PERSPECTIVES ON TERRORISM

RESEARCH ARTICLE

Prosecuting Terror in the Homeland: An Empirical Assessment of Sentencing Disparities in United States Federal Terrorism Cases

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Abstract: Recent mass casualty attacks in the United States have renewed a long-standing debate over the need for novel legislation to effectively prosecute domestic terrorism. Those who advocate for a new terrorism law argue that deficiencies in the US legal code present challenges to prosecuting domestic extremists, leading to unwarranted sentencing disparities in international and domestic terrorism cases. Critics of the proposal for a domestic terrorism law counter that the US legal code is sufficiently flexible for the courts to punish domestic extremists to the same extent as their international counterparts. Neither side, however, has produced an empirical assessment to support their claims. In this article, we address this research gap by analysing data on 344 US federal terrorism cases that were initiated between 2014 and 2019. We find that significant disparities are endemic to US federal terrorism prosecutions for three types of sentencing outcomes: length of incarceration; time spent on supervision upon release from prison; and the use of restrictive monitoring conditions. International terrorism defendants are more likely than domestic extremists to receive severe penalties for all three sentencing decisions even when controlling for criminal severity. Sentencing disparities in US federal terrorism cases are especially large when domestic extremists are prosecuted using common criminal charges, like weapons violations. We conclude with a discussion of what these findings mean for promoting judicial fairness in US terrorism prosecutions.

Keywords: Domestic terrorism, international terrorism, terrorism laws, prosecuting terrorism, sentencing

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Introduction

On his first day in office as President, Joe Biden instructed his national security team to provide recommendations for combating extremism in the United States, resulting in the first-ever national strategy for countering domestic terrorism.[1] When issuing his order, President Biden referred to domestic extremism as the "most urgent terrorism threat the United States faces."[2] The President's remarks reflect a belief held by many national security officials that domestic extremism is on the rise.[3] The Federal Bureau of Investigation (FBI) and Department of Homeland Security (DHS) illustrated this trend in their most recent joint report to Congress, noting that there has been a substantial expansion in the number of federal terrorism investigations, with nearly all of the increase being attributed to domestic terrorism inquiries.[4] Similarly, data show that more than 90 percent of the individuals who were charged in the United States between 2019 and 2022 for committing extremist crimes were connected to domestic extremist groups, such as white supremacist and nativist organisations, anti-government militias and the sovereign citizen movement, and fringe conspiracy theories.[5] All 22 of the mass casualty terrorist attacks committed in the United States from 2019 to 2022 were perpetrated by domestic extremists.[6]

While a host of legal statutes were passed after the September 11, 2001 (9/11) attacks to prosecute international terrorism, the rise in domestic extremism has not led to a similar process of revising the US legal code.[7] US authorities continue to face obstacles to prosecuting domestic terrorism that are not present in cases involving foreign terrorist groups.[8] For instance, terrorism charges like 18 USC §2339A (Providing Material Support to Terrorists) and 18 USC §2339B (Providing Material Support to Designated Terrorist Organisations) carry stiff penalties and often result in prison sentences of twenty years or more.[9] However, because of the requirement that an offence has an international nexus, as in the case of §2339B, or the nature of the enumerated crimes that can trigger the charges, as in the case of §2339A, prosecutors often cannot use them in domestic terrorism cases.[10] Instead, federal authorities often have to charge domestic extremists with more typical crimes, such as weapons violations or making criminal threats. In some cases, the Department of Justice has even had to utilise statutes designed to undermine the Mafia to prosecute domestic extremists.[11]

The lack of punitive, federal statutes designed explicitly for domestic terrorism has led to intense debate among legal experts over the need for new legislation.[12] Those who advocate for a new domestic terrorism law claim that the lopsided use of terrorism statutes in international terrorism cases often results in unwarranted sentencing disparities.[13] Sinnar, for example, notes that "...the uneven coverage of federal terrorism law means that a severe federal sentencing enhancement disproportionately applies to cases with an international nexus."[14] Those who advocate for new terrorism legislation claim that legal revisions are necessary to promote judicial fairness, address sentencing disparities, and deter individuals from engaging in domestic extremism.[15] Opponents of a new domestic terrorism law argue that

the flexibility of the US Code allows the courts to punish domestic terrorists to a similar extent as their international counterparts.[16] They also warn that a domestic terrorism statute could be used to target political opponents, including historically underserved communities and peaceful political protesters.[17] While the debate over novel terrorism legislation often focuses on judicial fairness, neither side has provided an empirical analysis that explores the scale of sentencing disparities in US terrorism prosecutions.[18] It is currently not possible to say if significant sentencing gaps are common in terrorism cases, how large they are, or whether the legal code is to blame. The lack of an empirical baseline demonstrating how the use of different laws in terrorism prosecutions influences judicial outcomes has prevented both sides in the debate from engaging in a productive dialogue about how best to counter the rise in domestic terrorism without infringing on civil rights and liberties.

This article contributes to the debate by providing an empirical assessment of sentencing outcomes in 344 US federal terrorism prosecutions that were initiated between 2014 and 2019. We find that significant disparities are endemic to federal terrorism cases for three types of sentencing outcomes: incarceration length; time spent on post-incarceration supervision; and the use of restrictive monitoring conditions after release from federal prison. International terrorism defendants are significantly more likely to receive severe penalties on all three outcomes when compared to domestic extremists who commit similar crimes. Moreover, while some observers suggest that the current legal code is effective for prosecuting domestic extremism, we find that sentencing disparities are especially large when more common charges are used in cases of domestic terrorism.

These results suggest that new legislation may be necessary to address judicial inequities in US federal terrorism prosecutions. While some of the observed sentencing gaps in terrorism cases could be addressed by using existing hate crime statutes, significant obstacles exist to applying these charges to domestic terrorism cases. Absent changes in how judges perceive threats to public safety and how prosecutors make decisions, existing laws are unlikely to produce judicial fairness in US terrorism cases.

The Current Legal Regime

Any debate about the need for a domestic terrorism statute must consider the efficacy of the current legal regime, which includes several laws for prosecuting individuals who provide support to terrorists. Originally enacted after the 1993 World Trade Centre bombing and later expanded after the 9/11 attacks, the material support charges codified in 18 USC §2339A-D have become important tools for prosecutors building cases against defendants accused of committing acts of international terrorism.[19] Material support laws significantly lower the bar for establishing a terrorism prosecution because they do not require that an individual participate in a specific crime or even know that a crime has occurred. For example, §2339B

requires only that an individual knowingly aid a group that has been designated as a foreign terrorist organisation by the US Secretary of State.[20] Aid can include financial help; sending weapons or fighters overseas; or providing lodging, transportation, or expertise to someone acting on a group's behalf in the US or abroad.[21] The statute's guidelines recommend a prison sentence of up to twenty years and they do not require that the defendant participate in a violent plot, making it an especially powerful tool for securing significant punishments in cases involving less serious criminal behaviours. Although the substantial prison sentences that accompany material support charges have been the subject of important debates about the ethical treatment of US defendants,[22] they have been effective in promoting specific deterrence. The recidivism rate for more ordinary types of crime in the United States is often greater than 50 percent,[23] but it is estimated at just 3 percent for individuals convicted of international terrorism.[24] In addition to their punitive effects, material support charges are commonly used in international terrorism prosecutions because the requisite elements of the offences are easy to prove, and convictions can result in reduced resources available to terrorist organisations.[25]

While §2339B and a companion statute that makes it a crime to receive military training from a terrorist organisation require that the offence in question have a nexus to international terrorism, the other material support charges codified in the US legal code do not.[26] For instance, §2339A only requires that the case involve a federal crime of terrorism, which is defined as an act "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct."[27] The predicate offence list attached to §2339A includes over 50 crimes, ranging from conspiring to use a weapon of mass destruction to computer hacking to producing deadly viruses.[28] Similar rules apply to the use sentencing enhancements in terrorism cases, the most common of which is §3A1.4 (Terrorism). The enhancement, which is found in the US sentencing guidelines provided to the federal courts, can be used in any case that meets the legal definition of terrorism, and it sets the minimum sentencing guideline to 17.5 years in prison and assigns the defendant a criminal history score that is typically used for career offenders.[29]

While there is no *a priori* reason why §2339A and related terrorism enhancements cannot be used in domestic terrorism prosecutions, critics of the current legal regime have noted that the statutes are typically only applied to cases of international terrorism.[30] Mary McCord, a former Department of Justice prosecutor, attributes the non-use of §2339A in domestic extremism prosecutions to the fact that the most common form of terrorism in the US – plots involving the use of firearms against civilian targets – is not on the list of enumerated crimes that can trigger the charge.[31] This is also true of 18 USC §2332A (Use of Weapons of Mass Destruction) because firearms are not included among the destructive devices listed in section 921 of the legal code.[32] Prosecutors must look for alternatives when building cases against domestic extremists who plot attacks using firearms. These cases often result in the use of more typical charges, like 18 USC §922 and 18 USC §924, which make it a crime to possess an unregistered firearm, and for

convicted felons to own a gun of any kind. Charges like these do not reflect the defendants' terrorist intentions, and they can carry weaker penalties than terrorism laws. Indeed, non-terrorism charges typically have wide sentencing guideline ranges, and they usually reserve the harshest penalties for repeat offenders.[33]

Finally, the US code includes several statutes and sentencing enhancements for prosecuting hate crimes that can result in significant prison terms. While these statutes can be used in cases of domestic terrorism that involve the deliberate targeting of victims based on protected identity characteristics, hate crime charges and sentencing enhancements are systemically under-utilised in cases with a clear bias motivation.[34] Definitional ambiguity and the high *mens rea* requirements for establishing a hate crime prosecution mean that prosecutors typically favour charges that are easier to prove.[35] In all but the most obvious cases (i.e., those that result in mass fatalities), this type of prosecutorial decision-making carries over to domestic terrorism cases.[36] As we demonstrate below, hate crime charges have only been used in 5 percent of recent domestic terrorism prosecutions, and less than 9 percent of prosecutions that involved defendants with links to white supremacy.

The Debate Over a New Domestic Terrorism Law

Following the 2017 Unite the Right rally in Charlottesville, Virginia, and the mass killing of Jewish worshippers at the Tree of Life Synagogue in 2018, legal observers began advocating for domestic terrorism legislation, noting that none of the neo-Nazi and white supremacist-affiliated individuals who participated in the deadly events were likely to be prosecuted as terrorists in federal court.[37] Renewed calls for a domestic terrorism law were made in the aftermath of the January 6, 2021, attack on the US Capitol, in which thousands of demonstrators, including hundreds with links to extremist groups, battled with police and destroyed government property in an attempt to stop the peaceful transfer of presidential power.[38] Legal advocates again pointed to deficiencies in the US code that would make it difficult for prosecutors to try the Capitol rioters as domestic terrorists – an argument that was subsequently shown to be true.[39] Of the more than 1200 people who have been charged in connection with the Capitol attack, none have been prosecuted using material support charges, and only a handful have had a terrorism enhancement applied to their cases.[40] Even the rioters who were convicted of seditious conspiracy for orchestrating the attack on January 6 avoided being prosecuted as terrorists.[41]

The calls for a new terrorism law have coincided with an increase in domestic extremist activity in the US. For instance, the Profiles of Individual Radicalization in the United States (PIRUS) database, which tracks US criminal cases linked to extremism, shows that 57 percent of the extremist crimes committed in the United States between 2010 and 2016 were connected to domestic terrorism.[42] From 2017 to 2022, domestic extremist crimes rose to 91.7 percent of all

cases included in the data. In 2022, crimes linked to domestic terrorism made up 95.4 percent of the cases added to the PIRUS database.

Proponents of a domestic terrorism law argue that the legal code perpetuates racial and religious biases in the judicial system by reserving the harshest punishments for international terrorists, who tend to be non-White and non-Christian.[43] Given the uneven use of terrorism laws in federal prosecutions, legal advocates assume that unwarranted sentencing disparities are the norm in terrorism cases.[44] This extends to the use of capital punishment, as jurors are often instructed to treat premeditated acts of terrorism as an aggravating factor when deciding whether to sentence a defendant to death.[45]

Critics of the proposal for a new domestic terrorism law counter that the US code gives prosecutors the tools they need to hold domestic terrorists accountable for their crimes.[46] They often point to a diverse set of conspiracy charges and more ordinary criminal statutes to support their claim, noting that the laws are broad in applicability, are familiar to judges and juries, and do not require prosecutors to prove what is and is not terrorism.[47] Implicit in this line of argument is the assumption that these laws are sufficient for punishing domestic extremists to the same extent as international terrorists.

Critics also see a darker side to proposed domestic terrorism legislation. Following the Capitol riot, more than 150 civil rights organisations signed a letter to Congress opposing a domestic terrorism law, claiming that revisions to the legal code could allow law enforcement and prosecutors to unfairly target the Black Lives Matter movement and other peaceful political demonstrators.[48] Michael German, a former FBI agent and current researcher at the Brennan Centre for Justice, has similarly warned about the potential for a new terrorism law to be abused, arguing that federal prosecutors often make decisions that reflect their political biases rather than the need to ameliorate the greatest threats to public safety. German notes that as the highly lethal far-right movement was growing in the early 2000s, the FBI labelled environmental activists the number one domestic terrorism threat in the US. At the same time, federal prosecutors vigorously used the Animal Enterprise Terrorism Act to prosecute property crimes related to the animal rights movement.[49] More recently, critics have pointed to the use of state-level domestic terrorism laws as evidence of how a federal law could be misused to silence political dissent. For example, prosecutors in Georgia are trying 23 non-violent demonstrators as domestic terrorists for their roles in protesting the construction of a police training facility outside of Atlanta.[50]

Both sides in the debate over a domestic terrorism law share concerns about the rising tide of extremism in the United States and the importance of protecting legal activism. However, they appear to be at an impasse about how best to achieve their common goals. One reason for the stalemate is that the debate is too often based on implicit assumptions about the legal outcomes

of terrorism cases.[51] Those on the side of passing a domestic terrorism law have not used sentencing data to demonstrate that disparities are typical in terrorism prosecutions, or that they are the product of the legal code. Without an empirical baseline that demonstrates judicial inequalities in the prosecution of terrorism, critics of the proposal for a domestic terrorism law quickly dismiss the idea and the problem it is intended to solve. For their part, opponents of the new legislation have not taken the opportunity to bolster their claims by demonstrating that ordinary laws are used to punish domestic terrorists to the same extent as their international counterparts. Critics assume, rather than demonstrate, that prosecutors exploit the flexibility of the legal code to charge domestic terrorists with crimes that carry penalties like those issued in international terrorism cases. For the debate to move forward, it needs to be based on a shared empirical understanding of the consequences of using different laws to prosecute people who engage in similar extremist crimes. The remainder of this article attempts to fill this gap by analysing the sentencing outcomes of more than 340 recent federal terrorism prosecutions.

Data

The data used in this study come from the PIRUS project, which is a suite of de-identified, cross-sectional datasets on the radicalisation characteristics and social networks of US extremists.[52] The PIRUS datasets are coded using open sources and contain dozens of variables on a wide range of radicalisation characteristics and extremist events, including violent plots and attacks, extremist networks, and factors relevant to radicalisation processes, such as demographics, family characteristics, and personal histories. The datasets that make up the PIRUS portfolio include cases representing the far-right, far-left, Jihadist, and single-issue milieus.

For this article, we analysed federal terrorism prosecutions that were initiated between 1 January 2014 and 31 December 2019.[53] We chose the end of 2019 as the cut-off for case inclusion to maximise the odds that the final data would include a set of federal terrorism cases for which sentencing decisions have been made. Including more recent years in the study could bias the data by excluding high-profile domestic terrorism cases that are still being adjudicated. These cases often involve the use of mass casualty violence, and they can take years to work their way through the federal court system.[54] They are also the cases that have the greatest potential to include the use of terrorism or hate crime charges, and to result in significant judicial punishments. Including more recent years in the data, therefore, could skew the sample of domestic terrorism cases towards less severe crimes and lead to overestimating sentencing disparities in federal terrorism prosecutions. We included all federal terrorism cases initiated during this period with two exceptions. First, narco-terrorism cases were not included because they do not satisfy the PIRUS inclusion requirement that crimes be primarily motivated by ideological goals. Second, individuals who travelled overseas to join foreign terrorist groups but did not commit additional crimes within the territorial boundaries of the US, were excluded from the study. Since international terrorism prosecutions typically involve the use of charges

that are not applicable to, or are rare in, domestic terrorism cases, examining sentencing disparities in federal terrorism cases requires comparing defendants who engaged in the same criminal behaviours. The act of travelling abroad to join a designated terrorist group does not have a domestic terrorism equivalent, making it impossible to compare the legal cases of foreign fighters to a cognate group of domestic terrorism defendants. Other types of material support were included in the data if the crimes are not unique to one type of terrorism prosecution. For instance, both international and domestic extremists have committed financial crimes to fund terrorist groups or pay for the materials needed to commit violent attacks. These types of material support cases were included in the data.

We classified cases as terrorism prosecutions if they resulted in federal criminal charges and met the PIRUS inclusion criteria, which require that the defendants were radicalised in the US and that there is clear evidence their criminal activities were the result of ideological motives, including the pursuit of political, economic, social, or religious goals. International terrorism prosecutions are cases where the defendants had links to, or were acting in support of, terrorist groups and movements whose bases of operation are located outside of the US.[55] Most of these groups appear on the Foreign Terrorist Organisations (FTO) and Specially Designated Global Terrorist (SDGT) lists maintained by the US State Department and the Department of the Treasury. All international terrorism cases from this period are classified in PIRUS as Jihadist. Unlike international terrorism, the US government does not maintain a list of officially designated domestic extremist groups that we could use to help in the identification of domestic terrorism prosecutions.[56] Thus, to identify domestic terrorism cases, we reviewed all subjects in the PIRUS data to determine if they were acting on behalf of groups or movements that pursue broad political, social, economic, or religious goals and operate primarily within the territorial jurisdiction of the US.[57] This resulted in the inclusion of 185 prosecutions that we classified as far-right, 22 that we coded as far-left, and nineteen that we categorised as single-issue. The final dataset includes 344 federal terrorism prosecutions – 226 domestic terrorism cases and 118 cases of international terrorism.[58]

We next added 25 variables to PIRUS that capture the courtroom and sentencing phases of terrorism cases. First, the legal statutes used in the prosecutions were coded, including the use of terrorism charges (e.g., §2339A, §2339B, §2339C, §2339D, §2332A, and §2332B). Second, cases were coded for several pre-sentence variables, such as where the cases were prosecuted, plea agreements, convictions by jury or bench trial, and whether some or all charges were dropped. Third, incarceration variables were added to the data, including the in/out decision (i.e., whether an individual was given a custodial sentence as opposed to probation), incarceration length, and whether prosecutors sought terrorism or other sentencing enhancements (e.g., §3A1.1, §3A1.2, and §3A1.4). Incarceration length and length of federal supervision were coded in months. Following the practice established by the US Sentencing Commission, defendants who were given life sentences were coded as receiving 470 months in federal prison.[59] Finally,

each case was coded for several post-incarceration variables, including length of federal supervision, access to rehabilitation services, and the use of restrictive supervision conditions, such as internet or GPS location monitoring, polygraph testing, and no-contact orders. These conditions are dichotomous measures in the data indicating whether they were present or absent.

The values for these variables were drawn from federal court documents, including indictments, plea agreements, sentencing memoranda, and judgments. To accurately compare these values for similar sets of international and domestic terrorism cases, we matched defendants using a typology of criminal behaviours and outcomes. For example, if two terrorism defendants—one international and one domestic—stockpiled weapons for future attacks, they were assigned to the same crime category, regardless of the actual charges they faced. As we noted above, this was done because international and domestic extremists are typically prosecuted using different legal statutes, making it impossible to compare similar terrorism cases by grouping them according to criminal charges.

Each case in the data was assigned to one of the following crime types: (1) successful attacks resulting in deaths; (2) successful attacks resulting in injuries only; (3) successful attacks resulting in property damage only; (4) violent attacks that were attempted but failed due to perpetrator error; (5) foiled violent plots in which the perpetrators successfully acquired weapons; (6) foiled violent plots in which the perpetrators failed to acquire weapons; (7) foiled violent plots in which the perpetrators identified targets but did not attempt to acquire weapons; (8) foiled non-violent plots to damage property; and (9) non-violent material support in the form of terrorist financing, making false statements, and illegally possessing weapons. We coded attacks as successful if the perpetrators deployed weapons against targets. Plots were coded as "foiled" if the defendants were interdicted by law enforcement while planning and preparing to commit attacks.

Findings

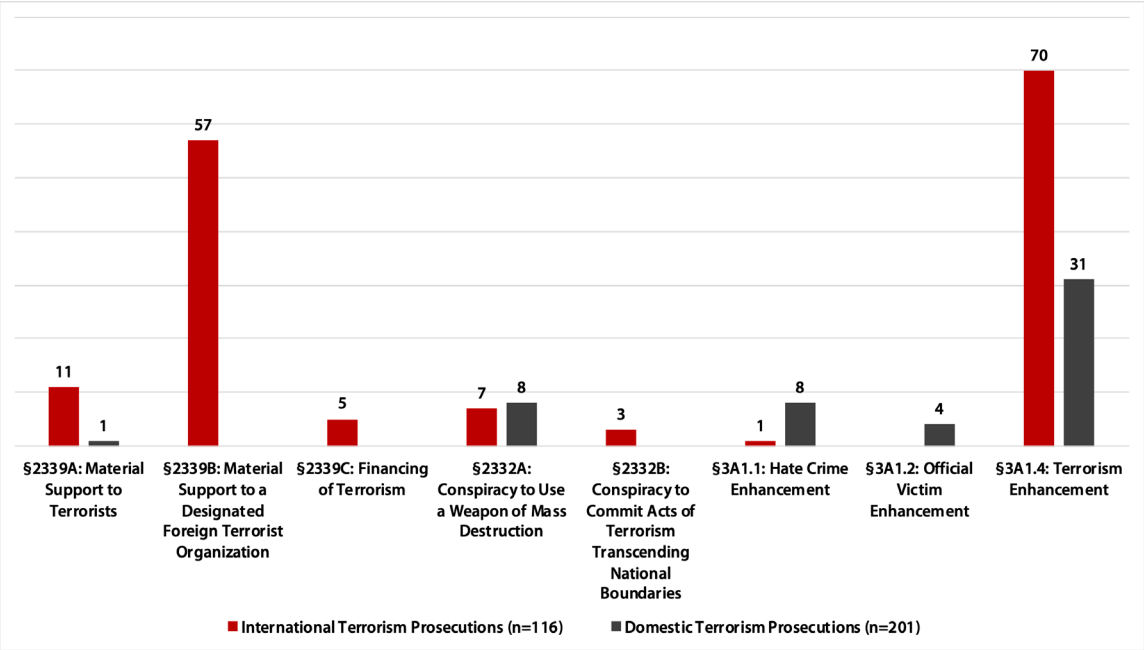
The Use of Terrorism Charges and Sentencing Enhancements

For prosecutions initiated between 2014 and 2019, terrorism charges were disproportionately used in international terrorism cases (see Figure 1).[60] International terrorism defendants were the only subjects in the data who pleaded guilty to, or were convicted of, §2339B, which is limited to cases where the accused acted in support of a designated foreign terrorist organisation. Domestic extremists operating in the US often have links to terrorist groups abroad, such as European neo-Nazi organisations, but these entities do not appear on the FTO or SDGT lists.[61]

By comparison, most international terrorism prosecutions involved defendants who had links to, or were inspired by, groups on these lists, such as the Islamic State of Iraq and Syria (ISIS)

and al-Qaeda and its various affiliates. Approximately 50 percent of international terrorism defendants prosecuted during this period pleaded guilty to, or were convicted of, §2339B.

Figure 1. Frequency of Terrorism Charges in Federal Prosecutions



Somewhat more surprising, §2339A, which does not require that a crime have an international nexus, was rarely used during this period. The statute was used to prosecute 11 (9.5 percent) international terrorism defendants, six of whom were involved in the same criminal scheme to provide money, weapons, US military uniforms, and tactical gear to a friend who was fighting for ISIS in Syria.[62] The statute was only used to prosecute one (0.05 percent) domestic terrorism defendant who was involved in a plot with their significant other to attack an oil pipeline.[63]

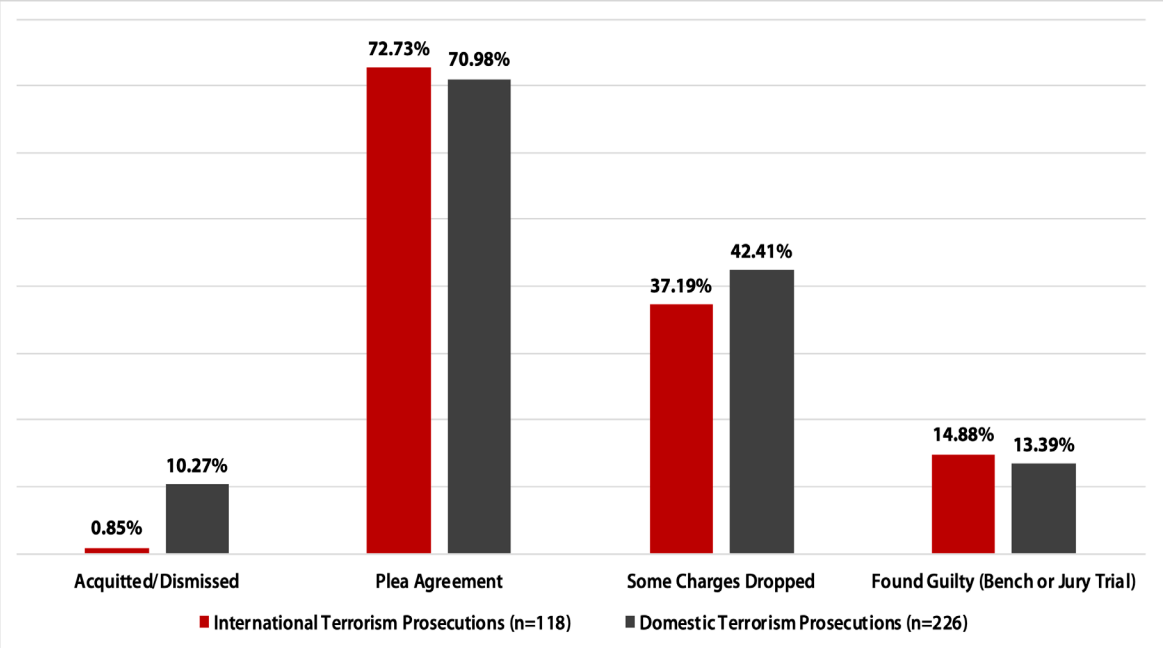
Conspiracy to use a weapon of mass destruction (§2332A), which is commonly included in discussions of terrorism offences, was also used sparingly during this period. The statute was used to prosecute fifteen terrorism defendants – eight domestic extremists and seven international terrorists. The defendants were involved in eleven unique plots, all of which involved attempts to acquire and use explosive devices. Only Ahmad Khan Rahimi, who committed several ISIS-inspired bombings in New York that injured more than 30 people, was successful in perpetrating attacks.[64] All told, 65 percent of international terrorism defendants pleaded guilty to, or were convicted of, one or more terrorism charges. However, only 4.5 percent of domestic terrorism defendants were prosecuted for committing terrorism offences. Instead, domestic extremists faced a wide array of charges that are not specific to crimes of terrorism. The most common of these were 18 USC §922 and 18 USC §924 (22 percent of cases), which involve the illegal use or possession of firearms, and 18 USC §875 (14.4 percent of cases), which makes it a crime to transmit threats across state lines. Conspiracy charges, which have been praised for their broad applicability to cases of domestic terrorism,[65] were only used to secure guilty pleas or convictions

in fifteen (7.5 percent) domestic terrorism prosecutions. Similarly, hate crime charges were only used in ten (5 percent) domestic terrorism prosecutions that resulted in guilty pleas or convictions.[66] Only eight (8.4 percent) defendants associated with white supremacist or neo-Nazi groups were prosecuted using hate crime charges. An analysis of the use of a terrorism sentencing enhancement under §3A1.4 reveals similar results. The enhancement, which does not require a transnational element to the crime, was requested far more often in international terrorism prosecutions. Prosecutors sought a sentencing enhancement under §3A1.4 in approximately 60 percent of international terrorism cases, but only requested similar penalties in 15.4 percent of domestic terrorism cases. Other sentencing enhancements, such as §3A1.1 (hate crime enhancement) and §3A1.2 (official victim enhancement), were seldom requested in either international or domestic terrorism prosecutions.

Case Disposition

Notable disparities in the outcomes of US criminal cases often occur before any decisions about incarceration are made. The choice of prosecutors to negotiate plea agreements with some defendants but not others can contribute to inequities in the judicial system.[67] Similarly, the decision of juries to acquit some defendants while convicting others can be influenced by factors that are exogenous to the case, such as race and gender.[68] The cases we reviewed, however, generally did not display notable disparities in these areas (see Figure 2). Roughly the same percentage of domestic and international terrorism defendants were offered, and accepted, plea agreements. Both types of defendants typically had one or more of their charges dropped by prosecutors as part of plea deal negotiations. Similarly, defendants who opted for jury or bench trials were convicted at similar rates, regardless of whether they were being accused of domestic or international terrorism.

Figure 2. Comparison of Case Outcomes



The only part of the pre-sentence process that displayed significant differences between international and domestic terrorism cases was acquittals. Domestic terrorism defendants were more than 10 times as likely to be acquitted of their charges. Only one international terrorism defendant was acquitted during the six-year period we reviewed, while 23 domestic terrorism defendants were deemed not guilty or had their cases dismissed. This potentially points to a significant type of legal disparity in federal terrorism cases, but it is important to note that the acquittals of domestic extremists during this period were highly concentrated in just two events. All but four of the domestic extremists who received acquittals or dismissals were accused of crimes related to the 2014 armed standoff at the Bundy ranch in Bunkerville, Nevada, and the 2016 occupation of the Malheur National Wildlife Refuge in Oregon. Both events involved rancher Cliven Bundy's family and their supporters in the anti-government movement confronting federal authorities over perceived government overreach.[69] Members of the Bundy family who were indicted for their roles in the ranch standoff walked free from a federal courthouse in 2018 after the judge in the case determined that the prosecution withheld evidence from the defence.[70] In the Oregon case, jurors decided that the government did not prove beyond a reasonable doubt that the occupation was the result of a criminal conspiracy to keep federal employees from doing their jobs.[71] When these cases are removed from consideration, the rate of acquittals in domestic terrorism prosecutions drops from 10.3 percent to 1.9 percent.

The In/Out Decision and Incarceration Length

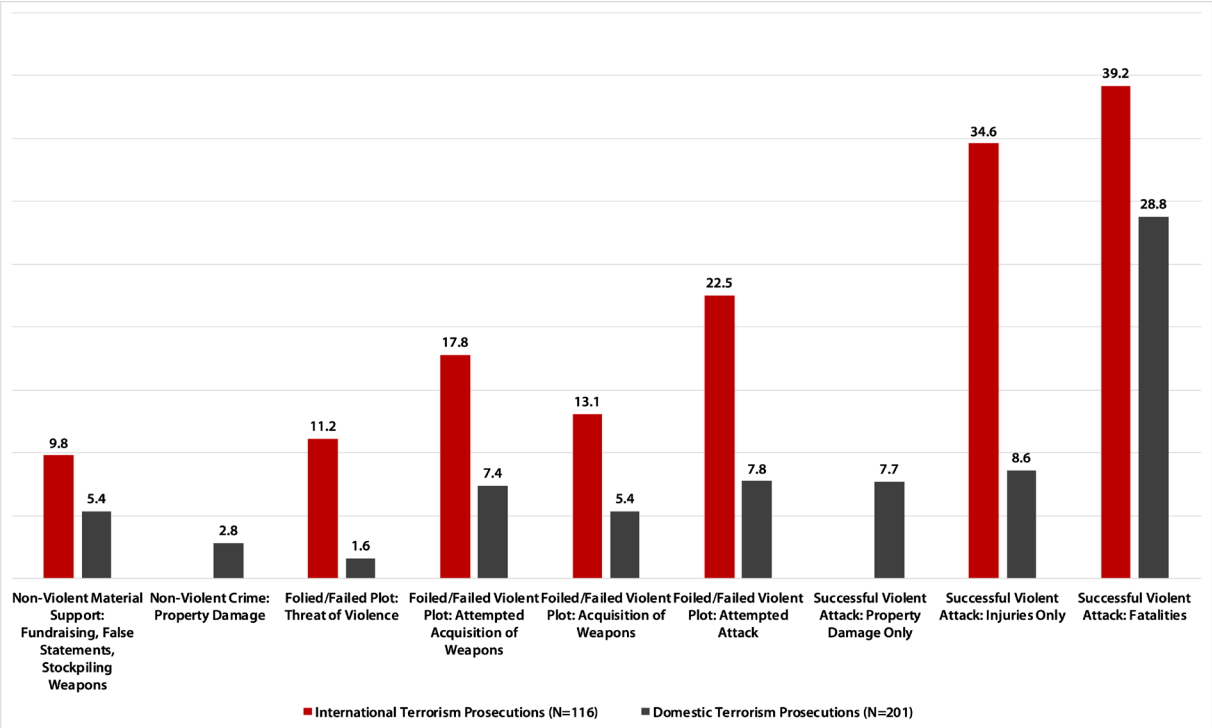
Research on the judicial outcomes of typical criminal cases commonly highlights the "in/out" decision – whether an individual is required to serve time in prison or is given a non-custodial sentence – as a potential area of inequities in the judicial system.[72] Indeed, when comparing defendants who committed similar crimes, studies show sentencing inequalities to be more common for the in/out decision than for incarceration length.[73] Two findings about the in/out decision in federal terrorism cases are worth noting. First, non-custodial sentences were uncommon (8.2 percent of all prosecutions) in the cases we reviewed, and they were only issued after guilty pleas. However, none of the defendants who received non-custodial sentences pleaded guilty to terrorism charges.

Second, significant inequalities were evident when comparing defendants who were given non-custodial sentences to defendants who were ordered to serve time in federal prison. Non-custodial sentences were given to domestic terrorism defendants at more than double the rate they were issued in international terrorism cases (12 percent vs 5 percent, respectively). Moreover, every international extremist who was given a non-custodial sentence pleaded guilty to a non-violent crime, such as making false statements to law enforcement about their support for foreign terrorist groups.[74] The international extremists who were prosecuted for plotting violent attacks were all sentenced to serve time in federal prison, regardless of how far they progressed in their criminal schemes. By comparison, 42.9 percent of the domestic terrorism

defendants who were given probation rather than time in prison threatened to commit violent attacks.[75] While none of these cases resulted in casualties, some plots were relatively mature, including two cases in which prosecutors alleged that the defendants had acquired weapons and selected targets for mass shootings.[76]

Significant disparities were also evident in how much time the defendants were sentenced to serve in federal prison. International terrorism defendants received average federal prison sentences that were more than double those given to domestic extremists (13.9 years vs 6.3 years, respectively). With that said, a potential limitation of comparing the aggregate average sentence lengths of the two populations is that it does not account for the role that criminal severity plays in driving sentencing decisions.[77] If international terrorism defendants are more often involved in violent crimes, then we might expect them to serve more time on average in federal prison. However, significant disparities were found in the prison sentences issued to international and domestic extremists even when controlling for crime severity (see Figure 3). International terrorism defendants were sentenced to serve more time in federal prison than domestic extremists for all crime types described above except for non-violent and violent attacks that resulted in property damage only – crimes and outcomes for which there were no international cases.

Figure 3. Length of Incarceration in Years by Crime Severity



Disparities in sentence length were especially large in cases involving subjects who plotted, but failed, to commit violent attacks. International terrorism defendants involved in these types of plots received average prison terms of 11.2 years, while domestic extremists who engaged in similar schemes were, on average, sentenced to just 1.6 years in prison. The uneven use of

terrorism laws appears to be a significant contributor to the lopsided prison sentences issued in these cases. For example, 64.1 percent of the international terrorism defendants who were involved in foiled or failed violent plots pleaded guilty to, or were convicted of, terrorism charges. These defendants received average prison sentences of 19 years. Domestic extremists who plotted similar attacks were most commonly (29.4 percent) prosecuted for making interstate threats and were sentenced to 2.7 years in prison on average.[78] Only 9.8 percent of domestic terrorism defendants who plotted foiled or failed attacks were prosecuted using terrorism charges.[79] Importantly, however, the sentencing gaps with international terrorism defendants were eliminated in these cases, with the average defendant receiving 19.7 years in prison.

Drastic disparities in the length of incarceration were also observed in cases involving defendants who committed attacks that resulted in casualties. In cases involving at least one victim injury but no deaths, international terrorism defendants were sentenced on average to 34.6 years in prison – a more than fourfold increase over their domestic extremist counterparts, who received average prison terms of 8.6 years. Even crimes that resulted in victim fatalities displayed notable sentencing disparities. International terrorism defendants who were accused of killing at least one person were ordered to spend approximately ten more years in prison on average than domestic extremists who committed similar attacks. Relatedly, life sentences were issued in 10 percent of international terrorism cases that involved violent plots but were only given to 5.7 percent of domestic terrorism defendants who were accused of similar crimes. The domestic terrorism defendants who were given life sentences all committed serious crimes that resulted in multiple people being killed or injured. However, nearly half (43 percent) of the international terrorism defendants who were ordered to spend the rest of their lives in prison committed crimes that did not result in any casualties. Again, the disproportionate use of terrorism laws in international terrorism prosecutions appears to have been a significant factor in causing these sentencing disparities. Five out of the six international terrorism defendants who committed attacks that resulted in victim injuries or fatalities were prosecuted using terrorism statutes, while none of the twenty domestic extremists who committed attacks that resulted in casualties were tried as terrorists in federal court.

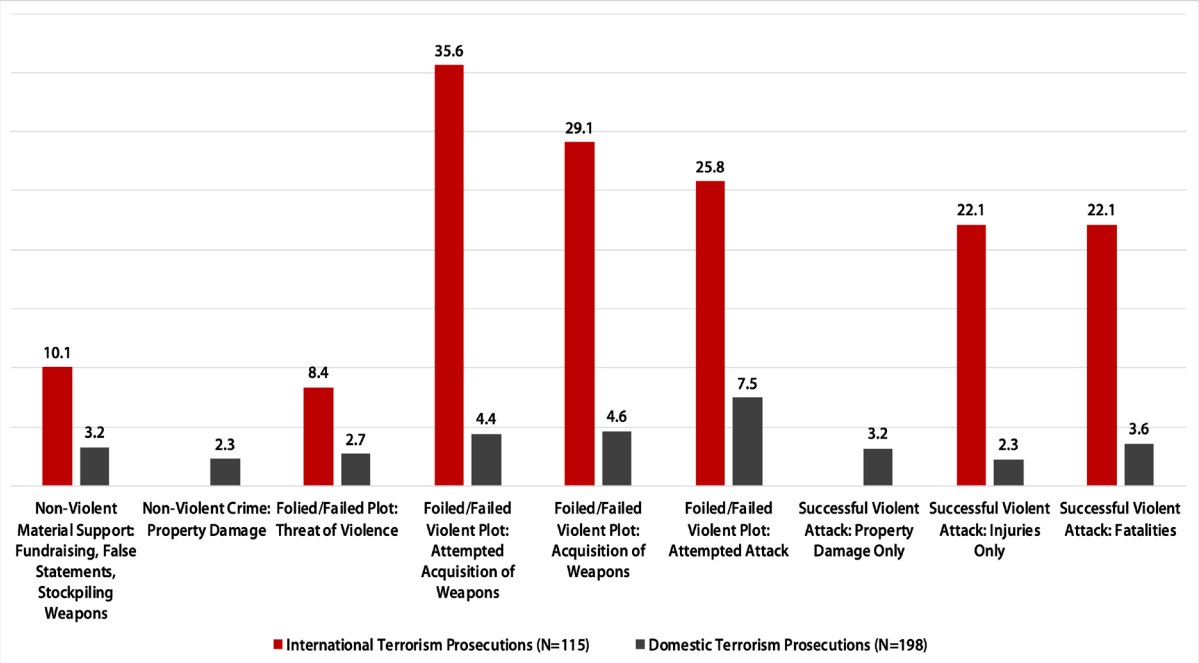
Sentencing enhancements under §3A1.4 also correlated with longer prison sentences. When prosecutors requested a terrorism sentencing enhancement, defendants were ordered to spend 13.8 years in federal prison on average. When they did not, defendants were sentenced to 6.9 years in prison on average. Prosecutors were nearly four times as likely to pursue a terrorism enhancement in international terrorism cases than they were in cases involving domestic extremists. When requested, sentencing enhancements were effective in producing more parity in prison sentences. For example, when prosecutors requested sentencing enhancements in terrorism cases involving foiled or failed violent plots, international terrorism defendants were sentenced to 17.7 years in prison on average, while domestic extremists were given average prison sentences of 15.1 years.[80]

Post-Incarceration Supervision

Often overlooked in the literature on sentencing is inequalities that impact people after they leave prison.[81] There can be notable differences in the amount of time defendants are ordered to spend on post-incarceration supervision, as well as the conditions with which they must comply upon release. Our analysis shows that international terrorism defendants leaving federal prisons will spend far longer on supervision than their domestic terrorism counterparts. International extremists were given average post-incarceration supervisory terms of 19.3 years, while the average domestic terrorism defendant was put on federal supervision for 3.5 years after leaving prison.

A drastic disparity in post-incarceration supervision length was observed even after controlling for criminal severity (see Figure 4). International terrorism defendants were given post-incarceration probationary sentences that were 3.1 to 8.1 times longer than domestic extremists who engaged in the same criminal behaviours. For instance, international extremists who committed attacks that resulted in casualties were sentenced to spend 22.1 years on average on supervision upon release from prison. Domestic terrorism defendants who committed similar attacks received average post-incarceration supervisory terms of just 2.9 years. Moreover, nearly a quarter (23.5 percent) of all international terrorism defendants were ordered to spend the rest of their lives on supervision after leaving prison. Only two (1.01 percent) domestic terrorism defendants received the same penalty.

Figure 4. Post-Incarceration Supervision Length in Years by Crime Severity



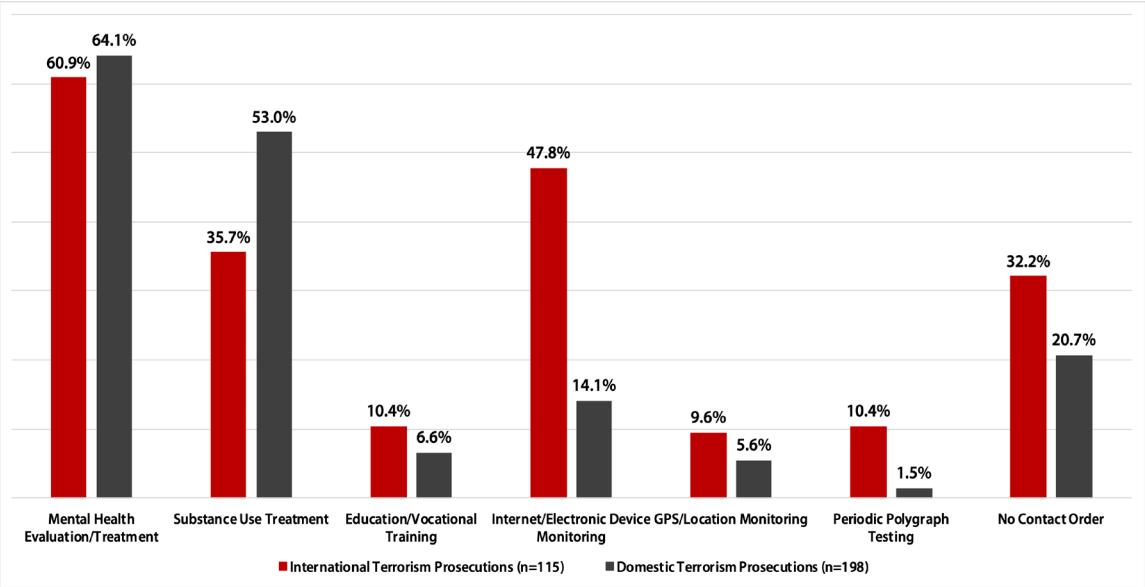
The unequal use of terrorism laws and sentencing enhancements in international terrorism cases again appears to be a contributing cause of these disparities. The average defendant who pleaded guilty to, or was convicted of, terrorism charges was sentenced to spend 26.3 years on

probation after leaving prison. Approximately 89 percent of these individuals were defendants accused of international terrorism. Overall, international terrorists who pleaded guilty to, or were convicted of, terrorism charges were ordered to spend 4.8 to 13.4 times longer on supervision after leaving prison than domestic terrorism defendants who engaged in similar crimes but were prosecuted using more typical criminal charges.

In addition to the amount of time a federal releasee spends on supervision, the conditions with which they are required to comply while on probation can be an important contributor to inequalities in judicial outcomes. Special conditions of supervision can involve the provision of rehabilitative services, but they can also include restrictive monitoring techniques that make it difficult for formerly incarcerated individuals to have contact with their family and friends, find and maintain employment, and form new pro-social relationships.[82] This includes location monitoring via GPS and the surveillance of electronic devices.

During the period under review, both cohorts of defendants received rehabilitative services at similar rates (see Figure 5). Domestic extremists were more often ordered to attend drug and/or alcohol treatment programmes due to their higher levels of substance use disorders.[83] However, international terrorism defendants were considerably more likely than domestic extremists to be ordered to comply with restrictive monitoring conditions. For example, while nearly half of all international terrorism defendants were barred from using the internet or were subjected to the monitoring of their electronic devices, only 14.1 percent of domestic extremists were given internet restrictions of any kind.

Figure 5. Rates of Post-Incarceration Rehabilitative Services and Supervision Conditions



International terrorism defendants were also more likely than their domestic terrorist counterparts to have their physical location monitored via GPS, to be required to sit for periodic polygraph examinations, and to receive no contact orders prohibiting them from associating

with co-defendants or members of extremist groups. More than 27 percent of the international terrorism defendants who received these conditions were ordered to comply with them for the rest of their lives. Only 2.9 percent of domestic extremists were give the same punishment. The majority (74.3 percent) of the domestic extremists who were issued restrictive conditions of release were ordered to comply with them for three years or less. Overall, 139 terrorism defendants (45.4 percent) were required to comply with one or more restrictive special conditions after leaving prison. Approximately 55 percent of these cases involved the use of terrorism charges and/or terrorism sentencing enhancements.

Discussion and Conclusion

The above analysis demonstrates that sentencing disparities are pervasive among federal terrorism prosecutions. International terrorism defendants are subject to significantly harsher judicial penalties than domestic extremists, even when the two engage in the same criminal behaviours. The disproportionate use of terrorism laws in international terrorism cases appears to be a primary contributor to these sentencing inequalities. International extremists who are prosecuted using material support statutes or who are given terrorism sentencing enhancements receive considerably longer prison sentences and post-incarceration supervision terms than domestic extremists who are prosecuted using more typical criminal charges. They are also far more likely to be subjected to restrictive supervision conditions after release from federal prison. The results of this study provide preliminary empirical support for the claim that the uneven use of terrorism laws in federal prosecutions is a major obstacle to promoting judicial fairness in terrorism cases. Critics of the proposal to enact a new domestic terrorism law often point to the flexible nature of the US legal code as evidence that prosecutors and judges have the tools necessary to hold domestic extremists accountable for their crimes, but the data clearly show that the use of more typical criminal charges in terrorism cases results in comparatively lenient sentences. Defendants who were prosecuted using more typical charges, like weapons violations, were given significantly lighter penalties for every criminal severity type included in this study.

There are practical challenges to using non-terrorism charges to punish domestic extremists to the same extent as international terrorists. The upper bounds of the sentencing guidelines attached to these criminal statutes are often reserved for repeat offenders or other special cases. For example, significant penalties can accompany a conviction for 18 USC §922(g) (Felon in Possession of a Firearm). However, in order for a defendant convicted of §922(g) to receive a prison sentence in the range of the ones commonly issued in cases involving terrorism charges, they would need to be prosecuted under the Armed Career Criminal Act (ACCA), which requires three previous convictions for violent crimes or serious drug offences.[84] There is no such previous criminality requirement for a person convicted on terrorism charges to be given a severe sentence. Indeed, 61.1 percent of the international terrorists in our data who were given

prison sentences of fifteen years or more had no prior criminal record. While judges are free to deviate from sentencing guidelines, serious upward departures are rare in cases involving more typical criminal charges.[85] For example, approximately one third of the cases in the federal system that involve the use of §922(g) result in departures from sentencing guidelines, but more than 88 percent of these are downward departures below the guideline minimum.[86]

The more frequent use of hate crime laws could be effective in reducing sentencing disparities in terrorism cases. Our data show that defendants who pleaded guilty to, or were convicted of, hate crime offences were sentenced to 22.2 years in federal prison on average, which is comparable to the prison sentences issued to international extremists who were convicted on material support charges. However, hate crime charges in terrorism cases have been rare, and prosecutors appear unlikely to use them outside of cases that involve mass casualties or other extraordinary outcomes. Indeed, in our data, all twelve of the domestic terrorism cases that included hate crime charges involved attacks that resulted in victim fatalities. Five of the cases involved mass casualties. While federal hate crime laws have been routinely expanded since their initial adoption in 1968, only 15 percent of cases referred for prosecution as hate crimes each year result in the use of hate crime charges.[87] Thus, without a sudden and significant change in how prosecutors make decisions, it is unlikely that hate crime statutes will be used to level the sentencing gaps in US terrorism cases.

Critics of the proposal for a new domestic terrorism law could argue that more time is needed to determine if the January 6 Capitol attack, and the increased focus on domestic terrorism it has prompted, will compel judges to issue more equitable sentences in terrorism cases. Preliminary evidence, however, suggests that this is not the case. Domestic terrorism defendants have not been charged with material support crimes (e.g., §2339A) any more often in the last four years than they were in the preceding six.[88] No Capitol riot defendant has been charged with a terrorism crime of any kind, and less than 3 percent have had a terrorism sentencing enhancement under §3A1.4 requested in their cases.[89] Moreover, evidence from the January 6 cases suggests that the prosecution of domestic terrorism continues to result in comparatively lenient sentences.[90] For example, more than 150 people have been prosecuted for assaulting police officers on January 6. These cases have resulted in average federal prison sentences of under 4.5 years.[91] At the time of this writing, 67 percent of the January 6 defendants received prison sentences below the federal guidelines.[92]

In addition to the ethical concerns that arise from the unequal treatment of people who commit the same types of crimes, the use of different laws in terrorism cases has real consequences for deterring future acts of violence.[93] As we noted above, the recidivism rate among international terrorism defendants prosecuted on material support charges is vanishingly low, and this is in no small part due to the significant prison sentences that have been issued in their cases. However, recent instances of reoffending among domestic extremists suggest that the same

may not be true for individuals who are prosecuted using more typical criminal statutes.[94] Take the case of Brandon Russell, a Florida based neo-Nazi and former leader of Atomwaffen Division. In 2017, Russell was found to be stockpiling explosives in his garage, but rather than being prosecuted using terrorism laws – such as §2332A, which prohibits the possession or use of a weapon of mass destruction – he pleaded guilty to having an unregistered weapon and the improper storage of explosive materials.[95] Russell was sentenced to five years in federal prison, of which he only served three. In February 2023, Russell was back in federal custody when authorities discovered that he and an associate were planning a series of attacks on power substations in Baltimore, Maryland.[96] The uneven use of terrorism laws in federal prosecutions, and the sentencing disparities that result, also have a notable impact on how society perceives threats to public safety.[97] Ample research shows that the way violent acts and their perpetrators are labelled influences how people conceive of terrorism, who they describe as terrorists, and what measures they find acceptable to counter the threat.[98] Limiting the use of terrorism laws and harsh punishments to international terrorism cases reinforces societal perceptions of terrorism as something that is limited to Muslim populations and can only be deterred through swift legal penalties. In turn, these perceptions influence legal responses to terrorism, thus perpetuating a public opinion and prosecution cycle that produces unwarranted sentencing inequalities in terrorism cases.

The debate over proposed domestic terrorism legislation would be more constructive if both sides recognised the consequences of maintaining the status quo and sought to find solutions to the problem that also protects civil rights and liberties. This includes a more thorough discussion of the safeguards that would need to accompany a domestic terrorism law to ensure that it cannot be weaponised to target vulnerable populations and peaceful political protesters. Moreover, as McCord has argued, within the existing legal framework, more consideration needs to be given to amending the predicate offence list attached to §2339A to give prosecutors the power to use the charge in more domestic terrorism cases.[99] This includes granting prosecutors the legal authority to apply the statute to terrorism cases involving the acquisition, storage, and use of firearms. During the period we reviewed, the majority (56.1 percent) of the individuals who were prosecuted for plotting to commit, or committing, violent terrorist attacks planned to use, or used, firearms. However, only 25 percent of these cases resulted in the use of terrorism charges. Although the legal ownership of guns is a constitutionally protected activity in the US, their use in terrorist attacks is not. When paired with ideological motivations, the use of firearms in acts of violence should not be viewed differently than other types of terrorism that involve similarly destructive weapons. Perhaps most importantly, an amendment to §2339A would not require the creation of a designated domestic terrorist organisations list, which would be legally tenuous at best and operationally dangerous at worst.[100]

Recent federal terrorism cases clearly demonstrate that international terrorism defendants frequently experience judicial inequalities that far exceed those observed in more typical criminal cases.[101] Future research should consider if factors like race, ethnicity, religion, and

gender act as contributing causes of these disparities. Using data from a longer timeframe, future research should also examine how the outcomes of terrorism cases have been impacted by key events, like the September 11 attacks, the 2009 expansion of federal hate crime laws, and the 2005 Supreme Court decision that struct down the statute requiring judges to issue sentences within the federal guidelines. While additional research like this can provide a more complete picture of the causes of sentencing disparities in cases involving extremists, our analysis suggests that the current legal regime is a significant obstacle to promoting judicial fairness in the prosecution of terrorism.

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39 Scholars have debated whether the January 6, 2021, attack meets various academic and official definitions of terrorism. While most agree that the Capitol attack should be considered an act of terrorism, others have suggested that it is better described as a "riot" or "insurrection." What is important for the analyses presented in this article, however, is that the events of January 6 clearly meet the US government's legal definition of terrorism (see above), which only requires that an act be committed to influence or affect the conduct of government. Thus, the non-use of terrorism charges in the January 6 cases likely has more to do with the difficulty of using material support charges in prosecuting domestic terrorism than it does with whether the Capitol attack constitutes terrorism according to the US legal code. On the academic debate over whether the Capitol attack constitutes terrorism, see See Sara Rimer, "BU's Jessica Stern on Why January 6 Attack on Capitol Was an Act of Terrorism," *BU Today*, 15 January 2021, https://www.bu.edu/articles/2021/jessica-stern-on-why-january-6-attack-on-capitol-was-act-of-terrorism/; Laura Dugan and Daren Fisher, "Far-Right and Jihadi Terrorism Within the United States: From September 11th to January 6th," *Annual Review of Criminology* 6, no.1 (2023):131-153; Cynthia Miller-Idriss, "From 9/11 to 1/6: The War on Terror Supercharged the Far Right," *Foreign Affairs*, 24 August 2021, https://www.foreignaffairs.com/articles/united-states/2021-08-24/war-on-terror-911-jan6; David C. Rapoport, "The Capitol Attack and the 5th Terrorism Wave," *Terrorism and Political Violence* 33, no. 5(2021): 912-916, https://www.tandfonline.com/doi/full/10.1080/09546553.2021.1932338; Arie Perliger, "Contextualising the Jan 6th Report: Contemporary Trends In Far-Right Violence in the US," *ICCT*, 2 January 2023, https://www.icct.nl/publication/contextualising-jan-6th-report-contemporary-trends-far-right-violence-us; Joana Cook and Tanya Mehra, "An Attack on the Capitol and Democracy: An Act of Terrorism?" *ICCT*, 11 January 2021, https://www.icct.nl/publication/attack-capitol-and-democracy-act-terrorism; and "Capitol Insurrection, Riot, or Domestic Terrorism?" an interview with Joe Young, https://www.american.edu/sis/big-world/44-capitol-insurrection-riot-or-domestic-terrorism.cfm. On January 6 meeting the U.S. legal definition of terrorism, see Lisa N. Sacco, "Domestic Terrorism and the Attack on the U.S. Capitol," *Congressional Research Service,* 13 January 2021, https://web.archive.org/web/20210126202252/https://crsreports.congress.gov/product/pdf/IN/IN11573.

40 Gerstein, "Why DOJ is Avoiding Domestic Terrorism Sentences for Jan. 6 Defendants."

41 Alan Z. Rozenshtein, "Seditious Conspiracy is the Real Domestic Terrorism Statute," *Lawfare*, 7 April 2022, https://www.lawfaremedia.org/article/seditious-conspiracy-real-domestic-terrorism-statute.

42 The National Consortium for the Study of Terrorism and Responses to Terrorism (START), "Profiles of Individual Radicalization in the United States (PIRUS)," https://www.start.umd.edu/data-tools/profiles-individual-radicalization-united-states-pirus.

43 McCord, "Lessons for Countering the Domestic Terrorism Threat"; Sinnar, "Separate and Unequal." On the ethnic and religious characteristics of international terrorism defendants, see Khaled Beydoun, "Lone Wolf Terrorism: Types, Stripes, and Double Standards," *Northwestern University Law Review* 112, no. 5 (2018): 1213-1243, https://scholarlycommons.law.northwestern.edu/nulr/vol112/iss5/6; and Caroline Mala Corbin, "Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda," *Fordham Law Review* 86, no. 2 (2017): 455-485, https://ir.lawnet.fordham.edu/flr/vol86/iss2/5.

44 Sinnar, "Separate and Unequal"; Ware and Zolyniak, "Jan. 6 and Beyond."

45 Michael Molstad, "Our Inner Demons: Prosecuting Domestic Terrorism," *Boston College Law Review* 61, no. 1 (2020): 339-383, https://lawdigitalcommons.bc.edu/bclr/vol61/iss1/8.

46 German, "Why New Laws Aren't Needed"; Rachael Hanna and Eric Halliday, "Discretion Without Oversight"; Jenkins, "Five Reasons to Be Wary of a New Domestic Terrorism Law."

47 German, "Why New Laws Aren't Needed."

48 "157 Civil Rights Organizations Oppose a New Domestic Terrorism Charge," *The Leadership Conference on Civil and Human Rights*, 19 January 2021, https://civilrights.org/resource/135-civil-rights-organizations-oppose-a-new-domestic-terrorism-charge/.

49 Animal Enterprise Terrorism Act, 18 USC § 43.

50 Jeff Martin and Jeff Amy, "23 Charged with Terrorism in Atlanta 'Cop City' Protest," *Associated Press*, 6 March 2023, https://apnews.com/article/atlanta-police-training-site-protest-fire-1ba4362c9337e27ecaf44283fc72fc56.

51 Empirical research on sentencing in US terrorism cases is extremely limited and tends to only focus on cases tied to one ideology rather than making comparisons across the ideological spectrum. Hodwitz, for example, includes sentence length in her research on terrorist recidivism but the data are limited to cases of international terrorism. Similarly, Gruenewald and colleagues examine sentencing decisions in US terrorism prosecutions but limit their analysis to cases of domestic terrorism. See Hodwitz, "The Terrorism Recidivism Study," and Jeff Gruenewald, Brent R. Klein, Brittany E. Hayes, William S. Parkin, and Taylor June, "Examining Disparities in Case Dispositions and Sentencing Outcomes for Domestic Violent Extremists in the United States," *Crime & Delinquency* (2022), https://doi.org/10.1177/00111287221109769.

52 START, "Profiles of Individual Radicalization in the United States (PIRUS)."

53 All cases were originally brought before the courts between 2014 and 2019, but they did not need to be completed during that timeframe to be included in the data. For instance, the prosecution of Patrick Crusius, a white supremacist who murdered 23 people at a Walmart store in 2019, is included in the data even though he was not sentenced in the case until July of 2023.

54 For example, Robert Bowers was charged on October 31, 2018, with 44 criminal counts after he killed 11 Jewish worshippers in an anti-Semitic attack at the Tree of Life Synagogue in Pittsburgh, Pennsylvania. A final sentencing outcome in the case was not reached until June of 2023—nearly five years after his initial arraignment. See, Marlene Lenthang and Brian Michael, "Pittsburgh Synagogue Gunman Found Guilty on all Federal Charges," *NBC News*, 16 June 2023, https://www.nbcnews.com/news/us-news/pittsburgh-synagogue-shooting-ruling-verdict-jury-hate-crimes-robert-b-rcna89337.

55 Subjects did not have to be official members of foreign terrorist organizations to be classified in the data as international terrorism defendants. Individuals who were inspired by, or acting on behalf of, foreign terrorist groups were also coded as international terrorism defendants even if they had no known contact with foreign groups. This practice is consistent with the use of material support laws in

federal prosecutions, which do not require a defendant to have formal membership in a foreign terrorist organisation.

56 The US legal code does not provide lists, descriptions, or definitions of the extremist groups or ideologies that constitute domestic terrorism. According to the legal code, domestic terrorism is defined in terms of the tactical goals of those who commit the acts and can be broadly applied to any individual or group who seeks to affect the conduct of government through coercion or intimidation. See the note below for how we operationalised domestic terrorism in this study.

57 Subjects were coded as domestic terrorism defendants if they were formal or informal members of extremist groups or movements that originated or operate primarily within the territorial boundaries of the US. On the extremist far-right, this includes anti-government militias like the Oath Keepers and Boogaloo Movement, neo-fascist and white supremacist groups like Atomwaffen Division and the Patriot Front, xenophobic and nativist groups like the Proud Boys, and fringe conspiracy theories like QAnon. On the far-left, this includes environmental and animal rights groups like the Earth Liberation Front and Animal Liberation Front, the loose collective of anarchist extremists often referred to as ANTIFA, and individuals aligned with Black nationalist groups like the Black Hebrew Israelites. During the period under review, single-issue extremism was primarily concentrated around anti-abortion activity. Individuals without links to known extremist groups were classified as domestic terrorism defendants if they were acting to advance the ideologies or goals that are commonly expressed by extremist groups in the United States or if they were acting in direct response to domestic political issues, such as abortion, gun rights, the use of public lands, federal tax laws, domestic environmental concerns, national economic conditions, or the use of force by US law enforcement.

58 We reviewed 838 individuals for possible inclusion in the data. Of the 494 who were excluded from the study, 150 attempted to join foreign terrorist groups abroad and did not commit additional crimes in the United States. The remaining 344 cases that were excluded were made up of individuals who were killed while committing terrorist attacks or were prosecuted in state or local court.

59 United States Sentencing Commission, *Life Sentences in the Federal System* (Washington, DC: US Sentencing Commission, 2022).

60 The following discussion refers to the charges to which the defendants pleaded or were found guilty. Charges that were dropped before a guilty plea conviction were not included in these figures.

61 To date, the only far-right group to be designated a terrorist organisation by the US State Department is the Russian Imperial Movement (RIM). There have not been any federal terrorism prosecutions involving defendants with links to the RIM.

62 Robert Patrick, "Final St. Louis Woman Gets 4 Years in Prison," *St. Louis Post-Dispatch*, 10 November 2020, https://www.stltoday.com/news/local/crime-and-courts/final-st-louis-defendant-in-terror-funding-case-gets-4-years-in-prison/article_1c42fff1-2cad-569f-af61-c82f24f61622.html.

63 This case is difficult to classify according to one ideology. The defendants were self-identified "anarchists" and were motivated in part by environmental concerns, but they also admired far-right mass killers, even going as far as corresponding with Dylann Roof, a white supremacist who murdered nine people in a historically black church in 2015, after Roof was sent to federal prison. See United States of America v. Elizabeth Lecron, 3:19-cr-0004 (2019).

64 Michael Wilson, "Bomber Sentenced to 2 Life Terms for Manhattan Attack," *New York Times*, 13 February 2018, https://www.nytimes.com/2018/02/13/nyregion/bomber-chelsea-manhattan.html.

65 German, "Why New Laws Aren't Needed."

66 These cases all involved the use of 18 USC § 249 (Hate Crime Acts).

67 See, for example, Carlos Berdejó, "Criminalizing Race: Racial Disparities in Plea-Bargaining," *Boston College Law Review* 59, no. 4 (April 2018): 1187-1250, https://ssrn.com/abstract=3036726; Alexander Testa and Brian D. Johnson, "Paying the Trial Tax: Race, Guilty Pleas, and Disparity in Prosecution,"

Criminal Justice Policy Review 31, no. 4 (2020): 500-531, https://doi.org/10.1177/088740341983.

68 See Samuel Sommers, "Race and the Decision Making of Juries," *Legal and Criminological Psychology* 12, no. 2 (2007): 171-187, https://doi.org/10.1348/135532507X189687.

69 James R. Skillen, *This Land is My Land: Rebellion in the West* (New York: Oxford University Press, 2020).

70 David Ferrara, "Appeals Court Upholds Dismissal of Cliven Bundy Case," *Las Vegas Review-Journal*, 6 August 2020, https://www.reviewjournal.com/crime/courts/appeals-court-upholds-dismissal-of-cliven-bundy-case-2089569/.

71 Courtney Sherwood and Kirk Johnson, "Bundy Brothers Acquitted in Takeover of Oregon Wildlife Refuge," *New York Times*, 27 October 2016, https://www.nytimes.com/2016/10/28/us/bundy-brothers-acquitted-in-takeover-of-oregon-wildlife-refuge.html.

72 John Kramer and Darrell Steffensmeir, "Race and Imprisonment Decisions," *The Sociological Quarterly* 34, no. 2 (1993): 357-376, https://doi.org/10.1111/j.1533-8525.1993.tb00395.x; Cassia Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process* (Washington, DC: Department of Justice, 2000).

73 Rhys Hester and Todd K. Hartman, "Conditional Race Disparities in Criminal Sentencing: A Test of the Liberation Hypothesis From a Non-Guidelines State," *Journal of Quantitative Criminology* 33, no. 1 (2017): 77-100, https://doi.org/10.1007/s10940-016-9283-z.

74 18 USC § 1001(a)(2).

75 During this period, three additional terrorism defendants—one international and two domestic—were deemed mentally unfit to stand trial.

76 Ryan Autullo, "Texas Man Plotting Mass Shooting Arrested on Weapons Charges," *Dayton Daily News*, 17 April 2017, https://www.daytondailynews.com/news/crime--law/fbi-austin-man-plotting-mass-shooting-arrested-weapons-charges/Js7cJF0eilpUKpmbc4wIeM/; Gary Craig, "Greece Man Who Expressed Support for New Zealand Mass Killings Admits to Lying to FBI," *Democrat & Chronicle*, 14 May 2019, https://www.democratandchronicle.com/story/news/2019/05/14/thomas-bolin-greece-ny-man-who-expressed-support-new-zealand-mass-killings-admits-to-lying-to-fbi/3665488002/.

77 Peter S. Lehmann, "Race, Ethnicity, Crime Type, and the Sentencing of Violent Felony Offenders," *Crime & Delinquency* 66, no. 6-7 (2020): 770-805, https://doi.org/10.1177/0011128720902699.

78 18 USC § 875(c).

79 All but one these cases involved the use of 18 USC § 2332A (Use of Weapons of Mass Destruction).

80 For these figures, we included requests for an enhancement under §3A1.4, as well as §3A1.1 (hate crime enhancement) and §3A1.2 (official victim enhancement).

81 For exceptions, see Tina L. Freiburger, and Carly M. Hilinski. "Probation Officers' Recommendations and Final Sentencing Outcomes" *Journal of Crime and Justice* 34, no. 1 (2011): 45-61, https://doi.org/10.1080/0735648X.2011.554746; Michael Leiber, John Reitzel, and Kristin Mack, "Probation Officer Recommendations for Sentencing Relative to Judicial Practice: The Implications for African Americans," *Criminal Justice Policy Review* 22, no. 3 (2011): 301-329, https://doi.org/10.1177/0887403410374230.

82 Matthew DeMichele, "Electronic Monitoring: It's a Tool, Not a Silver Bullet," *Criminology & Public Policy* 13, no. 3 (2014): 393-400, https://doi.org/10.1111/1745-9133.12089.

83 Approximately 39 percent of the domestic terrorism defendants in the data had documented substance use disorders. Only 19 percent of the international terrorism defendants who were prosecuted during this period had known substance use concerns.

84 According to the US Sentencing Commission, the average defendant convicted of a firearms offence under §922(g) and ACCA is sentenced to 186 months (15.5 years) in prison. The average Defendant who is convicted of §922(g) but who does not qualify to be charged under ACCA is sentenced to 59 months (4.92 years) of incarceration. United States Sentencing Commission, *Quick Facts—Felon in Possession of a Weapon* (Washington DC: U.S. Sentencing Commission, 2018).

85 United States Sentencing Commission, Office of the General Counsel, *Primer on Departures and Variances* (Washington, DC: US Sentencing Commission, 2023).

86 United States Sentencing Commission, *Quick Facts*.

87 Transactional Records Access Clearinghouse, "Few Hate Crime Referrals Result in Prosecution," https://trac.syr.edu/tracreports/crim/569/.

88 According to the data, only three domestic terrorism defendants have been prosecuted using §2339A from 2020 through the first nine months of 2023. Considering that this period included an unprecedented expansion in the number of domestic terrorism prosecutions, it is safe to conclude that the statute has not been used at a greater rate in domestic terrorism cases in recent years.

89 According to our data, prosecutors have sought a sentencing enhancement under §3A1.4 in 30 Capitol riot cases. Most of these were cases with defendants who had links to known extremist groups, like the Oath Keepers and Proud Boys. Preliminary evidence suggests that the judges in most of these cases denied the prosecution's requests for the enhancement to be applied at sentencing.

90 "Notes: Responding to Domestic Terrorism: A Crisis of Legitimacy," *Harvard Law Review* 136, no. 7 (2023): 1914-1935, https://harvardlawreview.org/print/vol-136/responding-to-domestic-terrorism-a-crisis-of-legitimacy/

91 The statistics come from National Consortium for the Study of Terrorism and Responses to Terrorism, "Capitol Insurrection Data Tool," https://www.start.umd.edu/capitol-insurrection.

92 Tom Jackman and Spencer Hsu, "Most Jan. 6 Defendants Get Time behind Bars, but less than U.S. Seeks" *Washington Post*, 5 January 2024, https://www.washingtonpost.com/dc-md-va/2024/01/05/january-6-riot-sentences/.

93 The extent to which legal punishments act as specific or general deterrents to future crime is a topic of considerable debate. Covering this literature is beyond the scope of this article, but it is important to acknowledge that there is lack of research that demonstrates the effects of sentencing decisions on general rates of terrorism or terrorist recidivism. For a review of the literature on sentencing and reoffending, see Daniel S. Nagin, Francis T. Cullen, and Cheryl Lero Jonson, "Imprisonment and Reoffending," *Crime and Justice* 38 (2009), https://doi.org/10.1086/599202.

94 For instance, preliminary analysis suggests that re-offending rates among domestic extremists may be as high as 50 percent. Michael A. Jensen, Patrick James, and Elizabeth Yates, "Profiles of Individual Radicalization in the United States—Desistance, Disengagement, and Deradicalization (PIRUS-D3)," *National Consortium for the Study of Terrorism and Responses to Terrorism*, July 2019, https://www.start.umd.edu/publication/profiles-individual-radicalization-united-states-desistance-disengagement-and.

95 Niraj Chokshi, "Neo-Nazi Leader in Florida Sentenced to 5 Years Over Homemade Explosives," *New York Times*, 10 January 2018, https://www.nytimes.com/2018/01/10/us/brandon-russell-sentenced-neo-nazi.html.

96 Mike Wendling, "Brandon Russell: Leader of Neo-Nazi Atomwaffen Group Charged with Baltimore Power Grid Plot," *BBC*, 6 February 2023, https://www.bbc.com/news/world-us-canada-64493319.

97 Connor Huff and Joshua D. Kertzer, "How the Public Defines Terrorism," *American Journal of Political Science* 62, no. 1 (2018): 55-71, https://doi.org/10.1111/ajps.12329.

98 See, for example, Erin Kearns, Allison Betus, and Anthony Lemieux, "Why Do Some Terrorist Attacks

Receive More Media Attention Than Others?" *Justice Quarterly* (2019): 1–39, https://doi.org/10.1080/07418825.2018.1524507; Kimberly A. Powell, "Framing Islam: An analysis of US media coverage of terrorism since 9/11," *Communication Studies* 62, no. 1 (2011): 90-112, https://doi.org/10.1080/10510974.2011.533599; Zachary S. Mitnik, Joshua D. Freilich, and Steven M. Chermak, "Post-9/11 Coverage of Terrorism in the New York Times," *Justice Quarterly* (2018): 1–25, https://doi.org/10.1080/07418825.2018.1488985.

99 McCord, "Lessons for Countering the Domestic Terrorism Threat."

100 Catrina Doxsee, "Bad Idea: Domestic Terrorist Organization Designations," *Center for Strategic and International Studies*, 1 December 2020, https://defense360.csis.org/bad-idea-domestic-terrorist-organization-designations/.

101 For instance, a recent study using 22 years of federal sentencing data found that Black defendants receive average prison sentences that are 1.7 percent longer than White defendants. By comparison, the PIRUS data suggest that the average international terrorism defendant receives a prison sentence that is 220 percent longer than the average domestic extremist. See Bryan Holmes and Ben Feldmeyer, "The Only Thing Constant is Change: Temporal Analyses of Racial/Ethnic Sentencing Disparities," *American Journal of Criminal Justice* (2023), https://doi.org/10.1007/s12103-023-09725-9.

About

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