NOTES

CONFRONTING THE ONE-MAN WOLF PACK: ADAPTING LAW ENFORCEMENT AND PROSECUTION RESPONSES TO THE THREAT OF LONE WOLF TERRORISM

Beau D. Barnes[*]

[*] J.D. Candidate, Boston University School of Law, 2013; M.A. Law and Diplomacy Candidate, The Fletcher School of Law and Diplomacy at Tufts University, 2013; B.A. International Affairs and Foreign Languages & Literatures, 2006, Lewis & Clark College. I acknowledge with gratitude Professor Rob Sloane's consistently helpful comments and suggestions at both the brainstorming and editing stages of this Note. My thanks to the staff of the *Boston University Law Review* – Patrick McCooe provided steady support throughout the drafting process, Jared Cohen graciously critiqued a late draft, and Tim Powell meticulously edited the final version. Finally, I thank Allison Shean for her love, her insightful editorial observations, and, most of all, for her patience.

In recent years, a new type of terrorist threat has emerged: the "lone wolf." Lone wolves present a challenge for current law enforcement and prosecutorial approaches to combating terrorism because these individuals are radicalized without significant contact with others and operate alone. The tools currently available to law enforcement and prosecutors focus on exploiting the vulnerabilities and liabilities created through group interactions, a "preventive" approach to terrorism that is inapplicable to the solitary terrorist.

This Note argues, however, that lone wolves – poorly trained individuals operating alone with minimal equipment against relatively unimportant targets – do not pose a significant threat to the United States. Indeed, the very traits that make lone wolves difficult to apprehend mitigate the damage lone wolves can effect. Therefore, a heavy-handed policy response is unnecessary and, in light of a proper understanding of the concept of "national security," ultimately counterproductive. Because of lone wolves' isolation, no readily available set of policies is likely to have a significant effect. Even if it were feasible to completely eliminate lone wolf terrorism, such an effort would not be worth the inevitably high cost, both in the allocation of scarce resources and the necessary infringements on civil liberties.

INTRODUCTION

On November 21, 2011, New York City Police arrested suspected terrorist Jose Pimentel for allegedly conspiring to explode homemade bombs for terrorist purposes in the New York area.[1] Pimentel, however, was acting alone, not as part of a larger organization. Indeed, in announcing the arrest, New York Mayor Michael Bloomberg made clear that Pimentel "was not part of a larger conspiracy emanating from abroad."[2] The suspect, according to Mayor Bloomberg, was a "total lone wolf."[3]

[1] Joseph Goldstein & William K. Rashbaum, *City Bomb Plot Suspect Is Called Fan of Qaeda Cleric*, N.Y. TIMES (Nov. 20, 2011), http://www.nytimes.com/2011/11/21/nyregion/jose-pimentel-is-charged-in-new-york-city-bomb-plot.html?pagewanted=all.

[2] Michael R. Bloomberg, *Mayor Bloomberg Updates New Yorkers on Arrest of Suspect in Terror Case*, YOUTUBE (Nov. 20, 2011), http://www.youtube.com/watch?v=ilDGYSaHaAE&feature=related.

[3] *Id.*

Preventing terrorism is now the number one priority of both the Department of Justice and the FBI, and a top priority for state and local law enforcement agencies. In the past decade, as military and diplomatic efforts have contained the threat of international terrorism, attention has shifted to headline-grabbing "homegrown" terrorism.[4] In the area of criminal law, this has resulted in the increased use of "material support" prosecutions, pretextual arrests for crimes unrelated to terrorism, conspiracy liability for inchoate terror plots, informants infiltrating Arab and Muslim communities, sting operations, and heightened physical and electronic surveillance. These tactics, while controversial, have been effective in disrupting numerous terror plots.

But in recent years, and in large part because of law enforcement's success in stopping homegrown group plots,[5] a new type of threat has emerged: the "lone wolf" terrorist. Although also "homegrown," lone wolves are individuals radicalized without significant contact with others – typically through the Internet – and operate entirely, or almost entirely, alone.[6] Therefore, the typical law enforcement tools used against homegrown terrorists are significantly less useful, and often useless, against lone wolves. In essence, these individuals and their plots are difficult to apprehend and prevent because they are only detectable by law enforcement when they commit a terrorist act.

The relatively novel threat of lone wolf terrorism presents a challenge for traditional law enforcement and prosecutorial approaches. Indeed, the threat is likely to increase in prevalence. Security experts note that the threat of lone wolf terrorism is one of the United States' main vulnerabilities today.[7] President Obama stated in 2011 that "the most likely scenario that we have to

[4] *See, e.g.*, Denise Lavoie, *Mass. Man Admits Guilt in Plot to Blow Up Pentagon*, BOS. (July 20, 2012), http://www.boston.com/news/local/massachusetts/articles/2012/07/20/man_to_plead_guilty_in_plot_to_blow_up_pentagon/; *NYC Man Gets 27 Years in Homegrown Terror Case*, WALL ST. J. (Mar. 2, 2012, 7:33 PM), http://online.wsj.com/article/AP51343368c6ae445d8d21c288e2db43a5.html; Susan Brooks Thistlethwaite, *White Supremacy: The Real 'Homegrown' Terrorism*, WASH. POST (Aug. 7, 2012, 7:07 PM), http://www.washingtonpost.com/blogs/guest-voices/post/white-supremacy-the-real-homegrown-terrorism/2012/08/07/1603addc-e0e3-11e1-8fc5-a7dcf1fc161d_blog.html; Milton J. Valencia, *Mehanna to Serve 17 1/2-Year Sentence*, BOS. GLOBE (Apr. 13, 2012), http://www.boston.com/news/local/massachusetts/articles/2012/04/13/tarek_mehanna_home_grown_terrorist_from_boston_area_who_promoted_al_qaeda_on_internet_sentenced_to_17_12_years/.

[5] *See* Bloomberg, *supra* note 2 ("[The suspect] represents exactly the kind of threat FBI Director Robert Mueller and his experts have warned about as American military and intelligence agencies have eroded al-Qaeda's ability to launch large scale attacks.").

[6] Paul Cruickshank & Tim Lister, *The "Lone Wolf" – The Unknowable Terror*, CNN (Sept. 7, 2011, 12:42 PM), http://security.blogs.cnn.com/2011/09/07/the-lone-wolf-the-unknowable-face-of-terror/ ("[R]ather than interacting online, such individuals passively soak up al Qaeda's message and decide to take action into their own hands.").

[7] MARC SAGEMAN, LEADERLESS JIHAD, at vii-viii (2008) ("The threat to the West [is now from] homegrown, self-financed, self-trained terrorists against whom the most effective countermeasure would be to stop the process of radicalization before it reaches its violent end.").

guard against right now ends up being more of a lone wolf operation than a large, well-coordinated terrorist attack."[8] Events of the past few years corroborate this statement. Pimentel, Rezwan Ferdaus (a U.S. citizen arrested in Massachusetts for plotting to bomb the Pentagon and U.S. Capitol), Army Major Nidal Hasan (an Army doctor who killed thirteen individuals and wounded thirty-two others at Fort Hood, Texas), Arid Uka (a Kosovar Islamist who killed two U.S. service members in Germany), and Naser Jason Abdo (an enlisted soldier arrested for attempting to detonate a bomb near Fort Hood) are but a few of the many examples of this type of terrorism.[9]

Because of the relatively recent emergence of the lone wolf threat, legal scholarship has not fully addressed this specific type of terrorism. Previous legal scholarship addressing the more widely discussed phenomenon of homegrown terrorism focuses primarily on prosecutors' efforts to criminalize nascent expressions of criminal intent.[10] A significant amount of social

[8] *Obama: Biggest Terror Fear Is the Lone Wolf*, CNN (Aug. 16, 2011, 6:06 PM), http://security.blogs.cnn.com/2011/08/16/obama-biggest-terror-fear-is-the-lone-wolf/.

[9] It is important to note, however, that the phenomenon of lone wolf terrorism is by no means limited to radical Islamic terrorism. In fact, some of the most shocking recent lone wolf terrorist attacks were perpetrated by individuals with no connection whatsoever to radical Islam. Those who represent this trend include Norwegian right-wing radical Anders Breivik, who killed seventy-seven people in Norway in July 2011; Jared Lee Loughner, who killed six people and wounded Representative Gabrielle Giffords in Tucson, Arizona, in January 2011; and James Holmes, who killed twelve people and wounded an additional fifty-eight at a showing of the film *The Dark Knight Rises* in Aurora, Colorado, in July 2012. Press Release, Anti-Defamation League, Arizona Shooter's Online Footprint Shows Distrust of Government, Interest in Conspiracy Theories (Jan. 11, 2011), *available at* http://www.adl.org/PresRele/Extremism_72/5961_72.html (describing some of the common themes in Loughner's online writings prior to the shooting in Tucson which reveal a "generic distrust of the government and a vague interest in conspiracy theories"); Joel Achenbach, *Motive Still a Blank in Aurora Shooter's Story*, WASH. POST (July 21, 2012), http://www.washingtonpost.com/national/health-science/motive-still-a-blank-in-aurora-shooters-story/2012/07/21/gJQAD69T0W_story.html ("Police say the killer at the movie theater had a small arsenal of weapons and a massive amount of ammunition, and he evidently wanted to kill as many innocent people as possible, as dramatically as possible."); Steven Erlanger & Scott Shane, *Oslo Suspect Wrote of Fear of Islam and Plan for War*, N.Y. TIMES (July 23, 2011), http://www.nytimes.com/2011/07/24/world/europe/24oslo.html?pagewanted=all (describing Breivik's attack and manifesto).

[10] *See, e.g.*, Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT'L SECURITY L. & POL'Y 5, 7 (2005) (examining the use of 18 U.S.C. §§ 2339 and 2339B "as a basis for early intervention, a kind of criminal early-warning and preventive-enforcement device designed to nip the risk of terrorist activity in the bud" and the potential for wide application of these statutes to infringe constitutional rights); Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 427 (2007) (examining the substantive criminal laws that authorize government anticipatory prosecution and analyzing the power they confer in the context of prosecuting "unaffiliated"

science scholarship has documented and examined the trends of homegrown and lone wolf terrorism. This body of scholarship has focused primarily on understanding how Western citizens are "radicalized," the role of the Internet in this process, and the role of homegrown terrorism in the overall strategic plan of Al Qaeda.[11] No work, however, specifically addresses the legal challenges that the rise of the "lone wolf" as a terrorist threat poses.

This Note attempts to fill this epistemic space by analyzing the law enforcement response to the emerging phenomenon of lone wolf terrorism. It argues that because lone wolves pose only a minimal threat, a heavy-handed

terrorist suspects); Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1082 (2008) (explaining how criminal and military detention models have evolved to converge on both procedural and substantive grounds and highlighting the areas of consensus as well as the remaining gaps in need of reform); David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693, 698 (2009) (arguing that preventive detention of suspected terrorists should be limited to circumstances in which the criminal justice system cannot protect against the danger posed by the suspect); Jon Sherman, *"A Person Otherwise Innocent": Policing Entrapment in Preventative, Undercover Counterterrorism Investigations*, 11 U. PA. J. CONST. L. 1475, 1478 (2009) (offering a framework for restructuring the entrapment defense in terrorism prosecutions in order to keep "counterterrorism efforts targeted and focused" and to protect "innocent First Amendment activity").

[11] *See, e.g.*, BRIAN FISHMAN & ANDREW LEBOVICH, NEW AM. FOUND., COUNTERING DOMESTIC RADICALIZATION: LESSONS FOR INTELLIGENCE COLLECTION AND COMMUNITY OUTREACH 22 (2011) (suggesting practices for communities in the United States to combat and reduce the occurrence of jihadi radicalization in the West); LONE WOLF TERRORISM, INSTITUUT VOOR VEILIGHEIDS- EN CRISISMANAGEMENT (2007), *available at* http://www.transnationalterrorism.eu/tekst/publications/Lone-Wolf%20Terrorism.pdf (exploring the "nature, extent, motivations, modus operandi and prospects of lone-wolf terrorism"); SAGEMAN, *supra* note 7, at 109-24 (describing how the Internet preserves the commitments and activities of past global Islamist terrorists, allowing them to continue to inspire future generations of terrorists); MITCHELL D. SILBER & ARVIN BHATT, N.Y. CITY POLICE DEP'T, INTELLIGENCE DIV., RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT 13 (2007), *available at* http://www.nypdshield.org/public/SiteFiles/documents/NYPD_ReportRadicalization_in_the_West.pdf (analyzing the process of radicalization of "unremarkable" terrorists in the West for purposes of developing effective counterterrorist efforts for the NYPD); RAMÓN SPAAIJ, UNDERSTANDING LONE WOLF TERRORISM: GLOBAL PATTERNS, MOTIVATIONS AND PREVENTION 56-58 (2012) [hereinafter SPAAIJ, UNDERSTANDING] (providing several case studies of individuals who have used the Internet as a source of connection to a community of support that further instigates and directs their activities); Edwin Bakker & Beatrice de Graaf, *Preventing Lone Wolf Terrorism: Some CT Approaches Addressed*, PERSP. ON TERRORISM, Dec. 2011, at 43, 46 (addressing seven potential counter-terrorist responses to lone wolf terrorism that reflect the role of "virtual communities" and the Internet in inspiring terrorist activity); Peter J. Phillips, *Lone Wolf Terrorism*, 17 PEACE ECON., PEACE SCI. & PUB. POL'Y, no. 1, 2011, at 1 (applying economic analysis to lone wolf terrorism); Ramón Spaaij, *The Enigma of Lone Wolf Terrorism: An Assessment*, 33 STUD. CONFLICT & TERRORISM 854 (2010) [hereinafter Spaaij, *Enigma*].

policy response is unnecessary and, in light of a proper understanding of the concept of "national security," ultimately counterproductive. To lay the foundation, Part I addresses the place of homegrown terrorism and lone wolf terrorism within a typology of terrorist activity, briefly outlining the variety of terrorist threats facing the United States, along with the policies available to combat each type of terrorism. Part II describes law enforcement's response to homegrown terrorism, examining the increasing reliance on confidential informants and surveillance to disrupt terrorist plots. In addition, it examines prosecutors' increasing use of statutes that provide for "preventive" criminal liability before an act of terrorism is committed. Turning specifically to lone wolf terrorism, homegrown terrorism committed by a solitary individual, Part III examines the rise of solitary terrorists within the broader radical Islamic terrorist movement, arguing that their emergence is due in large part to the impact of the very same tools that have proven so effective at combating group-based domestic terrorism. The tools currently available to law enforcement and prosecutors are ill-suited to countering (i.e., preventing) this new type of terrorism. The law enforcement community's preventive approach to terrorism focuses on exploiting the vulnerabilities and liabilities created through group interactions, an approach that is simply inapplicable to the solitary terrorist.

Stepping back from a close examination of law enforcement's methods, Part IV presents a critique of the national security community's approach to lone wolf terrorism, arguing that a policy goal of complete prevention is inappropriate. Because of lone wolves' near absolute isolation, no conceivable set of policies is likely to have a significant effect. Even if it were feasible to completely eliminate lone wolf terrorism, this Part argues that such an effort would not be worth the inevitably high cost, both in the allocation of scarce resources and the necessary infringements on civil liberties. Indeed, national security decision makers should incorporate such costs into any policy decisions. Lone wolf terrorists – poorly trained individuals operating alone with minimal equipment against relatively unimportant targets – do not pose an "existential threat," or even a significant threat, to the United States.

I. THE UNITED STATES AND THE THREAT OF TERRORISM – A PRIMER

This Part lays the foundation for this Note's analysis of homegrown and lone wolf terrorism, placing both phenomena within a broader understanding of terrorism. It provides the necessary background for a discussion of terrorism, addresses the appropriate definition of "terrorism," and briefly outlines the development of radical Islamic terrorism. The Section concludes by providing a rough framework to illustrate the policy responses available to address different types of terrorism.

A. *What Is "Terrorism"?*

No international consensus exists concerning the definition of "terrorism." The United Nations, where the rhetorical debate between "terrorists" and

"freedom fighters" is perhaps most acute, has famously been unable to come to agreement about how to define terrorism.[12] Scholarly approaches have varied from one akin to the "I know it when I see it" approach to defining obscenity,[13] to detailed, multi-part definitions.[14] Others have noted that terrorism "is what the bad guys do"[15] and that the label of "terrorist" is used mostly as a rhetorical tactic against one's enemies.[16] Indeed, entire volumes have been written about the problem of defining this politically charged phrase.[17]

In the United States, federal law defines terrorism in many different ways. "International Terrorism" and "Domestic Terrorism" are defined similarly as unlawful "acts dangerous to human life" that "appear to be intended" to coerce civilians or influence government policy.[18] Title 18 of the U.S. Code also

[12] Thalif Deen, *UN: Defining Terrorism*, AL JAZEERA, http://www.aljazeera.com/indepth/features/2010/11/201011241146218879 83.html (last modified Nov. 24, 2010, 1:13 PM).

[13] SAGEMAN, *supra* note 7, at 15.

[14] *See, e.g.*, DANIEL BYMAN, DEADLY CONNECTIONS: STATES THAT SPONSOR TERRORISM 8 (2005) ("Hoffman defines terrorism as having five distinguishing characteristics: (1) 'ineluctably political in aims and motives'; (2) 'violent – or, equally important, threatens violence'; (3) 'designed to have far-reaching psychological repercussions beyond the immediate victim or target'; (4) 'conducted by an organization'; and (5) 'perpetrated by a subnational group or non-state entity.' To Hoffman's five criteria I add a sixth: the attack deliberately targets non-combatants." (footnote omitted) (citing BRUCE HOFFMAN, INSIDE TERRORISM 43 (1998))).

[15] Brian M. Jenkins, *The Study of Terrorism: Definitional Problems*, *in* BEHAVIORAL AND QUANTITATIVE PERSPECTIVES ON TERRORISM 3, 3 (Yonah Alexander & John M. Gleason eds., 1981).

[16] Upendra D. Acharya, *War on Terror or Terror Wars: The Problem in Defining Terrorism*, 37 DENV. J. INT'L L. & POL'Y 653, 656 (2009) ("The problem of defining terrorism is further complicated in modern days by one party's tactical use of characterizing another party as a terrorist.").

[17] *See, e.g.*, BEN SAUL, DEFINING TERRORISM IN INTERNATIONAL LAW (2006) (analyzing the practice among the international community of labeling certain actions as "terrorist," discussing the implications of using that label, and offering alternatives to the terrorist label). For an analysis of the problematic expansion of the definition of "terrorism," see Sudha Setty, *What's in a Name? How Nations Define Terrorism Ten Years After 9/11*, 33 U. PA. J. INT'L L. 1, 2 (2011).

[18] 18 U.S.C. § 2331(1) (2006) ("[T]he term 'international terrorism' means activities that (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum . . . ."). The statute later defines "domestic terrorism" in nearly identical terms, omitting only the requirement in subsection (C) that the

defines "terrorists" as those who have committed or intend to commit any of forty-seven crimes,[19] including destroying an aircraft,[20] committing genocide,[21] or destroying communication systems controlled by the federal government.[22] Title 22 defines "terrorism," for the purpose of the Secretary of State's annual country reports on terrorism and the designation of Foreign Terrorist Organizations, as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."[23] The FBI defines terrorism as "the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives."[24] The Immigration and Nationality Act includes a different definition for "terrorist activity."[25]

Ultimately, however, a definition of terrorism must support the purpose of those defining the term. The United Nations consistently fails to define terrorism because although defining the term is inherently political in any context, doing so in a 193-member international organization is nearly impossible. The U.S. Code, however, contains multiple definitions of terrorism in order to expand the reach of criminal liability, increase criminal punishments, and augment the legal authority of U.S. government officials.[26]

This Note adopts a practical, policy-oriented definition that is by no means ideologically or methodologically pure. It seeks to address how U.S. law enforcement officials and the broader criminal justice system can address the phenomenon of individuals who become radicalized without significant physical interaction with or financial assistance from others and who then

activity occur outside of U.S. jurisdiction. *Id*. (5).

[19] *Id*. § 2339A.

[20] *Id*. § 32.

[21] *Id*. § 1091.

[22] *Id*. § 1362.

[23] 22 U.S.C. § 2656f(d)(2) (2006). The National Counterterrorism Center also uses this definition for its statistical analyses. *See* NAT'L COUNTERTERRORISM CTR., 2010 REPORT ON TERRORISM, at v (2011), *available at* http://www.nctc.gov/witsbanner/docs/2010_report_on_terrorism.pdf.

[24] 28 C.F.R. § 0.85(l) (2011).

[25] 8 U.S.C. § 1182(a)(3)(B)(iii) (2006) (defining "terrorist activity" as any unlawful activity which includes "highjacking [sic] or sabotage of any conveyance," detaining someone for the purposes of coercing a third party to do something, violently attacking "an internationally protected person," assassinating a person, using a "biological agent, chemical agent, or nuclear weapon or device, or . . . explosive, firearm, or other weapon or dangerous device" intending to endanger or harm, or threatening, attempting, or conspiring to do any of the foregoing).

[26] FBI, TERRORISM 2002-2005, at 32 (2005), *available at* http://www.fbi.gov/stats-services/publications/terrorism-2002-2005/terror02_05.pdf ("[T]o declare an incident a terrorist act is . . . to invoke a set of laws and punishments under which the incident may then be prosecuted.").

engage in violent acts on behalf of a perceived ideological or political goal.[27] This type of terrorism has been principally motivated by radical interpretations of the role of jihad in Islam, and, as such, this analysis focuses on radical Islamic terrorism, but the lessons gleaned from studying jihadist lone wolves are also broadly applicable to those with other motivations. This practical and flexible approach thus addresses itself mainly toward cases like that of Jose Pimentel, the lone wolf arrested in New York in November 2011, and Nidal Hasan, who, acting alone but apparently inspired by radical cleric Anwar al-Awlaki, used a semi-automatic handgun to kill thirteen individuals at Fort Hood, Texas, in November 2009.[28]

[27] I borrow this approach from Sageman, who elides a definition of terrorism and simply describes his subjects as "the men responsible for the September 11, 2001, attacks and all of those who, like them, threaten the United States and the West on behalf of a larger community, the vanguard trying to establish a certain version of an Islamist Utopia." SAGEMAN, *supra* note 7, at 15.

[28] A flexible approach to the concept of terrorism is even more evident when one addresses Nidal Hasan. Although many described the attacks as "terrorism," the court martial against Hasan included only thirteen charges of "premeditated murder under Article 118 of the Uniform Code of Military Justice." U.S. ARMY CRIMINAL INVESTIGATION COMMAND, FORT HOOD, FACTS ABOUT NOV 5 INCIDENT, *available at* http://www.hood.army.mil/incident/investigationfactsheet.doc (last modified Oct. 31, 2011, 1:41 PM). Indeed, many definitions of "terrorism" would explicitly exclude Hasan's attack because it targeted active duty military personnel who are not "non-combatants." *See* BYMAN, *supra* note 14, at 8. Notably, Byman's and Hoffman's definitions would also exclude all lone wolf terrorism, as both indicate that "terrorism" must be "conducted by an organization." *Id*. Jared Loughner, another individual commonly discussed as a "terrorist," faced forty-nine federal criminal charges, including "Attempted Assassination of a Member of Congress," "Murder of a Federal Employee," and "Causing Death to Participants at a Federally Provided Activity," but no terrorism-related charges. *See* Superseding Indictment at 1, United States v. Loughner, 782 F. Supp. 2d 829 (D. Ariz. 2011) (No. 11cr0187). Similarly, James Holmes will likely face no terrorism-related charges. *See* Adam Levine, *Colorado Governor: In a Funny Way, this Guy is a Terrorist*, CNN.COM (July 22, 2012, 1:55 PM), http://security.blogs.cnn.com/2012/07/22/colorado-governor-in-a-funny-way-this-guy-is-a-terrorist/ ("Just hours after the shooting spree in Colorado, federal authorities said they did not see any connection to terrorism. But as is often the case in these incidents, the definition of terrorist is malleable. In an interview with Candy Crowley on CNN's State of the Union, the governor of Colorado raised the question of whether the shooter should be considered a terrorist."); Nicholas Riccardi & P. Solomon Banda, *Suspected Aurora, Colo. Shooter James Holmes Gets 24 Murder Charges*, CHRISTIAN SCI. MONITOR (July 31, 2012), http://www.csmonitor.com/USA/Latest-News-Wires/2012/0731/Suspected-Aurora-Colo.-shooter-James-Holmes-gets-24-murder-charges-video ("Holmes faces two first-degree murder charges for each of the 12 people killed and two attempted first-degree murder charges for every one of the 58 injured in the July 20 shooting.").

B. *Typologies of Terrorism*

Despite the absence of a single accepted definition of terrorism, scholars have analyzed terrorism as a contextual phenomenon, distinguishing different "waves" of terrorism. This Section briefly summarizes several of the leading approaches to categorizing terrorism, ultimately adopting an alternative approach to more sharply analyze the policy options available to U.S. decision makers to counter these threats.

Professor David Rapoport's analysis of modern terrorism begins in Russia in the 1880s.[29] He describes the four "waves" that constitute modern terrorism as the "Anarchist wave," the "anticolonial wave," the "New Left wave," and the "religious wave."[30] The Anarchist wave began as an attack against the ruling order of czarist Russia, quickly spreading to the rest of Europe.[31] This wave culminated in the assassination of Archduke Franz Ferdinand, which sparked the First World War.[32] The anticolonial wave comprised terrorists who fought to "get the imperial powers to withdraw" and included such groups as the Irish Republican Army (IRA) and the Palestine Liberation Organization (PLO).[33] The third wave of terrorism consisted of groups from the extreme left in the 1970s, such as the Red Army Faction in West Germany, the Weather Underground in the United States, and the Red Brigades in Italy, and was directed at the existing capitalist system.[34] Today, the world finds itself in Rapoport's fourth and final wave, religious terrorism, in which "Islamic groups have conducted the most significant, deadly, and profoundly international attacks."[35] Rapoport argues that this wave was sparked by a combination of the Iranian Revolution and Soviet invasion of Afghanistan, both of which occurred in 1979.[36] Rapoport's typology thus takes a longer view, placing the current threat of radical Islamic terrorism in a broader historical context. Rapoport's analysis, however, lacks the granularity necessary to adequately understand – and address – the current threat, as his sweeping approach addresses all religious terrorism as part of a single wave. Specifically, his framework conflates the terrorism conducted by adherents of Sunni Islam (principally Al Qaeda) and Shia Islam (principally Hezbollah), when both movements – with different goals, motivations, and tactics – must be understood separately. Therefore, a typology more focused on the phenomenon of radical Islamic terrorism is necessary.

---

[29] David C. Rapoport, *The Four Waves of Modern Terrorism*, *in* ATTACKING TERRORISM: ELEMENTS OF A GRAND STRATEGY 46, 47 (Audrey Kurth Cronin & James M. Ludes eds., 2004).

[30] *Id*.

[31] *Id*.

[32] *Id*. at 52.

[33] *Id*. at 53.

[34] *Id*. at 56.

[35] *Id*. at 61.

[36] *Id*.

Dr. Thomas Lynch analyzes the differences between Shia and Sunni Islamic terrorism and describes the respective elements of each strand. The five discrete "campaigns" of modern Shia terrorism, beginning in 1981 in the aftermath of the Iranian Revolution, stem principally from Iranian foreign policy goals and relate mostly to Israel.[37] Although Shia terrorism certainly targets U.S. interests, it does so in the Middle East and almost entirely in conformance with Iranian foreign policy goals.[38]

The trajectory of Sunni terrorism, however, takes a "far more decentralized and non-statist" form, decidedly different than that of Shia terrorism.[39] Lynch describes four waves of Sunni terrorism, beginning also in the early 1980s, but focusing on the "broad objectives of destroying unacceptable Muslim state governments while replacing all Muslim states with a borderless Islamic caliphate."[40] Therefore, the first wave of Sunni terrorism focused on a decentralized battle against *takfir* (infidel) Muslim regimes throughout the Middle East and North Africa.[41] The second wave reversed this decentralization, directing the efforts of nearly all Sunni jihadists toward the Afghan resistance to the Soviet occupation.[42] After the Soviet withdrawal in 1989, radical Sunni jihadists decentralized once again, combating hostile regimes in Chechnya, the Balkans, and Somalia, as well as throughout the greater Middle East.[43] Their efforts fell short, however, and the "[f]ailure of the third wave begat a fourth."[44] The fourth wave shifted the focus of the fight from the "near enemy" (hostile Arab regimes) to the "far enemy" (the Western governments supporting these regimes).[45] The fourth wave "was inspired, organized and remains coordinated" by Al Qaeda and "continues today."[46]

---

[37] COL. THOMAS F. LYNCH III, COMBATING TERRORISM CTR., SUNNI AND SHI'A TERRORISM: DIFFERENCES THAT MATTER 23, *available at* http://gsmcneal.com/wp-content/uploads/2008/12/sunni-and-shia-terrorism-differences-that-matter.pdf (describing five different geographic and temporal concentrations of Shia terrorism from 1981 to the present).

[38] *Id*. at 29 ("The five campaigns of Shi'a group terror have each been designed to achieve a specific policy objective approved by the clerical leadership in Iran, or in coordination between Iranian agents and elements with Hezbollah and the Government of Syria.").

[39] *Id*. at 24.

[40] *Id*. at 29. For a more in-depth discussion of the ideology of radical Sunni terrorists, see MARY R. HABECK, KNOWING THE ENEMY: JIHADIST IDEOLOGY AND THE WAR ON TERROR (2006).

[41] LYNCH, *supra* note 37, at 27.

[42] *Id*.

[43] *Id*. at 28.

[44] *Id*. at 27.

[45] Paul R. Pillar, *The Diffusion of Terrorism*, MEDITERRANEAN Q., WINTER 2010, 1, 3 ("Bin Ladin's principal contribution to the strategic debate within the movement was to discern the advantage of attacking the far enemy – the United States – as a means to toppling their main enemies, which were the regimes within Muslim countries. It was the

Dr. Marc Sageman, a former CIA official and clinical psychiatrist, offers a narrower framework of terrorism, also invoking the "wave" metaphor, but describing only the current contours of the threat from Al Qaeda.[47] Sageman's first wave consists of Osama bin Laden and his initial companions: the "Afghan Arabs" who founded Al Qaeda and traveled to Afghanistan in the 1980s to fight the Soviet Union.[48] The second wave comprises those who joined Al Qaeda in the 1990s, after the Soviet Union withdrew from Afghanistan.[49] Together, Sageman's first two waves constitute what today is considered Al Qaeda "Central." Al Qaeda's third wave consists of "hoodlums putting the Al Qaeda label on themselves."[50] These "amateur wanna-bes"[51] are what Sageman labels the "al Qaeda social movement."[52]

Although these frameworks are helpful in understanding the history and evolution of terrorism, this Note draws from each to adopt an alternative, policy-oriented framework. Because of its policy-centric approach, this Note uses a typology based on the nature of the threat posed to the United States by different types of terrorism, as well as the tools the United States has used to counteract each threat. This framework operates on a rough continuum, with state-sponsored terrorism on one end of the spectrum, international terrorism by non-state actors in the middle, and homegrown terrorism occupying the opposite end. Such a framework reflects the continuum of policy options available to U.S. policy makers to counteract each type of terrorism, from military and diplomatic options at one end to law enforcement and the criminal justice system on the other end. It is necessarily imperfect, but allows for sharper distinctions among the suite of policy options available to decisionmakers, and, most importantly for this Note, a proper assessment of the tools available to combat lone wolf terrorism.

lack of success in felling the near enemies that led Zawahiri and some others eventually to favor bin Ladin's strategy."); *see also* FAWAZ A. GERGES, THE FAR ENEMY: WHY JIHAD WENT GLOBAL 32 (2d ed. 2009) (quoting Al Qaeda leader Ayman Al-Zawahiri as arguing that Al Qaeda's struggle against the international "Jewish-Crusader alliance" should "not [be] confined to a single region" but rather should "include[] the apostate domestic enemy and the Jewish-crusader external enemy").

[46] LYNCH, *supra* note 37, at 27.

[47] *See* SAGEMAN, *supra* note 7, at 32-33.

[48] *Id*. at 40.

[49] *Id*. at 49.

[50] *Putting Al Qaeda on the Couch*, NEWSWEEK (July 18, 2008, 8:00 PM), http://www.thedailybeast.com/newsweek/2008/07/18/putting-al-qaeda-on-the-couch.html (interview with Marc Sageman).

[51] *Id*.

[52] SAGEMAN, *supra* note 7, at 40.

C. *Enemies Abroad, Criminals at Home – A Policy-Oriented Framework of Terrorist Threats to the United States*

The United States faces a wide variety of national security threats, including many different types of terrorism. These threats, however, vary significantly in severity, as do the appropriate policies to counteract them. The resource-intensive policy responses to state-sponsored and international terrorism are premised on each threat's respective potential to inflict severe damage and high casualties. Although conceptualizing the terrorist threat to the United States as stemming from state-sponsored terrorism, international terrorism, and homegrown terrorism oversimplifies the complex contours of global terrorism, it places the available policy options in sharp relief.

1. State-Sponsored Terrorism

State-sponsored terrorism, the active support of a terrorist group by a national government,[53] was widespread during the Cold War and was typified by the Libyan government's central role in the 1986 terrorist attacks against U.S. servicemembers in a West Berlin disco. The U.S. response was predictable. Alleging "irrefutable proof" of Libyan involvement and deliberate targeting of Americans, President Ronald Reagan ordered Operation El Dorado Canyon: air strikes against targets in the Libyan cities of Tripoli and Benghazi.[54] State-sponsored terrorism is part of the relations among nation-states: "one instrument of many" among the tools of foreign relations.[55] Some describe state sponsorship of terrorism as akin to a "poor man's air force."[56] Accordingly, the tools available to combat state-sponsored terrorism generally consist of diplomacy, economic sanctions, and military force, either as a general deterrent against future terrorist acts or as "deterrence by denial"[57] through the targeting of specific individuals or facilities.[58]

---

[53] This is the most common description of state-sponsored terrorism, but national governments can, and do, support terrorist organizations through less aggressive, and even passive, support. *See* BYMAN, *supra* note 14, at 15 (describing the continuum of state support for terrorism from "strong supporter" to "unwilling host").

[54] *Operation El Dorado Canyon*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/ops/el_dorado_canyon.htm (last visited Sep. 9, 2012).

[55] BYMAN, *supra* note 14, at 22 ("For many leaders terrorism offers a lever of influence that, while far from ideal, has far more potential than other means available.")

[56] HOFFMAN, *supra* note 14, at 34.

[57] The concept of "deterrence by denial" refers to the goal of thwarting an adversary's "operational objectives," and is normally contrasted with "deterrence by threat of punishment." *See, e.g.*, David S. Yost, *The US Nuclear Posture Review and the NATO Allies*, 80 INT'L AFF. 705, 727 (2004).

[58] This is not to say that criminal liability plays no role in state-sponsored terrorism. The 1986 Berlin bombing, although linked to the government of Libyan leader Muammar Qaddafi, led to the conviction of four individuals for murder and attempted murder in a German criminal court in 2001. Steven Erlanger, *4 Guilty in Fatal 1986 Berlin Disco*

State-sponsored terrorism has seen a sharp decline since the Cold War, principally because state sponsors of terrorism have increasingly "found the practice costly."[59] Indeed, a significant decrease in state-sponsored terrorism has been apparent since even before the September 11, 2001, attacks.[60] Although state-sponsored terrorism is nowhere near as prevalent today as it was during the Cold War, it is by no means finished. Several of the fifty groups currently designated as Foreign Terrorist Organizations by the U.S. Secretary of State still receive significant state support.[61] Iran remains the principal state supporter of terrorist groups,[62] mainly through its extensive support of Lebanese Hezbollah.[63] State-sponsored terrorism thus remains a significant threat to U.S. interests, but it is not one to be addressed principally, or even significantly, by law enforcement; rather, it is a diplomatic and military issue.

Bombing Linked to Libya, N.Y. TIMES (Nov. 14, 2001), http://www.nytimes.com/2001/11/14/world/4-guilty-in-fatal-1986-berlin-disco-bombing-linked-to-libya.html (reporting on the conviction of four individuals for the bombing of the Berlin disco but noting the judge's acknowledgment of Libya's "at the very least . . . considerable . . . responsibility for the attack").

[59] Rapoport, *supra* note 30, at 59 (describing how European states severed diplomatic and economic relations with state-sponsors of terrorism, Israel invaded Lebanon in 1982 to eliminate PLO training facilities, and the United States bombed Libya in 1986 for its role in killing Americans in a Berlin nightclub attack).

[60] Pillar, *supra* note 45, at 3 ("One [trend] has been a reduction in the sponsorship, or direct use, of terrorism by states. Libya, Syria, and North Korea were, as recently as the late 1980s, practitioners of major terrorist operations, such as the blowing up of airliners or the attempt to do so. They no longer are . . . ."); *see also* SILBER & BHATT, *supra* note 11, at 13 ("The state terrorism of the Cold War, whether political or ideological, has almost disappeared.").

[61] Press Release, U.S. Dep't of State, Bureau of Counterterrorism, Foreign Terrorist Organizations (Jan. 27, 2012); *see also* BYMAN, *supra* note 14, at 2-3 ("Of the thirty-six terrorist groups designated as foreign terrorist organizations by the Secretary of State in 2002, for example, twenty had enjoyed significant state support at one point in their history, and nine still do [in 2006].").

[62] U.S. DEP'T OF STATE, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2009, at 192 (2010), *available at* http://www.state.gov/documents/organization/141114.pdf.

[63] *Id*. ("Iran has provided hundreds of millions of dollars in support to Lebanese Hizballah and has trained thousands of Hizballah fighters at camps in Iran."); *see also* BYMAN, *supra* note 14, at 79-115 (describing how political ideology has motivated and impacted Iran's state support for the Lebanese Hezbollah). Recent activity indicates that state-sponsored terrorism will remain a global threat for the foreseeable future. *See* Richard Esposito & Brian Ross, *Iran 'Directed' Washington, D.C., Terror Plot, U.S. Says*, ABC NEWS (Oct. 11, 2011), http://abcnews.go.com/Blotter/us-iran-tied-terror-plot-washington-dc-disrupted/story?id=14711933#.T1TtUofXGf4 (describing an incident in which the FBI and DEA foiled a terrorist plot which was "directed by high-ranking members of the Iranian government").

2. International Terrorism by Non-State Actors

The threat posed to the United States by non-state actors who engage in terrorism is significant, and embodied principally by the Al Qaeda attacks of September 11, 2001.[64] Although Al Qaeda had a symbiotic relationship with a national government – the Taliban regime in Afghanistan – the September 11 attacks were planned by members of a non-state organization from several locations around the world and executed from within the United States by individuals with advanced terrorist training. A non-state actor had threatened the national security of the United States.[65]

Ten years after the September 11, 2001, attacks, however, Al Qaeda's core is significantly weaker. Recent official estimates of Al Qaeda's total strength describe a relatively anemic organization. In June 2010, CIA Director Leon Panetta stated that there were between 50 and 100 Al Qaeda operatives in Afghanistan and National Counterterrorism Center Director Michael Leiter stated that there were approximately 300 Al Qaeda members in Pakistan's border regions.[66] In fact, recent news accounts have reported that U.S. counterterrorism efforts against Al Qaeda in Afghanistan and Pakistan have rendered the organization "operationally ineffective."[67]

Not all observers agree, however, that Al Qaeda is a diminished organization. These observers point to Al Qaeda's robust "branch and franchise" system as actually demonstrating an expansion of Al Qaeda's power through such groups as Al Qaeda in the Arabian Peninsula (AQAP) and Al Qaeda in the Islamic Maghreb (AQIM).[68] These "affiliated groups" often have

[64] NAT'L COUNTERTERRORISM CTR., *supra* note 23, at 6 ("[In 2010,] Sunni extremists committed almost 60 percent of all worldwide terrorist attacks[, which] caused approximately 70 percent of terrorism-related deaths . . . .").

[65] *See* K.A. Taipale, *The Ear of Dionysus: Rethinking Foreign Intelligence Surveillance*, 9 YALE J.L. & TECH. 128, 137 (2007) ("Organized groups of non-state actors now have the potential capacity and capability to inflict the kind of destructive outcomes that can threaten national survival by undermining the public confidence that maintains the economic and political systems in modern Western democracies." (footnotes omitted)).

[66] David E. Sanger & Mark Mazzetti, *New Estimate of Strength of Al Qaeda is Offered*, N.Y. TIMES (June 30, 2010), http://www.nytimes.com/2010/07/01/world/asia/01qaeda.html (reporting Leiter's statement that Al Qaeda "is weaker today than it has been at any time since 2001").

[67] Greg Miller, *Al-Qaeda Targets Dwindle As Group Shrinks*, WASH. POST (Nov. 22, 2011), http://www.washingtonpost.com/world/national-security/al-qaeda-targets-dwindle-as-group-shrinks/2011/11/22/gIQAbXJNmN_story.html.

[68] Leah Farrall, *How al Qaeda Works: What the Organization's Subsidiaries Say About Its Strength*, FOREIGN AFF., Apr. 2011, at 128, 134. ("[A]l Qaeda's core members focus on exercising strategic command and control to ensure the centralization of the organization's actions and message, rather than directly managing its branch and franchises. Such an approach reduces the command-and-control burden, because al Qaeda need only manage centralization on a broad level, which, with a solid *manhaj* already in place, can be achieved through strategic leadership rather than day-to-day oversight.").

divergent objectives from Al Qaeda, but nonetheless "consider it advantageous to . . . adopt[] the widely recognizable al Qaeda brand name . . . much the way franchisees adopt commercial brand names."[69]

Regardless of how one conceptualizes "Al Qaeda" – as a small, elite organization or as a sprawling terrorist conglomerate – the policy options available to U.S. policy makers are roughly the same.[70] Of course, the scope of such policies would be considerably larger, and their content more complicated, if organizations from AQIM in Morocco to Jemaah Islamiyah in Indonesia were included, but the balance of diplomatic and military options versus law enforcement options would be the same. In other words, Al Qaeda, however defined, requires a hybrid approach incorporating military, diplomatic, and law enforcement tools. The United States' targeted-killing policy in the border regions of Afghanistan and Pakistan, as well as in Yemen and Somalia, is the main military component of its policy toward Al Qaeda. Targeted killing is almost exclusively used in states that lack effective control over their territory.[71] The U.S. government eschews military options for closer law enforcement cooperation and diplomatic efforts in foreign nations whose governments maintain control over their territory, while efforts to address the Al Qaeda threat inside the United States consist solely of law enforcement and intelligence tools.[72]

Therefore, the "geography" of U.S. policy toward Al Qaeda varies based on the ability of law enforcement to function effectively. In the territory of the United States, law enforcement, public safety, and border protection are used. Abroad, the United States uses a mix of diplomacy, law enforcement cooperation, and military-to-military contact. In "failed states," or areas beyond the effective control of national governments, the United States uses principally military options. Regardless of geography, the United States also maintains a robust system that monitors the financial transactions of suspected terrorists and terrorist groups. The threat from Al Qaeda is significant, and justifies employing considerable resources against it. Nearly 3,000 people died on September 11, 2001, and subsequent Al Qaeda attacks throughout the world

[69] Pillar, *supra* note 45, at 7.

[70] *But see* Michael J. Ellis, Comment, *Disaggregating Legal Strategies in the War on Terror*, 121 YALE L.J. 237, 245 (2011) (arguing that "defeating Al Qaeda requires separating local grievances from global ideology").

[71] *See* MARC LYNCH, CTR. FOR A NEW AM. SEC., RHETORIC AND REALITY: COUNTERING TERRORISM IN THE AGE OF OBAMA 5 (2011) (describing the Obama administration's strategy of "escalat[ing] drone strikes in Pakistan and military efforts in Afghanistan and counterterrorism partnerships in the ungoverned spaces where al Qaeda and its affiliated movements thrive").

[72] *See* Jeff Breinholt, *Seeking Synchronicity: Thoughts on the Role of Domestic Law Enforcement in Counterterrorism*, 21 AM. U. INT'L L. REV. 157, 158 (2005) ("The United States enjoys a multi-faceted counterterrorism arsenal. By design, there is not one favorite tool, applicable to all national security challenges. . . . [These tools] run the gamut . . . from military action, diplomacy, law enforcement and economic sanctions, to intelligence and covert action.").

have caused significant damage. Indeed, the principal reason Al Qaeda has been effectively neutralized is because of the concerted effort U.S. policy makers have undertaken.[73]

3. Domestic Terrorism

Domestic, or "homegrown," terrorism has existed in many different contexts, engaging in violence on behalf of a wide variety of goals. Nationalist and separatist groups such as the Quebec Liberation Front, the Basque separatist movement ETA, and the IRA have engaged (and, in some respects, still engage) in terrorist campaigns against governments they see as oppressing minorities. Groups like the Red Army Faction and the Weather Underground engaged in similar domestic campaigns on behalf of broader leftist political goals. Homegrown terrorists also operate against specific government policies, as in the case of anti-abortion and white supremacist terrorism in the United States. Policy disagreements need not be specific, as U.S. homegrown terrorists have expressed broad grievances about the overall role of the federal government.[74] Finally, millenarian groups like the Japanese cult Aum Shinrikyo operate against their governments on behalf of ethereal spiritual goals.[75]

The nature of the threat posed by Al Qaeda-inspired homegrown terrorists in the United States is unique, blending elements of the above. These terrorists' goals are both religious and political, while also tied to the cessation of specific policies of the U.S. government, namely, those that result in the perceived oppression of Muslims throughout the world. Rather than a specific organization, however, the homegrown threat is a part of the Al Qaeda social movement, where the recruitment process has evolved from one of "top-down identification and indoctrination of members" to "a process that is largely one of self-selection."[76] Additionally, the threat is a product of pragmatism: rather than traveling from one country to another to fight, prospective jihadists "have

[73] *See supra* notes 66-67 and accompanying text.

[74] *See, e.g.*, Larry Copeland, *Domestic Terrorism: New Trouble at Home*, USA TODAY (Nov. 14, 2004, 11:12 PM), http://www.usatoday.com/news/nation/2004-11-14-domestic-terrorism_x.htm (describing the continued prevalence of "the 'black helicopter' crowd" and persons belonging thereto as "extremists who distrust and abhor the federal government").

[75] Not all domestic terrorist organizations fit into these categories, and many span these categories. For example, Peru's Shining Path can be equally characterized as a separatist group, a grievance-driven movement, and a spiritual cult. *See* Kathryn Gregory, *Backgrounder: Shining Path, Tupac Amaru (Peru, Leftists)*, COUNCIL ON FOREIGN REL., http://www.cfr.org/terrorism/shining-path-tupac-amaru-peru-leftists/p9276 (last updated Aug. 27, 2009). This cursory description also omits groups more accurately characterized as rebels or insurgents, such as Sri Lanka's now defunct Tamil Tigers (Liberation Tigers of Tamil Elam), against which the primary policy option was a military one. *See generally* M.R. NARAYAN SWAMY, THE TIGER VANQUISHED: LTTE'S STORY (2010).

[76] Steven Simon, *Al Qaeda Then and Now*, *in* AL QAEDA NOW: UNDERSTANDING TODAY'S TERRORISTS 3, 13 (Karen J. Greenberg ed., 2005).

begun to conduct operations within their own [countries]" because of "the greater scrutiny at borders."[77] In sum, in largely eschewing foreign training, financing, and tactical directives, homegrown operations have been "conducted by local al-Qaeda inspired affiliate organizations or by local residents/citizens, who utilized al-Qaeda as their ideological inspiration."[78]

In contrast to state-sponsored and international terrorism, neither diplomacy nor military action can effectively counter domestic terrorism.[79] Because domestic terrorism both emerges from and occurs within a country's borders, efforts to interdict potential terrorists at the border are fruitless, rendering useless the counterterrorism efforts of agencies such as Customs and Border Protection and the Transportation Security Administration. The lack of a need to cross borders also eliminates the utility of many immigration-related and passport-fraud investigations in counterterrorism efforts.[80] Therefore, only domestic policy options – principally law enforcement – are available to counter this threat.[81] Law enforcement agencies possess a variety of counterterrorism tools and tactics: infiltration of domestic terrorist groups through confidential informants, surveillance, physical protection of at-risk targets, denying potential terrorists the most dangerous means of carrying out attacks, and community engagement to preempt individual radicalization. Once individuals are identified, they can then be subject to criminal prosecution for both general and terrorism-related crimes.

---

[77] SAGEMAN, *supra* note 7, at 133.

[78] SILBER & BHATT, *supra* note 11, at 14.

[79] *Cf.* Erik J. Dahl, *The Plots That Failed: Intelligence Lessons Learned from Unsuccessful Terrorist Attacks Against the United States*, 34 STUD. CONFLICT & TERRORISM 621, 629 (2011) ("A large number of plots have been prevented as a result of intelligence or security operations overseas."). Military options are generally unavailable domestically against terrorists because of the Posse Comitatus Act of 1878's bar against the military's deployment "as a posse comitatus or otherwise to execute the laws." 18 U.S.C. § 1385 (2006). Additionally, it is perhaps fair to characterize counter-radicalization efforts as a type of domestic "public diplomacy." International diplomacy, however, focuses on both dissuading would-be terrorists and encouraging foreign officials to proactively counter terrorism within their own country.

[80] *See* Scott Stewart, *The Landscape of Passport Fraud Has Changed*, POLICEONE.COM (July 17, 2010), http://www.policeone.com/homeland-security/articles/2154935-The-landscape-of-passport-fraud-has-changed/ ("Passport fraud is also frequently committed by individuals involved in crimes such as narcotics smuggling and arms trafficking, as well as by militants involved in terrorist plots.").

[81] *Cf.* Diane Webber, *Can We Find and Stop the "Jihad Janes"?*, 19 CARDOZO J. INT'L & COMP. L. 91, 99 (2011) ("Since 2004, international terrorists have been treated in the same way as British citizens, so there is no practical distinction in the way homegrown or international terrorists on British soil are investigated, arrested, prosecuted or treated.").

II. COUNTERING THE HOMEGROWN THREAT

Homegrown terrorism has long threatened the United States, with varying degrees of severity. Although radical Islamic terrorism is arguably the most prominent homegrown terrorist threat today, Puerto Rican nationalists topped the list of domestic terror threats as recently as the 1980s.[82] Indeed, in 2006 the Department of Justice did not include radical Islamic terrorism among the risks of domestic terrorism facing the United States.[83] Today, however, radical Islamic homegrown terrorism is a major part of the terrorist landscape, and the threat appears to be growing.[84] The federal government has accordingly placed a major emphasis on "countering violent extremism in the homeland."[85]

This Part begins by describing the law enforcement community's strategic shift in counterterrorism policy, from treating terrorism as a more or less "standard" crime to its current status as something to be prevented at nearly any cost. It then describes the main tactics employed to counter the threat of homegrown terrorism in law enforcement's primary areas of national security responsibility: "disrupting terrorist plots through detection and arrest" and "incapacitating terrorists through prosecution and incarceration."[86] Agencies

---

[82] *See* JAMES M. POLAND, UNDERSTANDING TERRORISM: GROUPS, STRATEGIES, AND RESPONSES 72 (1988) ("The most active terrorist groups in the United States have historically been groups seeking Puerto Rican independence.").

[83] U.S. DEP'T OF JUSTICE, COUNTERTERRORISM SECTION, COUNTERTERRORISM WHITE PAPER 59 (2006), *available at* http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf ("Current domestic terrorism threats include animal rights extremists, eco-terrorists, anarchists, anti-government extremists such as 'sovereign citizens' and unauthorized militias, Black separatists, White supremacists, and anti-abortion extremists."); *see also* FBI, *supra* note 26, at 1 ("With the exception of a white supremacist's firebombing of a synagogue in Oklahoma City, Oklahoma, all of the domestic terrorist incidents [between 2002 and 2005] were committed by special interest extremists active in the animal rights and environmental movements.").

[84] THE WHITE HOUSE, EMPOWERING LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES 2 (2011) ("We know that [Al Qaeda and its affiliates and adherents] are actively seeking to recruit or inspire Americans to carry out attacks against the United States, particularly as they are facing greater pressure in their safe-havens abroad.").

[85] Eileen Sullivan, *Police Chiefs Meet at WH on Homegrown Terror Fight*, CNSNEWS.COM (Jan. 18, 2012), http://cnsnews.com/news/article/police-chiefs-meet-wh-homegrown-terror-fight ("There has been an uptick in attempted attacks by Americans and other legal U.S. residents in the past few years, prompting the Obama administration to place a priority on finding ways to stop this type of violence.").

[86] David Kris, *Law Enforcement As a Counterterrorism Tool*, 5 J. NAT'L SECURITY L. & POL'Y 1, 78 (2011); *see also* Alberto Gonzales, U.S. Att'y Gen., Remarks at the World Affairs Council of Pittsburgh on Stopping Terrorists Before They Strike: The Justice Department's Power of Prevention (Aug. 16, 2006), (transcript available at http://www.justice.gov/archive/ag/speeches/2006/ag_speech_060816.html) ("At the Department of Justice, our strategy of prevention is built on four primary pillars of activity: First, aggressive criminal and intelligence investigations. Second, utilization of partnerships, information-gathering and collaboration at every level: international, national,

charged with countering domestic terrorism focus on operational vulnerabilities: specific points in the cycle of a terrorist attack when they can most effectively uncover and disrupt plots.[87]

A. *The Strategic Shift to Preventive Counterterrorism*

Prior to the September 11, 2001, terrorist attacks, the FBI conceived of itself as a responsive agency that would aggressively investigate terrorism-related crimes and then refer cases to federal prosecutors.[88] The threat of terrorism was seen as emanating from overseas; terrorism was not a domestic law enforcement priority.[89] When terrorist acts were prosecuted, "pre-9/11 terrorism prosecution[s] centered on some act of violence and a link to the United States."[90] Terrorism was considered a qualitatively different type of crime, but not something to be addressed with a different set of tools and tactics.

September 11, however, changed the federal government's attitude toward law enforcement, "transform[ing] [its counterterrorism] approach from reactive to proactive, from response to prevention."[91] Protecting the United States from terrorism became the single top priority for the FBI.[92] Indeed, prevention became the "goal of all goals when it comes to terrorism."[93] Although the Department of Justice has attained a high conviction rate in terrorism cases, government officials are wary of waiting too long to disrupt threats – even at

state and local. Third, prosecution and incarceration of terrorists. And, finally, containment of the radicalization that leads to homegrown, al Qaeda-inspired terrorists.").

[87] *See* Scott Stewart, *Detection Points in the Terrorist Attack Cycle*, STRATFOR (Mar. 1, 2012, 12:13 PM), http://www.stratfor.com/weekly/detection-points-terrorist-attack-cycle?utm_source=freelist-f&utm_medium=email&utm_campaign=20120301&utm_term=sweekly&utm_content=readmore&elq=a3a062afea6e4935af6eab1924b207c7 (describing potentially vulnerable points in the "terrorist attack cycle" as selecting a target, engaging in "preoperational surveillance," training, weapon acquisition, and the attack's "operational phase").

[88] FBI, *supra* note 26, at 1 (describing the FBI's initial response as "discrete, ad hoc responses to terrorist threats"). For a thorough but accessible history of the FBI's counterterrorism operations, see *id*. at 32-55.

[89] John C. Richter, *Counter-Terrorism: A Federal Prosecutor's View*, 33 OKLA. CITY U. L. REV. 297, 303 (2008) ("[T]he few [terrorism] cases that were prosecuted were considered discrete matters, not warranting a more comprehensive approach domestically.").

[90] Wadie E. Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L.J. 543, 555 (2011).

[91] U.S. DEP'T OF JUSTICE, *supra* note 83, at 3; *see also* Wadie E. Said, *The Terrorist Informant*, 85 WASH. L. REV. 687, 715 (2010).

[92] U.S. DEP'T OF JUSTICE, FACT SHEET: SHIFTING FROM PROSECUTION TO PREVENTION, REDESIGNING THE JUSTICE DEPARTMENT TO PREVENT FUTURE ACTS OF TERRORISM (2002), *available at* http://www.justice.gov/archive/ag/speeches/2002/fbireorganizationfactsheet.htm.

[93] Gonzales, *supra* note 86.

the expense of evidence and intelligence collected – and have emphasized both that "preventing the loss of life is our paramount objective" and that "a successful prosecution is not worth the cost of one innocent life."[94]

This new preventive approach focuses on discovering, arresting, and prosecuting prospective terrorists "before any dangerous plot can come to fruition,"[95] reflecting a determination that normal law enforcement mechanisms are unable to address terrorism.[96] This new approach has resulted in additional powers for federal and state agencies and "a massive redeployment of resources away from other areas" of law enforcement.[97] Additionally, the strategic change from reaction to prevention has led to major changes within the bureaucratic composition of the Department of Justice and the FBI, including the creation of the FBI's National Security Branch in 2005 and the Department of Justice's National Security Division in 2006.[98] Pursuant to this prevention strategy, law enforcement has developed a distinct set of investigative and prosecutorial tools to stop homegrown terrorism before it comes to fruition.

B. *Law Enforcement's Tools*

In preventing homegrown terrorism, law enforcement faces a difficult challenge. Terrorism plots rely heavily on closely held information and "often involve individuals operating in close secrecy, a predicament that requires law enforcement officials to think creatively about the means of extracting

---

[94] *Id*.

[95] Said, *supra* note 91, at 715.

[96] U.S. DEP'T OF JUSTICE, *supra* note 83, at 5 ("On every level, we are now committed to a new strategy of prevention. This includes the design, implementation and support of policies and strategies, including the investigation and prosecution of terrorism and terrorism-related cases and the pursuit of legislative initiatives, which will prevent, disrupt and defeat domestic and international terrorist operations before they occur.")

[97] Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 618-19 (2005) ("Now we are unwilling to wait for attacks to occur; we demand that federal enforcement agencies work to prevent them from happening, not just by improving their intelligence capabilities but by prosecuting the terrorists before they actually strike."); *see also Confronting the Terrorist Threat to the Homeland: Six Years After 9/11: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 110th Cong. 1 (2007) (statement of Robert S. Mueller, III, Director, FBI) ("Since 9/11, the FBI has set about transforming itself into a national security agency, expanding our mission, overhauling our intelligence programs and capabilities, and undergoing significant personnel growth."); CTR. ON LAW & SEC., TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001 – SEPTEMBER 11, 2011, at 2 (2011), *available at* http://www.lawandsecurity.org/Portals/0/Documents/TTRC%20Ten%20Year%20Issue.pdf [hereinafter CTR. ON LAW & SEC. 2011] (referencing the federal government's "heavy reliance on preventive law enforcement" in counterterrorism efforts).

[98] *See* Kris, *supra* note 86, at 7-9.

information about a particular terrorist plot or group."[99] Holding no silver bullet, police must execute "the difficult and lengthy task of penetrating terrorist groups."[100] To prevent homegrown terrorism, rather than to merely react to it, law enforcement has embraced several key tactics: attempting to prevent the radicalization of susceptible individuals, employing confidential informants and other sources of "human intelligence," electronically and physically surveilling suspected terrorists, denying would-be terrorists the means to carry out attacks, engaging with community leaders, and providing physical security for vulnerable locations. Although disrupting domestic terror plots is a daunting task, these tools have proven fundamentally successful in protecting the United States from terrorism, exploiting the operational vulnerabilities of terrorist groups.

1. Community Engagement and Counter-Radicalization

One principal tool of law enforcement has been to engage with those who live in the communities most susceptible to terrorism. These efforts seek to build trust with community members in order to preempt radicalization and ensure effective cooperation. Perhaps the most logical and direct way to counteract the nefarious harms of terrorism is to persuade those individuals with radical tendencies and sympathies to moderate their views and actions.[101] The federal government has accordingly made counter-radicalization a central part of their strategy of "countering violent extremism."[102] Typical efforts involve outreach to Arab, South Asian, and Muslim community leaders, education programs, and efforts to explain controversial policies. Crucially, these efforts involve a concerted push to establish a counter-narrative that discredits violent interpretations of Islam, proffered by respected community leaders or those adherents of Al Qaeda's ideology that have foresworn its extreme positions.[103] Government programs to counter violent extremism are based on the "premise that well-informed and -equipped families, communities, and local institutions represent the best defense against terrorist ideologies."[104]

Although questions remain about the efficacy of counter-radicalization efforts and the legality of government working closely on an issue inextricably

[99] Said, *supra* note 91, at 688.

[100] Dahl, *supra* note 79, at 629.

[101] *See* Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 STAN. L. REV. 125, 145-61 (2012).

[102] THE WHITE HOUSE, *supra* note 84, at 5.

[103] *See generally* Omar Ashour, *Online De-Radicalization? Countering Violent Extremist Narratives: Message, Messenger and Media Strategy*, PERSP. ON TERRORISM, Dec. 2010, at 15.

[104] *DHS's Approach to Countering Violent Extremism*, DEP'T OF HOMELAND SECURITY, http://www.dhs.gov/dhss-approach-countering-violent-extremism (last visited Sep. 11, 2012).

tied to religion,[105] "counterradicalization is rapidly becoming a key tool for addressing homegrown terrorism before it manifests itself as violent activity."[106] Establishing trust with affected communities also encourages proactive cooperation, which in turn leads to more effective law enforcement.[107] Law enforcement's cooperative relationship with the Arab and Muslim community has resulted in consistent counterterrorism successes,[108] but overuse of other methods, most notably stings and informants, "has the potential to sour relations between law enforcement and Muslim groups in ways that may degrade the ability of the former to identify potential terrorist plots over the long run."[109] At its most basic level, "[t]he war against the al Qaeda social movement is . . . a battle for the hearts and minds of the Muslim community."[110]

2. Confidential Informants

Confidential informants are a frequent source of information leading to the disruption of terrorist plots and the subsequent arrest and prosecution of terrorist suspects. The precise sequence with which law enforcement uses confidential informants varies. Sometimes an individual from within a terrorist group changes his mind and comes voluntarily to the police, or an informant is placed after police receive a tip from the public.[111] Other confidential informants are recruited after they themselves are arrested, and their cooperation with police results in dropped charges or favorable sentencing. Still other informants come from law enforcement itself and are used in "sting"

[105] *See* Rascoff, *supra* note 101, at 129 ("[C]ounter-radicalization risks conflict with core American commitments to religious freedom embodied in the First Amendment's Religion Clauses.").

[106] Samuel J. Rascoff, *The Law of Homegrown (Counter)Terrorism*, 88 TEX. L. REV. 1715, 1719 (2010).

[107] *See* Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 233 (2008) ("To be effective in lowering crime and creating secure communities, the police must be able to elicit cooperation from community residents."); Al Baker, *F.B.I. Official Faults Police Tactics on Muslims*, N.Y. TIMES (Mar. 7, 2012), http://www.nytimes.com/2012/03/08/nyregion/chief-of-fbi-newark-bureau-decries-police-monitoring-of-muslims.html (quoting Michael B. Ward, the Special Agent in Charge of the FBI's Newark, New Jersey, office, as saying "when people pull back cooperation, it creates additional risk, it creates blind spots, it hinders our ability to have our finger on the pulse of what's going on around the state. It makes the job of the Joint Terrorism Task Force much, much harder.").

[108] *See* Sullivan, *supra* note 85 (quoting Cambridge, Massachusetts Police Commissioner Robert Haas as saying "[p]olice can't be seen as violating the trust they've built in local communities to ferret out information that potentially could prevent an attack").

[109] FISHMAN & LEBOVICH, *supra* note 11, at 22.

[110] SAGEMAN, *supra* note 7, at 94.

[111] Dahl, *supra* note 79, at 630.

operations when would-be terrorists seek to acquire weapons.[112] Regardless of the specific process, "the information available indicates [that] intelligence gathered through the use of informants, and from tips received from members of the public . . . appears to be the most effective counterterrorism tool for breaking up domestic plots."[113]

The effectiveness of confidential informants in homegrown terrorism investigations is borne out by statistics. One study found that approximately sixty-two percent of the prosecutions in the fifty highest profile terrorist plots since 2001 relied on confidential informants.[114] Another study examined eighty-nine thwarted domestic terrorist plots, finding that sixty-six "were prevented at least in part as a result of the work of undercover agents and informants, or tips from the public."[115] Approximately fifty percent of terrorism prosecutions since 2009 have involved informants.[116] Although many informant and sting operations target individuals seemingly without the capability to become significant national security threats, "sting operations are

[112] *See* Petra Bartosiewicz, *To Catch a Terrorist: The FBI Hunts for the Enemy Within*, HARPER'S MAG., Aug. 2011, at 37, 41 ("Informants have been deployed by law enforcement for centuries, but in these recent terrorism investigations they have been given a more active role in shaping cases, often encouraging or even coercing individuals to commit violent acts toward which the individuals have otherwise shown no predisposition."); Stewart, *supra* note 87 ("[I]nexperienced grassroots operatives . . . tend to aspire to conduct spectacular attacks that are far beyond their capabilities. For example, they may decide they want to conduct a bombing attack even though they do not know how to make improvised explosive devices. It is also not uncommon for such individuals to try to acquire Stinger anti-aircraft missiles, automatic firearms or hand grenades. When confronted by this gap between their capability and their aspirations, grassroots operatives will often reach out to someone for help with their attack instead of settling on an attack that is within their ability. Increasingly, the people such would-be attackers are encountering when they reach out are police or domestic security agency informants.").

[113] Dahl, *supra* note 79, at 630.

[114] CTR. ON LAW & SEC., TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001 – SEPTEMBER 11, 2010, at 20 (2010), *available at* http://www.lawandsecurity.org/Portals/0/documents/01_TTRC2010Final1.pdf ("Of the 156 prosecutions of defendants implicated in the top 50 plots, informants were relied on in 97 of them, or 62%. The conviction rate in cases that rely on informants is 92%.").

[115] Dahl, *supra* note 79, at 630.

[116] CTR. ON LAW & SEC. 2011, *supra* note 97, at 4 ("The rise in indictments over the past two or three years is significantly affected by FBI informant operations."); *see also* FISHMAN & LEBOVICH, *supra* note 11, at 9-10 ("[T]he use of informants has become increasingly prevalent in law enforcement investigations, especially after new FBI guidelines were issued in 2008 allowing more expansive use. In 183 cases evaluated by the New America Foundation, informants were used in 65, while undercover agents were involved in 18 cases (five involved both an undercover agent and an informant). Similarly, a tally by the Congressional Research Service found that informants or undercover agents were used in 20 homegrown terrorism cases or plots in the United States since 9/11, out of 43 measured.").

premised on the idea that individuals who would participate in schemes initiated by FBI informants might otherwise have been approached by an actual terrorist recruiter."[117] Because of its success, both statistically and in high-profile cases, the use of confidential informants will likely remain a significant fixture in the law enforcement counterterrorism toolbox.[118]

3. Surveillance

Law enforcement agencies also collect significant amounts of intelligence on domestic terrorist plots from electronic and physical surveillance. In general, surveillance "includes monitoring, observing, listening to, and recording persons' conversations, movements, activities and communications with the aid of a surveillance device."[119] Electronic surveillance – also known as "signals intelligence" – comprises "wiretapping, Internet monitoring and other forms of communications interception."[120] Domestic physical

[117] CTR. ON LAW & SEC. 2011, *supra* note 97, at 4-5. Many, however, dispute the characterization that confidential informants have been an unambiguous success in counterterrorism operations. Federal, state, and local law enforcement agencies have engaged in aggressive tactics, at times resembling a strategy of "not merely allow[ing] a paid informant to troll houses of worship looking for recruits by promising them money, but seem[ing] to overtly approve of such activity." Said, *supra* note 91, at 729; *see also* Bartosiewicz, *supra* note 112, at 47 ("Such sting operations present a disturbing kind of theater: the government provides the script, the arms, the cash, and other props, and offers logistical support."). Viewed holistically, some have concluded that "[t]he use of informants in federal terrorist prosecutions has been an overall failure, despite its successes in procuring convictions in the courtroom." Said, *supra* note 91, at 738. The most damning criticism is that "[g]iven the context in which terrorism prosecutions occur, the experience of using informants reveals that the practice arguably does nothing to interdict actual violent activity." *Id*. at 691. For a broader criticism of the use of informants, see Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 646 (2004) ("Snitches increase crime and threaten social organization, interpersonal relationships, and socio-legal norms in their home communities, even as they are tolerated or under-punished by law enforcement because they are useful.").

[118] *See* Kevin Johnson, *Informants Vital in FBI's War on Terror*, USA TODAY (Feb. 21, 2012, 10:45 PM), http://www.usatoday.com/NEWS/usaedition/2012-02-22-Informants_ST_U.htm; Malia Wollan & Charlie Savage, *Holder Calls Terrorism Sting Operations 'Essential*,' N.Y. TIMES (Dec. 11, 2010), http://www.nytimes.com/2010/12/12/us/politics/12holder-1.html ("Attorney General Eric H. Holder Jr. has defended the use of sting operations orchestrated by government informers [as] an 'essential law enforcement tool in uncovering and preventing terror attacks.'").

[119] Webber, *supra* note 81, at 106; *see also* Dina Temple-Raston, *Terrorism Case Shows Range of Investigators' Tools*, NPR (Oct. 3, 2009), http://www.npr.org/templates/story/story.php?storyId=113453193 (quoting a former NYPD official in his description of "electronic surveillance [as] just a fancy term for eavesdropping on phone calls and looking into e-mails . . . and . . . physical surveillance [as] what you and I would call casing a joint or following a person").

[120] Dahl, *supra* note 79, at 629.

surveillance has few constitutional restrictions; police may observe and record the actions of an individual with any technology that is "in general public use."[121] While the National Security Agency may adopt a broad and systematic "dragnet" approach to electronic surveillance abroad, the federal government must operate domestically within the confines of the Fourth Amendment and may only conduct electronic surveillance after a showing of probable cause.[122]

Surveillance alone has not proven one of the more effective means of discovering and disrupting domestic terrorist plots. In Britain, a country with more permissive legal surveillance standards and saturated with closed circuit television cameras, observers have noted that "[i]t is highly questionable how effective these [cameras] are to . . . find potential terrorists."[123] In the United States, "publicly available information, at least, suggests it may not be as useful as other methods in preventing terrorist attacks."[124] Moreover, because of the constitutional and statutory protections granted to individuals within the United States, electronic surveillance plays an accordingly greater role in the disruption of international terrorist plots, as compared with domestic ones. Nevertheless, because terrorists will continue to be susceptible to "having their email and telephone messages intercepted"[125] and "patterns [observed] among [their] legal behaviors that suggest radicalization or violent intent,"[126] law enforcement will continue to rely on physical and electronic surveillance as part of a comprehensive strategy to detect and disrupt domestic terrorist plots.

4. Denial of Means

Denying potential homegrown terrorists the means to carry out terrorist acts consists of two core components: denying access to specialized knowledge and

[121] Kyllo v. United States, 533 U.S. 27, 34 (2001); *see also* United States v. Jones, 132 S. Ct. 945, 953 (2012) ("This Court has to date not deviated from the understanding that mere visual observation does not constitute a search.").

[122] *See* United States v. U.S. Dist. Court, 407 U.S. 297, 316-17 (1972) ("These Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch."). Recent changes to foreign intelligence surveillance have given the mistaken impression that the Foreign Intelligence Surveillance Act now addresses lone wolves; FISA's "lone wolf provision," however, does not address lone wolf terrorists, but rather persons "not necessarily linked to a foreign group per se but . . . planning to engage in international terrorism." Stephanie Cooper Blum, *What Really Is at Stake with the FISA Amendments Act of 2008 and Ideas for Future Surveillance Reform*, 18 B.U. PUB. INT. L.J. 269, 276 n.46 (2009).

[123] Webber, *supra* note 81, at 108.

[124] Dahl, *supra* note 79, at 629 (stating that only eleven out of eighty-nine foiled domestic terror plots "appear to have been foiled as a result of some form of [signals intelligence]").

[125] MARK S. HAMM, TERRORISM AS CRIME: FROM OKLAHOMA CITY TO AL-QAEDA AND BEYOND 191 (2007).

[126] FISHMAN & LEBOVICH, *supra* note 11, at 17.

denying access to weapons. Specialized knowledge useful to domestic terrorists includes operational and weapons training, bomb-making skills, and information about "hard" targets, such as important government facilities, high-profile commercial buildings, and critical infrastructure.[127] Denying would-be terrorists weapons, of course, would neutralize any potential threat.

Although the two categories are fundamentally different, neither goal is realistically attainable. Information potentially useful to a terrorist operation is omnipresent, both on the Internet and elsewhere, and it would be nearly impossible to restrict all useful information.[128] Indeed, "even a rudimentary effort to limit information about how to make or use explosives or other weapons may be constrained by the First Amendment to the Constitution or defeated by the internet."[129] Restricting access to explosives would require "something comparable to the Brady Law to monitor purchases of . . . particular explosives and perhaps some form of marker to let authorities know when explosives were near a target."[130] Meaningful restrictions on access to firearms would likely fail constitutional muster,[131] even if they were to overcome significant obstacles to political feasibility.[132] The inevitable trade-offs between cost and effectiveness, however, require that choices be made about which resources to focus on, as there are "many more [resources of potential use to terrorists] than one could sensibly monitor."[133]

---

[127] *See, e.g.*, Pillar, *supra* note 45, at 6 (describing the importance of and "wide availability on the Internet of information needed to develop even the most nefarious skills (such as bomb making)").

[128] GABRIEL WEIMANN, TERROR ON THE INTERNET: THE NEW ARENA, THE NEW CHALLENGES 75 (2006) ("Numerous Web sites are used by, linked to, or associated with al Qaeda, and despite all attempts to ban or destroy the Internet presence of bin Laden and his supporters, their presence and activities on the Net have only become more conspicuous, more significant, and more sophisticated.").

[129] Philip B. Heymann, *Dealing with Terrorism: An Overview*, INT'L SECURITY, Winter 2001-02, at 24, 31.

[130] *Id.* at 30.

[131] *See* District of Columbia v. Heller, 554 U.S. 570, 629 (2008) ("[H]andguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid."). *But see id.* at 627 ("We think that [limiting the right to "keep and carry arms" to weapons "in common use at the time"] is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'").

[132] *See* Jeffrey M. Jones, *Record-Low 26% in U.S. Favor Handgun Ban*, GALLUP (Oct. 26, 2011), http://www.gallup.com/poll/150341/record-low-favor-handgun-ban.aspx ("Americans have shifted to a more pro-gun view on gun laws, particularly in recent years, with record-low support for a ban on handguns, an assault rifle ban, and stricter gun laws in general. This is the case even as high-profile incidents of gun violence continue in the United States, such as the January shootings at a meeting for U.S. Rep. Gabrielle Giffords in Arizona.").

[133] Heymann, *supra* note 129, at 31.

The difficulty of limiting access to basic information and weapons does not mean that denying terrorists the means to carry out attacks is a worthless endeavor. Sensitive information about the physical security of nuclear power plants and government facilities is not, and should not be, publicly accessible.[134] Similarly, although U.S. law allows widespread access to firearms, access to explosive material is limited, while possession of deadlier materials, such as radiological material, heat-seeking missile systems, and fatal viruses, is, of course, heavily proscribed.[135]

5. Physical Security

Law enforcement also takes a prophylactic approach to counterterrorism, providing physical security for the most likely targets of terrorist attacks. These locations receive heightened physical protection: the White House, the Capitol, and the Pentagon are heavily guarded, as are all federal office buildings.[136] Other similarly protected targets include critical infrastructure such as power plants and water treatment facilities,[137] public transportation

[134] *See* 10 C.F.R. § 73.22 (2012) (detailing "specific requirements for the protection of Safeguards Information" about nuclear reactors, nuclear weapons, fissile material and other nuclear facilities); Roland M. Frye, Jr., *The Nuclear Regulatory Commission Is Not Required by Statute to Release Terrorism-Related Portions of Environmental Impact Statements*, 55 ADMIN. L. REV. 643, 657-59 (2003) (stating that the Nuclear Regulatory Commission "is subject to a statutory mandate under the [Atomic Energy Act] to *withhold* from the public domain any information that would jeopardize the common defense and security" and must account for "the very real risk that a public revelation of safety and safeguards information . . . could provide terrorists with useful information and thereby jeopardize the safety of nuclear facilities").

[135] *See, e.g.*, 18 U.S.C. § 175 (2006) (criminalizing possession of "any biological agent, toxin or delivery system"); *id.* § 175c (criminalizing possession of the Variola virus); *id.* § 229 (criminalizing possession of "any chemical weapon"); *id.* § 831 (criminalizing possession of "any nuclear material or nuclear byproduct material"); *id.* § 2332g (criminalizing possession of "an explosive or incendiary rocket or missile that is guided by any system designed to enable the rocket or missile to . . . seek or proceed toward energy radiated or reflected from an aircraft or toward an image locating an aircraft").

[136] The Department of Homeland Security contains a specialized subdepartment, the Federal Protective Service, tasked with providing physical security "to facilities owned or leased by the General Services Administration." *Federal Building Security*, U.S. DEP'T OF HOMELAND SECURITY, http://www.dhs.gov/xabout/structure/gc_1253889058003.shtm (last visited Sep. 11, 2012).

[137] *See Emergency Preparedness in Response to Terrorism*, U.S. NUCLEAR REG. COMM'N, http://www.nrc.gov/about-nrc/emerg-preparedness/respond-to-emerg/response-terrorism.html (last visited Sep. 11, 2012) ("Physical security at nuclear power plants is provided by well-armed and well-trained security personnel who remain ready to respond to an attack 24 hours a day, seven days a week. The sites are protected by sensitive intrusion detection equipment, fences, and barriers all of which are monitored by cameras and security patrols.").

systems,[138] and major commercial centers.[139] Physical security is an extremely effective way of preventing and deterring terrorist attacks against the most vulnerable targets. Attacks against protected targets are rare, and the success rate of those terrorists that are undeterred is extremely low. Protecting certain targets, however, does not prevent terrorist attacks in general; it prevents only the most significant attacks. Indeed, the U.S. government acknowledges that "[a]s security increases around more predictable targets, [terrorists] shift their focus to less protected assets."[140] Moreover, because "those on the defensive often do not know what targets to protect,"[141] physical security is necessarily a limited means of protecting the United States from terrorist attacks. Terrorists will seek psychologically significant targets containing large numbers of people.[142] Such a formulation is broad enough to encompass countless locations around the world, but a key aspect of law enforcement's counterterrorism strategy will remain protecting the most vulnerable and important potential terrorist targets.

C. *The Prosecutor's Tools*

After terrorist suspects are discovered and apprehended by law enforcement, prosecutors use criminal laws to incarcerate such individuals for their crimes. As part of the post-9/11 shift to prevention in the national security arena, prosecutors have developed a variety of tools to secure convictions for the pre-attack conduct of suspected terrorists. These tools have attained a conviction rate of nearly ninety percent for terrorism or national security crimes, similar to that attained in other areas of criminal law, as well as sentences "on average 8.5 times longer than defendants not charged with such crimes."[143] Indeed,

---

[138] *See* Al Baker, *Subway Searches Go on Quietly, Just How Police Like Them*, N.Y. TIMES (July 6, 2007), http://www.nytimes.com/2007/07/06/nyregion/06bags.html.

[139] Lucas Jackson, *Inside the NYPD's Counter Terrorism Unit*, REUTERS (Sept. 8, 2011), http://blogs.reuters.com/photographers-blog/2011/09/08/inside-the-nypds-counter-terrorism-unit/ ("Every commercial building in New York has a security team and identification is required to get to work."). *See generally* U.S. DEP'T OF HOMELAND SEC., THE NATIONAL STRATEGY FOR THE PHYSICAL PROTECTION OF CRITICAL INFRASTRUCTURES AND KEY ASSETS 35-70 (2003), *available at* http://www.dhs.gov/xlibrary/assets/Physical_Strategy.pdf (describing the need for physical protection of a variety of "critical infrastructures," including public health, water, energy, and transportation).

[140] U.S. DEP'T OF HOMELAND SEC., *supra* note 139, at viii.

[141] Heymann, *supra* note 129, at 31.

[142] TOM LATOURRETTE ET AL., RAND, REDUCING TERRORISM RISK AT SHOPPING CENTERS: AN ANALYSIS OF POTENTIAL SECURITY OPTIONS 1 (2009), *available at* http://www.rand.org/pubs/technical_reports/2006/RAND_TR401.pdf ("Facilities in which large numbers of people are present in high concentrations, such as office buildings, auditoriums, and shopping centers, are attractive targets for terrorists.").

[143] CTR. ON LAW & SEC. 2011, *supra* note 97, at 7-9, 12 ("Approximately 87% of all resolved cases [involving terrorists inspired by jihadist ideas] have resulted in a conviction.").

prosecutors possess a "well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit."[144] The tools, some statutory and some tactical, have combined to produce "a strong record of convictions" in terrorism prosecutions.[145]

1. Direct Criminal Liability for Terrorist Acts

The clearest route for criminal liability for terrorists is direct liability for terrorist attacks themselves. A typical scenario was the 1998 bombings of the U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania. After the attacks, which killed more than 220 people and injured more than 4,000, the FBI investigation led to the arrest, indictment, and conviction of several suspects.[146] Sentencing for terrorist-related crimes is severe, and often includes eligibility for the death penalty. Criminal liability for completed terrorist attacks, however, is preventive only to the extent that the punishment itself acts as a deterrent. In terrorist attacks the perpetrator "may be satisfied with overcoming security countermeasures and executing the attack effectively, and have little regard for his or her fate afterward and only modest concern about the consequences to his or her organization."[147] Because "the threat of significant punishment as a deterrent may count for little"[148] to aspiring terrorists, criminal liability for completed terrorist attacks, while the most obvious tool for prosecutors, will out of necessity remain a minor tool in the federal government's preventive law enforcement strategy.[149] Therefore,

[144] Hamdi v. Rumsfeld, 542 U.S. 507, 547 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

[145] CTR. ON LAW & SEC. 2011, *supra* note 97, at 5.

[146] *See* U.S. DEP'T OF STATE, REPORT OF THE ACCOUNTABILITY REVIEW BOARDS ON THE EMBASSY BOMBINGS IN NAIROBI AND DAR ES SALAAM ON AUGUST 7, 1998, at 1 (1999) *available at* http://terror.workforceconnect.org/images/Crowe_Report.pdf; Benjamin Weiser, *Life Sentence is Requested in Bomb Case*, N.Y. TIMES (Jan. 7, 2011), http://www.nytimes.com/2011/01/08/nyregion/08ghailani.html.

[147] ANDREW R. MORRAL & BRIAN A. JACKSON, RAND, UNDERSTANDING THE ROLE OF DETERRENCE IN COUNTERTERRORISM SECURITY 6 (2009), *available at* http://www.rand.org/pubs/occasional_papers/2009/RAND_OP281.pdf ("Although both the likelihood and the severity of punishment surely play some role in the decisionmaking of terrorists, there are important differences between the objectives of terrorist organizations and individual criminals. For instance, most criminal activity has the objective (or hope) of avoiding accountability for the crime. The same may not be true for many terrorist acts.").

[148] *Id*.

[149] *But see* PAUL K. DAVIS & BRIAN MICHAEL JENKINS, RAND, NAT'L DEF. RESEARCH INST., DETERRENCE & INFLUENCE IN COUNTERTERRORISM: A COMPONENT IN THE WAR ON AL QAEDA 60 (2002), *available at* http://www.rand.org/content/dam/rand/pubs/monograph_reports/2005/MR1619.pdf ("Even if al Qaeda's *leaders* . . . are not generally deterrable, what about others in the overall system that the organization comprises? We know that supporters of terrorists, for example, can often be deterred. The al Qaeda system, then, is not a single entity with an on-off switch.").

law enforcement will rely heavily on criminal statutes whereby convictions can be secured before a terrorist attack is executed.

2. Conspiracy Liability

A significant prosecutorial tool in the fight against terrorism is liability for criminal conspiracies. Generally speaking, conspiracy is the punishment for an agreement between two or more individuals to commit a crime, which "advances the moment of criminal guilt and permissible official intervention to a point considerably earlier than that allowed by the law of attempt."[150] Conspiracies can be general in nature,[151] specific to violent conduct,[152] or included as an alternative theory of liability for a specific criminal prohibition.[153] Beyond the quintessential conspiratorial scheme – when a group of individuals strike an explicit agreement to execute a crime together – conspiracy liability can attach in more attenuated circumstances. "Wheel" conspiracy includes a single person as the "hub" with agreements with any number of individuals who function as "spokes"; "chain" conspiracy normally involves a multi-part supply chain.[154] In neither circumstance are all co-conspirators in agreement with all others. Additionally, the "agreement" to break the law need not be explicit as to "the details of executing the offense, such as the intended victim or target, the date of the offense, or the persons, methods, and materials to be used"; it need only specify "the type of offense to be committed."[155] Depending on the jurisdiction, conspiracy liability can hinge on several other considerations. In the context of federal law enforcement's pivot to preventive counterterrorism, however, it suffices to note that "the point of potential intervention arises sooner with respect to conspiracies than it does when a single individual is involved."[156]

---

[150] Note, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1122 (1975).

[151] 18 U.S.C. § 371 (2006) ("If two or more persons conspire either to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.").

[152] *Id*. § 956 (punishing "[w]hoever, within the jurisdiction of the United States, conspires with one or more persons . . . to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming [in the United States], if any of the conspirators commits an act within the jurisdiction of the United States to effect any object of the conspiracy"). For a detailed analysis of § 956, see Chesney, *supra* note 10, at 459-74.

[153] *See, e.g*., 18 U.S.C. § 2332a(a) (establishing a criminal offense for any "person who, without lawful authority, uses, threatens, or attempts or conspires to use, a weapon of mass destruction").

[154] Chesney, *supra* note 10, at 450 (footnote omitted).

[155] *Id*. at 456.

[156] *Id*. at 448 ("Whereas individuals become liable for the inchoate offense of attempt only when their intent to commit an unlawful act is joined with conduct that constitutes a

In law enforcement counterterrorism efforts, conspiracy liability has played a major role. General criminal conspiracy, punishable under 18 U.S.C. § 371, has been the most commonly charged crime in terrorism and national security cases since 2001.[157] Since 2009, general conspiracy and conspiracy to kill, kidnap, or maim in a foreign country have been two of the four most common charges against suspected terrorists.[158] Criminal conspiracy charges have featured prominently in several high-profile cases, including that of Zacarias Moussaoui, the September 11 co-conspirator who was charged with six different criminal conspiracies in connection with his terrorist activities.[159] Because of this success, conspiracy liability forms one of the pillars of the preventive prosecution strategy employed against domestic terrorism.

3. Material Support

Besides conspiracy liability, the most frequently used source of criminal liability for terrorists are the "material support" statutes, which carry "a scope of potential application broader than traditional conspiracy."[160] The statutes criminalize the provision of material support to anyone seeking to commit one of forty-seven terrorism-related predicate offenses[161] or to any previously designated Foreign Terrorist Organization.[162] While the statutes exclude medicine and religious materials, the concept of "material support" is defined as providing "any property, tangible or intangible, or service."[163] At their core, the material support statutes represent the statutory realization of the unofficial motto that "we'd rather catch terrorists with their hands on a check than on a bomb."[164] The material support statutes "create a crime of 'being a terrorist.'"[165]

substantial step toward completion of that act, conspiracy liability typically attaches the moment that an intent to accomplish unlawful or fraudulent ends is joined simply with the act of agreeing with others to achieve such ends." (citing MODEL PENAL CODE § 5.01(1)(c) (1985))).

[157] CTR. ON LAW & SEC. 2011, *supra* note 97, at 13.

[158] *Id.* at 14.

[159] Richter, *supra* note 89, at 322 (commenting that Moussaoui was charged with "conspiracy to commit acts of terrorism transcending national boundaries, conspiracy to commit air piracy, conspiracy to destroy aircraft, conspiracy to use weapons of mass destruction, conspiracy to murder employees of the United States, and conspiracy to destroy property" (footnote omitted)).

[160] Abrams, *supra* note 10, at 30.

[161] 18 U.S.C. § 2339A (2006).

[162] *Id.* § 2339B.

[163] *Id.* § 2339A(b)(1) (describing "material support" as including "currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation").

[164] Richter, *supra* note 89, at 323 (citing *Reauthorization of the USA PATRIOT Act:*

Although the material support statutes have been widely criticized as criminalizing an overly broad swath of conduct, the Supreme Court has upheld this broad application. Facing vagueness and First Amendment challenges to § 2339B's lack of a specific intent requirement in *Holder v. Humanitarian Law Project*,[166] the Court ruled that the statute constitutionally proscribed "a narrow category of speech" that takes place "under the direction of, or in coordination with, foreign groups that the speaker knows to be terrorist organizations."[167] Moreover, the Court held that even support for a Foreign Terrorist Organization's non-violent goals indirectly supported its violent goals, because "[s]uch support frees up other resources within the organization that may be put to violent ends."[168]

Material support was made a crime in 1994,[169] then expanded in 1996,[170] and "[a]lthough [it was] rarely enforced before 9/11, it has since become a principal tool in the Justice Department's 'terrorism' prosecutions."[171] Indeed, the material support statutes have been put to "increasingly aggressive use" by the Obama Administration, resulting in a material support charge in nearly ninety percent of terrorism and national security prosecutions in 2011.[172]

Hearing Before the H. Comm. on the Judiciary, 109th Cong. 6 (2005) (statement of James B. Comey, Deputy Att'y Gen., U.S. Department of Justice); Christopher A. Wray, Assistant Attorney Gen., Criminal Div., U.S. Dep't of Justice, Remarks to the American College of Trial Lawyers (Mar. 6, 2004)).

[165] Andrew Peterson, *Addressing Tomorrow's Terrorists*, 2 J. NAT'L SECURITY L. & POL'Y 297, 335 (2008) (quoting JEFFREY A. BREINHOLT, COUNTERTERRORISM ENFORCEMENT: A LAWYER'S GUIDE 264 (2004)).

[166] 130 S. Ct. 2705 (2010).

[167] *Id*. at 2723.

[168] *Id*. at 2725.

[169] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120005, 108 Stat. 2022 (codified as amended at 18 U.S.C. § 2339A (2006)).

[170] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 303, 323, 110 Stat. 1250, 1255 (amending 18 U.S.C. § 2339A to include more predicate offenses and, as codified at 18 U.S.C. § 2339B, criminalizing support to Foreign Terrorist Organizations). The material support statutes were subsequently amended by the USA PATRIOT Act, which increased the maximum sentence from ten to fifteen years, and the Intelligence Reform and Terrorism Prevention Act of 2004, which clarified the definition of "material support or resources." Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004). *See* CHARLES DOYLE, CONG. RESEARCH SERV., R41333, TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. 2339A AND 2339B, at 2 (2010), *available at* http://www.fas.org/sgp/crs/natsec/R41333.pdf.

[171] Cole, *supra* note 10, at 723.

[172] CTR. ON LAW & SEC. 2011, *supra* note 97, at 2, 19 ("Since 2007, material support has gone from being charged in 11.6% of [terrorism or national security] cases to 69.4% in 2010. In 2011 so far, 87.5% of cases involve a material support charge.").

The central role of material support in federal government agencies' preventive approach to counterterrorism "is simple: it allows the government to obtain a 'terrorist' conviction without establishing that an individual engaged in any terrorism, conspired to engage in terrorism, aided or abetted terrorism, or even intended to further terrorism."[173] The statutes' broad scope has been employed in numerous cases, often "as a sweeping form of individual inchoate crime liability."[174] The statutes fulfill "Congress' original intent to criminalize support for terrorism to the fullest extent possible under the Constitution."[175]

4. Pretextual Prosecutions

Even when an individual has not committed a terrorism-related offense, prosecutors often charge suspects with crimes not related to terrorism in order to secure their incarceration.[176] This approach is known as the "Al Capone" strategy, after the federal government's prosecution of the notorious Prohibition-era gangster for the lowly offense of income tax evasion, rather than for extortion, bribery, or any number of violent crimes that he allegedly committed.[177] In the 1960s, lacking "significant federal laws that forbade the [Ku Klux] Klan's terrorist activities," the FBI "successfully developed a case against a ranking Klan official based on his violation of a law against interstate prostitution."[178] Today, typical pretextual charges in terrorism investigations include tax evasion,[179] false statements on federal forms,[180] obstruction of

[173] Cole, *supra* note 10, at 723; *see also* Abrams, *supra* note 10, at 6 ("These provisions can be used to impose punishment for conduct remote from the commission of criminal harms, often conduct involving minimal and outwardly non-criminal acts.").

[174] Chesney, *supra* note 10, at 491 (arguing that § 2339A, when combined with other statutes providing for conspiracy liability, "provides a potent alternative to pursuing an attempt charge, sparing prosecutors the need to await the point at which a lone wolf suspect has reached the 'substantial step' threshold required for attempt liability").

[175] Richter, *supra* note 89, at 317.

[176] *See* Attorney General John Ashcroft, Remarks at the U.S. Mayors Conference (Oct. 25, 2001) (prepared remarks available at http://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm) ("Robert Kennedy's Justice Department, it is said, would arrest mobsters for 'spitting on the sidewalk' if it would help in the battle against organized crime. It has been and will be the policy of this Department of Justice to use the same aggressive arrest and detention tactics in the war on terror.").

[177] Richman & Stuntz, *supra* note 97, at 587 ("[T]he Justice Department has invoked Al Capone's name frequently in [the domestic portion of the War on Terror), as it prosecutes terror suspects with any available criminal charge.").

[178] FBI, *supra* note 26, at 34.

[179] *See, e.g.*, United States v. Mubayyid, 658 F.3d 35, 41 (1st Cir. 2011) (upholding "convictions for filing false tax returns and for endeavoring to obstruct the administration of the Internal Revenue laws" because defendants' supposedly "non-profit" organization actually supported violent jihad).

[180] *See, e.g.*, United States v. Damrah, 412 F.3d 618, 621-22 (6th Cir. 2005) (upholding

justice,[181] and false statements made to federal investigators.[182] Prosecutors often combine multiple pretextual charges.[183]

Pretextual prosecution can be used in several contexts: when the government suspects but cannot prove terrorist activity, when proving terrorist activity would require divulging classified information, and when the government seeks sentencing enhancements in addition to terrorism-related charges.[184] In addition, there are several types of crimes that actual and potential terrorists typically commit, and investigating occurrences of these crimes often secures leads to terrorist plots.[185]

III. THE NEW THREAT – SOLITARY LONE WOLVES

Homegrown terrorism has been on the rise since the September 11 attacks, but in recent years a new threat has emerged: the lone wolf terrorist. Whereas the typical homegrown terrorist operates in coordination with a small number

conviction for "unlawful procurement of naturalization in violation of 18 U.S.C. § 1425(a) and (b)" because defendant failed to disclose his involvement with three terrorist organizations on his INS Form N-400).

[181] *See, e.g.*, United States v. Ashqar, 582 F.3d 819, 821 (7th Cir. 2009) (upholding conviction for "obstruction of justice and criminal contempt," in addition to a terrorism sentencing enhancement, for defendant's refusal "to answer certain questions before a grand jury . . . investigating alleged terrorist acts of Hamas").

[182] *See, e.g.*, United States v. Hayat, No. 2:05-CR-0240-GEB, 2006 WL 1686491, at *1 (E.D. Cal. June 19, 2006) (denying defendant's motion to dismiss convictions for "knowingly making a false statement to the Federal Bureau of Investigation . . . in violation of 18 U.S.C. § 1001(a)" by claiming (1) "that he never attended a jihadist camp," (2) "that he never received weapons or other types of jihadist training," and (3) "that he never received training to fight against the United States").

[183] *See, e.g.*, *Mubayyid*, 658 F.3d at 40 ("This complex appeal arises out of the joint criminal prosecution of Emadeddin Muntasser, Muhamed Mubayyid, and Samir Al-Monla for conspiring to defraud the United States by obstructing the functions of the Internal Revenue Service ('IRS'), for corruptly endeavoring to obstruct the due administration of the Internal Revenue laws, for filing false tax returns, for making false statements to agents of the Federal Bureau of Investigation ('FBI'), and for scheming to conceal material facts from a federal agency.").

[184] *See* U.S. DEP'T OF JUSTICE, *supra* note 83, at 29 ("Prosecution of terrorism-related targets on these types of charges is often an effective method – and sometimes the only available method – of deterring and disrupting potential terrorist planning and support activities without compromising national security information.").

[185] HAMM, *supra* note 125, at 221 (arguing that counterterrorism policies should focus on "deal[ing] with passport fraud, credit card theft, cell phone cloning, motor vehicle violations, low-level drug dealing, or arms smuggling"); Michael P. Atkinson & Lawrence M. Wein, *An Overlapping Networks Approach to Resource Allocation for Domestic Counterterrorism*, 33 STUD. CONFLICT & TERRORISM 618, 644-45 (2010) (arguing that to "more effectively catch[] terrorists via their precursor criminal activities . . . the government should focus on identifying crimes that are relatively obscure, somewhat easy to detect, and have appeal to terrorists").

of extremists whose continued intra-group communication facilitates the radicalization process, lone wolves are solitary.[186] Lone wolves' modus operandi in large part explains why they have received such hyperbolic press coverage: their status as "loners" makes them poorly understood, and, worst of all, entirely unpredictable.[187] This new threat has been typified in several recent attacks, including Nidal Hasan's shooting at Fort Hood, Texas, and Naser Jason Abdo's attempted attack at the same base. Hasan, perhaps the most visible lone wolf terrorist in the United States, led a relatively private life as an Army psychiatrist, and his attack, carried out entirely on his own, was a shock to even his closest friends and family.[188] Rather than a strict "command and control" relationship with a broader organization, these individuals have undertaken terrorist plots with little or no outside involvement from other terrorist groups.

A. *The Origin of the Lone Wolf Terrorist – Al Qaeda Adapts*

The success of U.S. counterterrorism operations has been widely noted by observers, among which have been those who aspire to terrorism themselves.

[186] Spaaij, *Enigma*, *supra* note 11, at 856 (defining lone wolf terrorism as "terrorist attacks carried out by persons who (a) operate individually, (b) do not belong to an organized terrorist group or network, and (c) whose modi operandi are conceived and directed by the individual without any direct outside command or hierarchy"). A rough working definition of lone wolves in law enforcement, however, remains "people who ha[ve] come to view their home country as the enemy." Richter, *supra* note 89, at 328.

[187] The "lone wolf" is an ideal type that is not often achieved. *See* INSTITUUT VOOR VEILIGHEIDS- EN CRISISMANAGEMENT, *supra* note 11, at 87 ("The analytical distinction between lone-wolf terrorism and group-based terrorism is often problematic in practice, since group dynamics may also influence, to some extent, individuals who operate autonomously."). The media is undoubtedly too quick to label any suspected terrorist not taking orders from a distant terrorist leader as a "lone wolf." J.M. Berger, *The Boy Who Cried Lone Wolf*, FOREIGN POL'Y, (Feb. 21, 2012), http://www.foreignpolicy.com/articles/2012/02/21/lone_wolves ("[The terrorist network members] were receiving advice, concrete assistance, and passive reinforcement from people they believed – rightly or wrongly – to be part of larger terrorist organizations. None of this means that these guys aren't dangerous, and none of this is to argue that they shouldn't have been arrested. But they are not lone wolves. They are essentially al Qaeda volunteers – people who step forward and offer their services to a terrorist organization that can provide them with resources and support."). In this vein, perhaps a more accurate typology would simply place "lone wolves" at the far end of the spectrum identified previously, *see* discussion *supra* Part I.C., rather than placing them in a sui generis category. These semantic skirmishes about definitional precision, however, skirt the main issue of this Note – how to address this threat.

[188] *See* Cindy Smith & Imtiyaz Delawala, *Cousin of Fort Hood Shooter Speaks Out Against Violent Extremism*, ABC NEWS (Sept. 4, 2011), http://abcnews.go.com/Politics/ft-hood-shooters-cousin-speaks-violent-extremism/story?id=14445896#.T5IjkVHXEsd ("Nearly two years after the worst terrorist attack on U.S. soil since Sept. 11, Nader Hasan still doesn't know what drove his cousin, former Army Major Nidal Malik Hasan, to commit the mass shooting at Fort Hood in Nov. 2009.").

In recent years, Al Qaeda and other members of the global jihadist movement have specifically promoted "smaller-scale, less technically complex tactics . . . [which are] more difficult for law enforcement and intelligence operatives in the United States to identify in advance."[189] One well-documented "online training camp" exhorted aspiring mujahideen that they need not "travel to other lands" because "[a]lone, in your home or with a group of your brothers, you too can begin to execute the training program."[190] The shift to online activities was part of Al Qaeda's "strategy to ensure that its war with the U.S. will continue even if many of its cells across the world are broken up and its current leaders are killed or captured."[191]

Declaring that Al Qaeda's strategy now principally focuses on disaffected loners perhaps overstates the point, but the law enforcement efforts of the past decade have drastically reduced the number of options available to prospective terrorists. Lone wolf terrorism, then, is not just a subset of the broader category of homegrown terrorism, but is, more accurately, an ineluctable tactical evolution of the Al Qaeda social movement. Terrorists "learn from experience and modify their tactics and targets to exploit perceived vulnerabilities and avoid observed strengths."[192] Al Qaeda's members are simply "adapt[ing] to their hostile physical environment."[193]

Al Qaeda's evolution should come as no surprise. As the quintessential practitioners of "asymmetric warfare" – wherein a much weaker party attacks a much stronger party by targeting its weak points[194] – terrorist organizations have always evolved in ways that play to their strengths. Terrorist organizations "evolve and transform in response to internal and external

---

[189] FISHMAN & LEBOVICH, *supra* note 11, at 11.

[190] Vivian Salama, *Ask a Terrorist*, DAILY BEAST (Dec. 19, 2007, 7:00 PM), http://www.thedailybeast.com/newsweek/2007/12/19/ask-a-terrorist.html (quoting the Al-Battar Training Camp website); *see also* Bakker & de Graaf, *supra* note 11, at 45 ("In 2003, an article was published on the extremist Internet forum Sada al Jihad (Echoes of Jihad), in which Osama bin Laden sympathizers were encouraged to take action without waiting for instructions. . . . In 2006, Al Qaeda leader Abu Jihad al-Masri followed suit with a call to arms, entitled 'How to fight alone' circulated widely in jihadist networks.").

[191] WEIMANN, *supra* note 128, at 66 (quoting Paul Eedle, *Terrorism.com*, GUARDIAN (July 16, 2002), http://www.guardian.co.uk/print/0,3858,4462872-103680,00.html). "Lectures, taped announcements, videos of terrorist attacks, guidebooks, and manuals are disseminated through al Qaeda's Web sites, forums, chat rooms, and online bulletin boards." *Id*. at 65-66.

[192] U.S. DEP'T OF HOMELAND SEC., *supra* note 139, at viii.

[193] SAGEMAN, *supra* note 7, at 121; *see also* Bruce Hoffman, *Rethinking Terrorism and Counterterrorism Since 9/11*, 25 STUD. CONFLICT & TERRORISM 303, 313 (2002) ("[T]he necessity for change in order to stay one step ahead of the counterterrorism curve compels terrorists to change – adjusting and adapting their tactics, modus operandi, and sometimes even their weapons systems as needed.").

[194] *See* Ivan Arreguin-Toft, *How the Weak Win Wars: A Theory of Asymmetric Conflict*, INT'L SECURITY, Summer 2001, at 93, 93-94 (2001) (describing "how a weak actor's strategy can make a strong actor's power irrelevant").

pressures. Like any social organization, they adapt to their changing environment in a variety of ways, often splintering into different entities or merging with other groups."[195] The global jihadist movement, "[l]ike any sophisticated enemy, . . . adapts its approaches and methods to what the United States does."[196] Of course, one cannot give all of the "credit" for lone wolf terrorism to Al Qaeda; it is a complex social phenomenon with multiple influencing factors, and it would be too simplistic to ascribe to a mono-causal explanation. Indeed, the issue of causation itself can be complicated, as the Al Qaeda movement has at times only embraced lone wolves after their attacks.[197] However, Al Qaeda's strategic embrace of lone wolves remains a significant factor in the emerging threat.

From this analysis, a general picture emerges of the contemporary lone wolf terrorist who shares only an ideological affinity with the broader radical Islamic terrorist movement. This individual uses the Internet as a source of both ideological and operational support, and is capable of terrorism, but only with the most basic means. The lack of training, weapons, and manpower means that complex operations against protected targets are passed over in favor of simpler attacks against undefended targets.

B. *The Tools of the Trade Fall Short*

In light of the emergence of lone wolves as a new terrorist threat, the tools available to law enforcement and prosecutors must be assessed. This assessment, however, leads to the unfortunate conclusion that few, if any, of the tools employed to stop domestic terrorist groups will have any utility when applied to lone wolves.

1. Law Enforcement

Law enforcement tools are simply not effective against lone wolf terrorists. In stark contrast to "group terrorism or network-sponsored terrorists, lone operators have a critical advantage in avoiding identification and detection

---

[195] Ronald D. Crelinsten, *The Internal Dynamics of the FLQ During the October Crisis of 1970*, *in* INSIDE TERRORIST ORGANIZATIONS 59, 61 (David C. Rapoport ed., 1988). For an overview of Al Qaeda's post-September 11 evolution, see Bill Braniff & Assaf Moghadam, *Towards Global Jihadism: Al-Qaeda's Strategic, Ideological and Structural Adaptations Since 9/11*, PERSP. ON TERRORISM, May 2011, at 36.

[196] Audrey Kurth Cronin, *Toward an Effective Grand Strategy*, *in* ATTACKING TERRORISM: ELEMENTS OF A GRAND STRATEGY 285, 289 (Audrey Kurth Cronin & James M. Ludes eds., 2004).

[197] *See* Patrik Jonsson, *Fort Hood Shooting: Al Qaeda Now Portrays Nidal Hasan as Terrorism Star*, CHRISTIAN SCI. MONITOR (Oct. 19, 2010), http://www.csmonitor.com/USA/2010/1019/Fort-Hood-shooting-Al-Qaeda-now-portrays-Nidal-Hasan-as-terrorism-star (describing how Al Qaeda initially doubted that Hasan was a "terrorist," but that "[m]ore recently . . . the international jihadist group has sought to portray Hasan as a terrorist 'trailblazer' who conducted a 'historic and trend-setting' operation").

before and after their attacks since most of them do not communicate their plans with other people."[198] Lone wolves "provide fewer opportunities for detection," and accordingly "may be more difficult for law enforcement and homeland security authorities to disrupt."[199]

Because lone wolf terrorists are by definition solitary, confidential informants are ineffective. Observing the proliferation of informants in Muslim communities, jihadist groups have warned aspiring terrorists to avoid discussing their plans with others.[200] *Inspire*, Al Qaeda's English-language magazine, "advises potential operatives to be aware of operational and communications security with suggestions to avoid using the internet or cell phones, utilize code words, and use encryption."[201] In light of the notoriety surrounding informants within Arab and Muslim communities in America and the jihadist movement's awareness of the trend, "future jihadi plotters are likely to change their operational security measures to counter government informants."[202]

Denying lone wolves the means to carry out attacks is a similarly futile police tactic. Lone wolves have typically used firearms that are freely available in the United States.[203] Some scholars have suggested "special scrutiny" for the "specific group of people who are allowed to keep firearms," but this appears both politically implausible and likely unconstitutional.[204] To

[198] Bakker & de Graaf, *supra* note 11, at 46.

[199] DEP'T OF HOMELAND SEC. & FBI, USE OF SMALL ARMS: EXAMINING LONE SHOOTERS AND SMALL-UNIT TACTICS 2 (2011), *available at* http://www.cbsnews.com/htdocs/pdf/JIB_Use_of_Small_Arms_Examining_Lone_Shooters.pdf.

[200] FISHMAN & LEBOVICH, *supra* note 11, at 10.

[201] DEP'T OF HOMELAND SEC. & FBI, SECOND EDITION OF *INSPIRE* MAGAZINE: CONTINUES TO ENCOURAGE ATTACKS IN THE WEST 2 (2010), *available at* http://info.publicintelligence.net/DHS-Inspire2Warning.pdf.

[202] FISHMAN & LEBOVICH, *supra* note 11, at 22.

[203] Jerome P. Bjelopera, CONG. RESEARCH SERV., R41416, AMERICAN JIHADIST TERRORISM: COMBATTING A COMPLEX THREAT 9 (2011), *available at* http://www.fas.org/sgp/crs/terror/R41416.pdf (citing terrorist training videos that explicitly recommend exploiting America's gun laws to legally obtain firearms for use in terrorist attacks).

[204] Bakker & de Graaf, *supra* note 11, at 48. It is worth noting that such suggestions normally stem from European scholars and address the European terrorism context, which differs from the American in at least two significant ways. First, Europe faces a significantly greater threat from homegrown terrorism than the United States because of "differences in the rate of radicalization of their respective Muslim communities." SAGEMAN, *supra* note 7, at 89-90. These differences are due in large part to Europe's proximity to the Middle East and North Africa, higher Muslim populations with higher rates of poverty, and relatively less successful efforts to integrate Arab and Muslim residents into mainstream society, aptly summarized as "[t]he differences in the intensity of Muslim outrage and the way they interpret and experience life in Europe and America." *Id*. at 106. Second, European countries generally have less "gun friendly" cultures and almost no constitutional restrictions on prohibiting gun possession. *See* Christina Eigel, *Internal*

the extent that lone wolves have aspired to use minor explosives, the knowledge and materials are also widely available.[205]

Heightened surveillance will also be an ineffective means of detecting and neutralizing lone wolf terrorists. An individual working independent of group contacts will necessarily forgo communications, eliminating any possibility of interception. Indeed, "it is extremely difficult to single out lone wolves who will carry out an actual attack before they strike, even with the help of the most sophisticated technical intelligence gathering tools."[206]

Physical security of likely terrorist targets faces a similar problem. Although some lone wolves have attacked "hard" targets, the trend has been for lone wolf terrorists to acknowledge their limited weaponry and training, and instead attack "soft" targets.[207] This target profile, however, does very little, if anything, to limit the potential targets of a lone wolf terrorist. The United States can physically protect "a relatively small percentage of its many attractive targets, but there are far too many to rigorously limit access to every target whose loss might have a major effect on feelings of security in the United States."[208] Moreover, physical security causes a "displacement effect," whereby "[e]nhancing countermeasures for any one terrorist tactic or target . . . makes it more likely that terrorists will favor another."[209] It is simply impossible to protect every potential terrorist target.

Security in an Open Market: The European Union Addresses the Need for Community Gun Control, 18 B.C. INT'L & COMP. L. REV. 429, 431 (1995) (stating that the "Netherlands's Firearms Act[, which] is an example of the tradition of gun control legislation throughout Europe, . . . prohibits the import, export, manufacture, supply or possession of a gun without an official certificate"); Dan Bilefsky, *European Legislators Back Tough Gun Control Rules*, N.Y. TIMES (Nov. 29, 2007), http://www.nytimes.com/2007/11/29/world/europe/29iht29union.4.8530991.html?_r=1&_rl ("European Union legislators . . . overwhelmingly backed tough new gun control rules they said they hoped would prevent Europe from becoming a gun-friendly culture like the United States.").

[205] Stephen Jones, *Al-Qaeda Give Bomb-Making Tips in First English Magazine*, EPOCH TIMES (July 1, 2010), http://www.theepochtimes.com/n2/world/al-qaeda-dubai-magazine-terrorist-38404.html (observing that an article in Al Qaeda's English-language *Inspire* magazine entitled "Make a Bomb in the Kitchen of Your Mom" included "a detailed yet short, easy-to-read manual on how to make a bomb using ingredients found in a kitchen").

[206] Bakker & de Graaf, *supra* note 11, at 46.

[207] Byrony Kones, *French Attacks Could Inspire Next Generation of Terrorists*, CNN.COM (Mar. 21, 2012), http://articles.cnn.com/2012-03-21/world/world_europe_lone-wolf-future-of-terrrorists_1_sajjan-gohel-counter-terrorism-forces-french-attacks?_s=PM:EUROPE.

[208] Heymann, *supra* note 129, at 31.

[209] U.S. DEP'T OF HOMELAND SEC., *supra* note 139, at viii; *see also* LATOURRETTE ET AL., *supra* note 142, at 4 n.2 ("Because of so-called target shifting, or displacement (i.e., terrorists deterred from one target may choose an alternate target), site-specific security measures are likely to reduce the risk to society as a whole less than they do at the individual site of interest.").

Community engagement will likely fail as a disruption tactic because of the isolation in which lone wolves operate. An individual who has radicalized largely on his own and through passively absorbing media is not likely to be susceptible to being shown the "error of his ways," as "lone-wolf terrorists tend to create their own ideologies that combine personal frustrations and aversion with political, social or religious grievances."[210] Indeed, lone wolves are significantly more likely to suffer from "psychological disturbance[s],"[211] further limiting their susceptibility to counter-radicalization.

Group dynamics play an important role in the radicalization process for most aspiring terrorists and an accordingly large part in counter-radicalization efforts. But there is simply no "group" to speak of with lone wolves. Information from community members, the other process by which community engagement prevents terrorism, will prove ineffective at detecting lone wolves. "Ties and renewed contacts with family members have been major factors that have caused militant individuals to reconsider their membership in a terrorist organization,"[212] but the activities of lone wolves have gone unsuspected, even by their neighbors and family members, demonstrating the limited reach of this approach.[213] Indeed, lone wolves typically "physically withdraw themselves from mainstream society."[214] When an individual holds views that are obviously far outside of the mainstream, they will be reluctant to subject their opinions to those who would attempt to dissuade them.[215]

The evolution of homegrown terrorism to the individual level, therefore, renders obsolete much of the post-9/11 law enforcement architecture. Lone wolf terrorists will not be caught in stings, make inculpatory statements to confidential informants, or divulge their plans in intercepted calls or emails. Lone wolves will target sites lacking robust security; federal, state, and local

---

[210] INSTITUUT VOOR VEILIGHEIDS- EN CRISISMANAGEMENT, *supra* note 11, at 86.

[211] Spaaij, *Enigma*, *supra* note 11, at 862 (arguing "that although most terrorists are 'normal,' the rate of psychological disturbance is considerably higher among lone wolves" (citing CHRISTOPHER HEWITT, UNDERSTANDING TERRORISM IN AMERICA: FROM THE KLAN TO AL QAEDA 80 (2003))).

[212] Michael Jacobson, *Terrorist Drop-Outs: One Way of Promoting a Counter-Narrative*, PERSP. ON TERRORISM, Aug. 2009, at 12, 15.

[213] *See, e.g.*, *Faisal Shahzad Kept Low Profile in U.S.*, CBS NEWS (May 4, 2010, 8:40 PM), http://www.cbsnews.com/stories/2010/05/04/national/main6459360.shtml (reporting that neighbors believed terrorist Faisal Shahzad lived an ordinary life with his wife and children).

[214] Spaaij, *Enigma*, *supra* note 11, at 863.

[215] Additionally, even if a family member or close friend recognizes an individual's behavior is changing toward extremism, "interventions" are not likely, as the overwhelming majority of such cases will not result in planned violence. *See Ariz. Suspect's Parents: 'We Don't Know Why This Happened*,' MSNBC.COM (Jan. 11, 2011), http://www.msnbc.msn.com/id/41014125/ns/us_news-crime_and_courts/t/ariz-suspects-parents-we-dont-know-why-happened/#.T4LKkJnXEsc (reporting that suspect began behaving in an erratic, paranoid manner but friends and family ignored his behavior without intervening).

governments cannot protect every mall, bus stop, and restaurant where a solitary extremist could cause harm. Legal weapons and firearms are likely to continue to be available, supplying adequate means to attack unsecured locations. Finally, even attempts to counter the radicalization process will be futile, as lone wolf terrorists typically radicalize by themselves, showing few visible signs to those in a position to affect their descent into extremism. Therefore, it should come as no surprise that "[t]he four successful homegrown jihadist terrorist attacks that have occurred since 9/11 were all committed by lone wolves."[216]

2. Prosecutors

Lone wolf terrorists are nearly impossible to stop before an attack is committed. Even if a potential lone wolf could be discovered and apprehended before an attack occurred, it would be difficult to find a basis in U.S. law upon which the typical lone wolf could be prosecuted and detained. The various forms of preventive liability employed by prosecutors will also fall short. Lone wolves by definition have no co-conspirators, eliminating the availability of conspiracy liability. The material support statutes are similarly inapplicable, as lone wolves will likely have no direct connection to a Foreign Terrorist Organization or to other would-be terrorists.[217] Criminal punishment for terrorist attacks will not serve as the basis for preventive prosecution, nor will these charges' deterrent effect have much impact.

Finally, the material and preparation required to execute the typical lone wolf attack are, absent governmental omniscience of an individual's intent, wholly legal. Moreover, lone wolves need not commit any of the crimes generally linked to broader terrorist plots, such as document fraud and money laundering. Because they operate within their own easily attainable means, they cannot be prosecuted pretextually. Up until the moment the trigger is pulled, the quintessential, and typical, lone wolf will not have violated any laws. Without conspiratorial assistance, an aggrieved individual can investigate a populated location, purchase a firearm, and travel to the selected site, all without having openly violated any criminal statute. Lone wolves thus lie beyond the reach of law enforcement's post-September 11 preventive counterterrorism strategy.

Therefore, the short answer to the question of whether "lone wolf" terrorists can be effectively stopped is simple: they can't. The long answer is that while current law enforcement methods will occasionally intercept lone wolves prior to their attacks, such cases will occur as a matter of coincidence and happenstance, and will by no means be assured. Moreover, even if law

---

[216] JEROME P. BJELOPERA, *supra* note 203, at 45.

[217] *See* Chesney, *supra* note 10, at 437 ("There is, however, a significant limit on the reach of prosecutions under § 2339B and § 1705. By definition, these statutes have no application unless the defendant can be linked to a designated entity. The threat of terrorist violence, however, is not always confined to that circumstance.").

enforcement can identify lone wolves, the absence of pre-attack illegal conduct renders most discoveries insufficient to effectively incapacitate a would-be lone wolf. It would appear, then, that the United States currently faces a significant terrorist threat that is both increasing in prevalence and nearly impossible to prevent.

IV. THE LONE WOLF THREAT IN PERSPECTIVE

While the United States faces many different threats to its security, all vary in frequency, likelihood, and severity. No threat can be seen in isolation; context is critical. Similarly, the observation that current counterterrorism efforts are almost entirely ineffective at preventing and disrupting lone wolf terrorism must be put into context. This Part attempts to provide this contextual understanding, describing the overall threat posed by the rise of lone wolf terrorism and placing the threat within the framework of national security. Although the threat is increasing, poorly understood, and unstoppable, this section argues that the likely costs associated with eliminating lone wolf terrorism are too high a price to pay.

A. *Bad News and Good News – An Unstoppable but Ultimately Insignificant Threat*

Lone wolf terrorism is a case of both good news and bad news. The bad news is that, short of drastic changes to the current allocation of scarce resources and to the government's relationship with American society, lone wolf terrorism is nearly impossible to stop. The good news, however, is that the same factors that cause lone wolves to be nearly unstoppable render their impact ultimately insignificant.

Previous domestic terrorist plots were disrupted by exploiting the vulnerabilities inherent in the groups themselves through surveillance, informants, and community information. Lone wolves lack the vulnerabilities of groups, but this same tactical evolution causes lone wolves to lack the inherent strengths of group terrorism. Institutional support provides terrorists with advanced training, deadlier weapons, and more manpower with which to execute attacks, precisely the characteristics that would allow lone wolves to inflict more harm, but which lie beyond their reach.[218]

Lacking training, lone wolf terrorists must either train themselves through publicly available sources or proceed without training. Although operational military training guides and bomb-making guides are readily available on the

[218] This observation has its exceptions, most notably the devastatingly effective attack carried out by Anders Breivik in Norway in July 2011. *See* Erlanger & Shane, *supra* note 9. Breivik, who according to available information acted entirely on his own, detonated several explosive devices in downtown Oslo and then used small arms against civilians on a nearby island, ultimately killing ninety-two individuals. *Id*. Breivik's lone wolf attack, however, has proven a significant deviation from the norm.

Internet,[219] Internet lessons are not an adequate substitute for advanced training.[220] Indeed, "[t]errorist plots have a much higher degree of success if some of the cell's members have received training in bomb making and operational doctrine in person."[221] It is precisely for these reasons that previous aspiring terrorists sought overseas training from Al Qaeda, for "[t]he greatest acts of terrorism in the post-communist era . . . would not have been possible without the support of privately owned terrorist training camps."[222] The reality remains, however, that complex operations are more difficult, and thus more likely to fail.[223]

Lone wolves will stick to attacks that are operationally feasible, "look[ing] for vulnerabilities and seiz[ing] opportunities to act, rather than dreaming of what would make an even bigger impact but probably would be too difficult to pull off."[224] Operations that follow the trend of the "comparatively easy-to-achieve model of low intensity terrorism,"[225] however, will cause a significantly lower amount of damage and less loss of life.[226] Lone wolves largely use firearms to the exclusion of more lethal means,[227] and statistics

[219] *See* U.S. DEP'T OF JUSTICE, 1997 REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION (1997), *available at* http://digitalcorpora.org/corp/nps/files/govdocs1/394/394212.html.

[220] *See* SAGEMAN, *supra* note 7, at 140 ("The major impact of not being able to link up with al Qaeda Central is lack of access to technical expertise. By default, most of the third-wave terrorist groups are self-trained. This explains the deterioration in the quality of operations and tradecraft in the past few years, which allows many potential terrorists to be detected and arrested before they come close to carrying out an operation."); SPAAIJ, UNDERSTANDING, *supra* note 11, at 74 ("[O]nline bomb-making manuals tend to contain significant errors.").

[221] Peter Bergen, *Al Qaeda, the Organization: A Five-Year Forecast*, 618 ANNALS OF AM. ACAD. OF POL. & SOC. SCI. 14, 18 (2008); *see also* DANIEL BENJAMIN & STEVEN SIMON, THE NEXT ATTACK: THE FAILURE OF THE WAR ON TERROR AND A STRATEGY FOR GETTING IT RIGHT 28 (2005) (describing how "the terrorists' lack of training showed" in the 2003 attack against Jewish targets in Casablanca, Morocco, which failed to kill any Jews).

[222] *See* HAMM, *supra* note 125, at 10-11 (describing the "three-part basic training" undertaken at Al Qaeda training camps in Afghanistan and Pakistan as including training on light weapons, explosives, and heavy weapons).

[223] MORRAL & JACKSON, *supra* note 147, at 12 ("As complexity increases, operational security can become more difficult, training and technical-skill requirements increase, and there may be a proliferation of failure modes in the operation plan.").

[224] Pillar, *supra* note 45, at 11.

[225] Robert Chesney, *Sustained Sequences of Non-Spectacular Terrorist Attacks*, LAWFARE (Mar. 19, 2012, 5:00 PM), http://www.lawfareblog.com/2012/03/sustained-sequences-of-non-spectacular-terrorist-attacks/.

[226] David Dryer, *Terrorism in the West: Al-Qaeda's Role in "Homegrown" Terror*, 13 BROWN J. WORLD AFF. 91, 94 (2007) (interview with Bruce Hoffman, Professor in the Security Studies Program at Georgetown University).

[227] Spaaij, *Enigma*, *supra* note 11, at 864.

corroborate that these attacks are far less lethal than those perpetrated by Al Qaeda and other terrorist groups.[228]

B. *Lone Wolf Terrorism and the Concept of "National Security"*

If Al Qaeda itself represents a significant national security threat, while lone wolf terrorists likely do not, where does that leave us? Pundits often decry that "the terrorists have won" if civil liberties are restricted in the name of national security, but the underlying truth of this statement is frequently ignored. Indeed, "national security," a profoundly human construct, is precisely what society makes of it; a nation is "secure" based on its own subjective criteria.[229] This Section will place lone wolf terrorism within the framework of national security and describe how risk analysis is the best way to view this threat. Departing from the previous descriptive and analytical posture of this Note, this Section offers a normative argument about national security: the threat of lone wolf terrorism is not significant enough to drastically change our society in response.

The concept of "national security" is notoriously vague, and "can be a dangerously ambiguous concept if used without specification."[230] At its broadest, national security connotes objectively "the absence of threats to acquired values," and subjectively "the absence of fear that such values will be attacked."[231] But national security must also address the allocation of resources and the appropriate means to "facilitate[] comparisons of the value of security with that of other goals."[232] When national security policy is created to protect important values, but its implementation compromises those values, society cannot be said to have been made more "secure." Furthermore, although national security typically addresses only military threats, it need not be so limited, and can also include natural disasters and environmental destruction.[233] When conceptualized broadly, national security thus includes

---

[228] *Id*. at 865 ("The number of casualties resulting from lone wolf terrorism has been relatively limited."); *see also* NAT'L COUNTERTERRORISM CTR., *supra* note 23, at 7 (stating that although terrorist attacks with firearms "in 2010 continued to be the most prevalent form of attack, accounting for more than a third of the total," "[b]ombings, including suicide attacks, were far more lethal, causing almost 70 percent of all deaths"); SPAAIJ, UNDERSTANDING, *supra* note 11, at 28 ("[T]here is no evidence that the overall lethality of lone wolf terrorism is on the increase[, which] is an interesting finding when compared to the growing lethality of terrorism in general . . . .").

[229] Arnold Wolfers, *"National Security" As an Ambiguous Symbol*, 67 POL. SCI. Q. 481, 488 (1952) ("[N]umerous domestic factors such as national character, tradition, preferences and prejudices will influence the level of security which a nation chooses to make its target.").

[230] David A. Baldwin, *The Concept of Security*, 23 REV. OF INT'L STUD. 5, 12 (1997).

[231] Wolfers, *supra* note 229, at 485.

[232] Baldwin, *supra* note 230, at 24.

[233] *See* Roland Paris, *Human Security: Paradigm Shift or Hot Air?*, 26 INT'L SECURITY 87, 99 (2001).

policy areas such as education, scientific research, job growth, health care, and deficit reduction.[234] In the end, "national security" is what we make of it.[235]

An implicit assumption in many discussions of terrorism today is that the government should do everything it can to eliminate terrorism completely. Society's "all-encompassing fear of terrorism" has caused many to conceptualize counterterrorism efforts as "a battle against the unlocated specter of terrorism's reality."[236] In this vein, we win the "war on terror" when terrorism itself is eradicated. Indeed, terrorism is seen as something to be prevented, not tolerated. But completely eradicating terrorism is as futile as winning a "war on drugs" or a "war on poverty"; none of these evils can realistically be completely eliminated. While complete eradication of threats is a chimera – "perfect security" – "it is also the expectation set by the media and the political environment."[237] Indeed, not only do exhortations to "perfect security" ignore feasibility, but they also ignore the costs associated with such attempts. Completely eliminating all terrorism, even if it were feasible, would come at an extremely high price.

The proper inquiry should be to ask, given the costs, what amount of terrorism is acceptable, not how to banish the tactic from the face of the earth. The existence of a threat must be modulated by considerations of its likelihood, severity, and possible countermeasures.[238] Indeed, "risk management" is commonly invoked across a broad range of non-security-related policy areas where loss of life is contemplated.[239] Considering these variables allows a candid assessment of a threat and any policy response's costs and benefits. Therefore, national security policy should more closely approximate a calculation where a level of security is chosen where "the marginal costs

---

[234] *See* THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 2 (2010), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

[235] Wolfers, *supra* note 229, at 485-86 ("Some may find the danger to which they are exposed entirely normal and in line with their modest security expectations while others consider it unbearable to live with these same dangers.").

[236] Nick J. Sciullo, *The Ghost in the Global War on Terror: Critical Perspectives and Dangerous Implications for National Security and the Law*, 3 DREXEL L. REV. 561, 565 (2011).

[237] LYNCH, *supra* note 71, at 9.

[238] Henry H. Willis, *Guiding Resource Allocations Based on Terrorism Risk* 11 (RAND, Ctr. for Terrorism Risk Mgmt. Policy, Working Paper No. WR-371-CTRMP, 2006), *available at* http://www.rand.org/pubs/working_papers/2006/RAND_WR371.pdf. ("[T]errorism risk represents the expected consequences of taking into account the likelihood that attacks occur (i.e., threat) and that they are successful if attempted (i.e., vulnerability).").

[239] Jay Michaelson, Note, *Rethinking Regulatory Reform: Toxics, Politics, and Ethics*, 105 YALE L.J. 1891, 1891 (1996) ("In less obvious instances of state control, such as regulating safety or allocating scarce resources, the state must make difficult, 'tragic' choices of how many lives to sacrifice in exchange for benefits that may not be coequal with life itself.").

outweigh the marginal benefits."[240] In identifying the point where a state will "forgo[] an [additional] increment of security," states should consider the "values to be protected, the degree of security to be sought, and the costs to be incurred."[241] The marginal benefit in adding more security is not always worth it.[242] Although the desired level of security depends on a society's weighing of values, the most important point is that more security is not always, nor even frequently, good policy.

The preceding analysis thus provides the necessary context to consider lone wolf terrorism's place in U.S. national security. The frequency of lone wolf attacks appears to be increasing, and this Note has shown that the current system is ineffective at stopping lone wolves. But a threat's frequency must be measured against its severity. Weapons of mass destruction are accordingly considered "[t]he gravest danger to the American people and global security,"[243] but the lethality of lone wolf terrorism, on the other hand, is minimal. In sum, although likely to continue, "[t]he societal impact of lone wolf terrorism is generally limited."[244] Moreover, when evaluating potential policy changes, it is clear that, in light of the ineffectiveness of the already existing controversial and resource-intensive countermeasures, any further incremental increase in security will be purchased at a very high price. Indeed, even if the United States chose to enact additional anti-lone wolf countermeasures, it is unclear if they would succeed at preventing solitary terrorists. To effectively stop individuals from carrying out terrorist plots by themselves, these changes would of necessity be drastic.

Firearms could be tightly regulated, if not banned outright, as could all materials usable in explosive concoctions. The U.S. government could tightly restrict Internet access, routing all traffic through government-monitored servers to eliminate access to potentially dangerous websites, such as those that espouse radical jihadist beliefs or provide information about committing terrorist attacks.[245] Increased electronic and physical surveillance of anyone

---

[240] Baldwin, *supra* note 230, at 22.

[241] *Id*.

[242] Wolfers, *supra* note 229, at 494 ("At a certain point . . . the gain in security no longer compensates for the added costs of attaining it.").

[243] THE WHITE HOUSE, *supra* note 234, at 8; *see also* RON SUSKIND, THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11, at 62 (2006) (quoting Vice President Dick Cheney as saying, "If there's a one percent chance that Pakistani scientists are helping al Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our response").

[244] Spaaij, *Enigma*, *supra* note 11, at 867.

[245] While this description was intended to emphasize the folly of such a policy, such proposals are not unthinkable, even in a democracy. *See, e.g.*, *Sarkozy Announces Crackdown on Internet Hate Sites*, REUTERS (Mar. 22, 2012, 8:50 AM), http://www.reuters.com/article/2012/03/22/us-france-shooting-sarkozy-idUSBRE82L0MH20120322 ("President Nicolas Sarkozy said on Thursday that France would make it a crime to consult Web sites that advocate terrorism or hate crimes . . . .").

suspected of having terrorist sympathies, likely including significant ethnic and religious profiling, would further facilitate terrorism prevention. Physical security could be placed wherever groups of people congregate. Finally, to effectively incarcerate those suspected of terrorist sympathies, more expansive concepts of attempt, conspiracy, and material support could be legislated. Criminal law could edge closer to criminalizing any expression of terrorist sympathies.

This description makes clear, however, that the cure would be much worse than the disease. Such heavy-handed tactics would undoubtedly violate the Constitution; the Bill of Rights protects individuals' rights to own firearms, express hateful opinions, practice their religion as they see fit, and be secure from unreasonable searches and seizures. Additionally, a push to completely eliminate terrorism would place a significant burden on the United States' already strained public treasury. A substantial expansion of physical and electronic surveillance would necessitate large hiring increases, as would an increase in physical security for likely terrorist targets. Simply put, total prevention of lone wolf terrorism would not only be exceedingly difficult, but, even if achievable, not worth the inevitable costs.

Of course, a ledger weighing fatalities and injuries against budget increases and decreased liberties is impossible to mechanically balance. Government cost-benefit analyses have long wrestled with how to incorporate the value of life, but such calculations are inherently controversial. This analysis does not mathematically resolve the delicate balancing issues facing those who decide U.S. national security and counterterrorism policy; it merely clarifies the choices involved and offers one possible answer. Indeed, this Note's goal is accomplished merely by "mak[ing] it more difficult for advisers or executors of policy to hide from themselves or others the moral value judgments and preferences which underlie whatever security policy they choose to recommend or conduct."[246] Forcing policy makers to confront the underlying assumptions of their policies encourages "an honest conversation about our core values" in which we address "where security fits in our priorities."[247]

CONCLUSION

While the policy of the United States should not be to completely eliminate the threat of terrorism, accepting the futility and the inadvisability of attempting to eliminate lone wolf terrorism leads to an inevitable question: What then can be done? A possible answer from the preceding analysis is simple: Nothing. In light of the minimal threat posed by lone wolves, the United States' policy could be to tolerate these attacks, much as a giant ignores a mosquito. Doing nothing, however, is perilous political territory,[248] and it

[246] Wolfers, *supra* note 229, at 499.

[247] SAGEMAN, *supra* note 7, at 163.

[248] *Norway Intelligence Admits Possible Errors Ahead of Anders Breivik Attacks*, TELEGRAPH (Sept. 2, 2011, 5:58 PM), http://www.telegraph.co.uk/news/worldnews/europe/

ignores the policies that, while not likely to eradicate lone wolf terrorism, can have significant beneficial effects.

Indeed, "doing nothing" should not be confused with a concerted effort to educate Americans about the relative trade-offs inherent in national security policy decisions. In light of the inevitable terrorism-related "public overreaction to highly publicized, low-probability risks," "[t]he best response is information and education."[249] Policy makers should explain that "doing nothing" actively preserves scarce resources and precious civil liberties, pointing out the likely costs associated with new policy changes. Furthermore, it seems likely that lone wolf terrorism captures the imagination of the American public so vividly because it is perceived as a new and highly dangerous type of "terrorism." Therefore, a public awareness initiative should characterize lone wolves as criminals, rather than as terrorists, for "the word 'terrorism' evokes vivid images of disaster, thus crowding out probability judgments."[250] The United States can tolerate even high levels of criminality; no amount of murder or arson affects U.S. national security, but when a murder and arson become "terrorism," more is demanded of the government. Finally, policy makers should encourage discussion of lone wolf terrorism without sensationalism; the moniker "lone wolf" should be perhaps the first casualty of any "war on lone wolf terrorism." The foremost goal of policy makers should be to create an environment where this emerging threat can be discussed rationally.

Efforts to prevent individuals from embracing extremism should also be strengthened. These programs can provide alternative paths for those most susceptible to extremist messages, inhibiting the development of those likely to resort to violence. Encouraging critical and searching debate on U.S. policies could also provide individuals with a forum in which to air their grievances. Because of the high prevalence of mental illness among lone wolves, more proactive screening and counseling should be implemented, with outreach to community members about the warning signs of individuals planning solitary extremist violence. Counter-radicalization programs, besides potentially preventing future violence, also have significant spillover effects. Stronger communities, a more robust civil society, and a more vibrant political discourse are all important "goods," notwithstanding any direct link to counterterrorism.

Lone wolf terrorists are a frightening aspect of modern society, but not a new development in the arc of history. Just as societies have weathered lone

norway/8738267/Norway-intelligence-admits-possible-errors-ahead-of-Anders-Breivik-attacks.html ("After the July 22 twin attacks, [the head of Norway's intelligence agency] was lambasted for prematurely claiming her agency could not have picked up on any clues of a pending attack because the [sic] Breivik was a 'lone wolf.'").

[249] Cass R. Sunstein, *Terrorism and Probability Neglect*, 26 J. RISK & UNCERTAINTY 121, 133 (2003).

[250] *Id.* at 127-28.

gunmen in the past, the United States will do so in response to the current threat. A small number of poorly trained and poorly equipped individuals operating alone should not cause the United States to alter the course of the ship of state. National security policy protects us from harm, but it protects more than just our persons; it protects who we are as a society.