perma.cc/UV8W-GLN9].

likely entrench the problematic systems of expertise, institutions, and policy surrounding terrorism.[148]

As significant as these risks are, "terrorism" is not the only category at issue. The Justice Department has charged members of militant groups like the Oath Keepers and Proud Boys with seditious conspiracy, a rarely used charge that criminalizes conspiracies to overthrow the government or forcefully prevent or delay the execution of the law.[149] One legal scholar argues that the seditious conspiracy statute in fact operates as a domestic terrorism law.[150] And other concepts like "insurrection" have reappeared in public debate, mostly as a means to disqualify former President Trump from running for president under the Fourteenth Amendment.[151] While "terrorism" may be the most prominent construct today for conceptualizing and responding to perceived threats of violence against the state, that may shift.

This Article does not attempt to judge the return of seditious conspiracy or insurrection. Political violence on the right is a real threat, and one not prone to the hyperbolics of historical tendencies to cast racial minorities and immigrants as dangerous. If anything, racial dynamics often lead us to underestimate that threat. But the same charges and practices built up on the premise of addressing real threats in narrow circumstances where they may be justified can easily be redeployed against others on illegitimate grounds. Unraveling the purposes, benefits, and risks of these new/reemerging categories is urgent in light of the seriousness of the threats to democracy and longstanding historical patterns, including those addressed in this Article.

The two-decade-long post-9/11 war on terror—capping several decades of development of the terrorism idea and corresponding counterterrorism institutions—shows how one construct can rise after another recedes. This is not a simple causal story in which terrorism displaced treason, not least because treason charges had fallen into disuse for several decades before 9/11. But a partial explanation for treason's virtual absence in the war on terror is that the government has

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[148] *See generally* Sinnar, *Hate Crimes*, *supra* note 28.

[149] 18 U.S.C. § 2384; *see also* Alanna Durkin Richer & Lindsay Whitehurst, *What Seditious Conspiracy Means in Proud Boys' Jan. 6 Case*, ASSOCIATED PRESS (May 4, 2023, 3:15 PM), https://apnews.com/article/proud-boys-seditious-conspiracy-explained-207f7ca08d7c30d3cb28127eb9992bca [https://perma.cc/2RBC-K8JS] (describing the seditious conspiracy cases).

[150] Alan Z. Rozenshtein, *Seditious Conspiracy is the Real Domestic Terrorism Statute*, LAWFARE (Apr. 7, 2022, 10:48 AM), https://www.lawfaremedia.org/article/seditious-conspiracy-real-domestic-terrorism-statute [https://perma.cc/75MU-AR7R] ("[M]uch of the substance of a domestic terrorism statute is already covered by and prosecuted under the crime of seditious conspiracy.").

[151] *See* Trump v. Anderson, 601 U.S. 100 (2024) (rejecting Colorado Supreme Court's disqualification of former President Trump from the 2024 presidential race on the grounds that only Congress, not an individual state, can disqualify candidates under the Fourteenth Amendment).

alternative, and in key respects more powerful, tools for suppressing political threats, both real and inflated.

Others have pointed out the more general tendency of criminal charges to shift in response to controversies that impose constraints on political offenses. In a study of several English-speaking jurisdictions, Australian legal scholar Michael Head surveys "crimes against the state" including "subversion, rebellion, treason, mutiny, espionage, sedition, terrorism, riot and unlawful assembly."[152] He observes a "replacement over a period of time of prosecutions for one offense by arrests for another once legal or political impediments emerged to the initial prosecutions."[153] As an example, he cites legal scholar Philip Hamburger's argument that seditious libel law became England's chief means of suppressing the press in the eighteenth century because other charges, like treason and licensing violations, had become too controversial or ineffective.[154]

Some might see these shifts as salutary and even intended by the constitutional design. Constitutional drafters and jurists made treason narrow, the argument goes, knowing full well that other alternatives would preserve the government's ability to meet real security threats. But the question is, at what point do those alternatives recreate so many of treason's flaws—or that of any other problematic construct, including terrorism—that they undercut the objective of narrowing in the first place?

In the case of terrorism, we have gone far beyond that point: terrorism charges in their current form sweep too broadly in targeting people on the basis of perceived future dangerousness and subjecting individuals to severe sentences in excess of their actions—all along racialized lines. With respect to other charges that are new or reemerging, legal scholars and policymakers have just begun to assess the question. That assessment is critical. Reimagining national security requires vigilance to avoid replacing one problematic construct with another that may become equally pernicious.

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[152] MICHAEL HEAD, CRIMES AGAINST THE STATE: FROM TREASON TO TERRORISM 1 (2011).

[153] *Id.* at 9.

[154] *Id.* at 22 (citing Philip A. Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661, 662–63 (1985)).