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# Charging Crimes As “Terrorism”

Jenna McLaughlin \*

The Department of Justice charged Dylann Roof, the white 21-year-old man who allegedly gunned down nine black churchgoers in Charleston, South Carolina on June 17, with murder, attempted murder and the use of a firearm, all in the commission of a hate crime. Attorney General Loretta Lynch announced the charges in June. But the DOJ did not charge Roof with domestic terrorism, or include terrorism in the indictment. Some media outlets<sup>1</sup>, lawyers, public figures<sup>2</sup> and activists<sup>3</sup> have called for Roof to be charged not just with a hate crime, an illegal act “involving actual or perceived race, color, religion or national origin,” but with the separate label of domestic terrorism.<sup>4</sup> Critics contend that the label of terrorism is too often only applied to Islamic extremists, and not white supremacists or anti-government anarchists. Many were outraged after FBI Director James Comey balked at the term during a June 20 press conference, telling reporters he didn’t see the murders “as a political act,” a requirement he designated as necessary for terrorism.<sup>5</sup> Even after Roof’s “manifesto” detailing his radical political beliefs surfaced, Comey said he was still unsure the crime fit the

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\* This article first appeared on The Intercept website on July 22, 2015 and includes some additional content and commentary. See Jenna McLaughlin, *Why Wasn’t Dylann Roof Charged With Terrorism*, THE INTERCEPT (July 22, 2015) <https://theintercept.com/2015/07/22/department-justice-didnt-charge-dylan-roof-domestic-terrorism/>.

<sup>1</sup> Dean Obeidallah, *Get Real: Charleston Church Shooting Was Terrorism*, THE DAILY BEAST (June 18, 2015) <http://www.thedailybeast.com/articles/2015/06/18/let-s-call-charleston-shooting-what-it-was-a-terrorist-attack.html>.

<sup>2</sup> @ChrisCuomo Comment to Dean Obeidallah, TWITTER (June 18, 2015, 5:38 AM), <https://twitter.com/ChrisCuomo/status/611513307653120000>.

<sup>3</sup> James Downie, *The Charleston shooter is a Terrorist. The Federal Government Should Charge Him as One*, WASH. POST (June 26, 2015) <https://www.washingtonpost.com/blogs/post-partisan/wp/2015/06/26/the-charleston-shooter-is-a-terrorist-the-federal-government-should-charge-him-as-one/>.

<sup>4</sup> 18 U.S.C. § 249(a)(1) (2012).

<sup>5</sup> See Arie Melber, *Clinton Breaks With FBI Director on Calling Charleston Shooting ‘Terrorism’*, MSNBC (June 23, 2015) <http://www.msnbc.com/msnbc/clinton-breaks-fbi-director-charleston-shooting>; also see Andrew Husband, *FBI Director Says Charleston Shooting Not Terrorism*, MEDIATE.COM (June 20, 2015) <http://www.mediaite.com/tv/fbi-director-says-charleston-shooting-not-terrorism/>.

definition, clarifying that it would not affect “the energy” applied to the case either way.<sup>6</sup>

Roof’s crime certainly seems to fit the federal description of domestic terrorism, which the FBI defines as:

activities . . . [that] involve acts dangerous to human life that violate federal or state law . . . appear intended to (i) intimidate or coerce a civilian population, (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.”<sup>7</sup>

According to the criminal code, a “federal crime of terrorism” is “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct” and may involve violence on a federal facility with a “dangerous weapon” or against a federal officer.<sup>8</sup>

Remember: Roof allegedly told a few friends that he intended the murder of the parishioners, attendees of historically black Emmanuel African Methodist Episcopal Church, to start a “race war,” while his online “manifesto,” verified by the FBI, confirmed his motivations to intimidate and assassinate.<sup>9</sup> He took as inspiration, among other things, George Zimmerman’s 2012 shooting of Trayvon Martin, the Confederate flag, the KKK and skinheads.<sup>10</sup>

It turns out there was one major obstacle in charging Roof with domestic terrorism: The crime does not exist. “As you know, there is no specific domestic terrorism statute,” said Lynch during the press conference to announce Roof’s indictment.<sup>11</sup> FBI Director Comey said that “I only operate in a legal framework,” and that it was hard to

<sup>6</sup> Ryan Reilly, *FBI Director James Comey Still Unsure If White Supremacist’s Attack In Charleston Was Terrorism*, HUFFINGTON POST (July 9, 2015) [http://www.huffingtonpost.com/2015/07/09/james-comey-charleston-terrorism-\\_n\\_7764614.html](http://www.huffingtonpost.com/2015/07/09/james-comey-charleston-terrorism-_n_7764614.html)

<sup>7</sup> See 18 U.S.C. § 2331 (2012); also see *Definitions of Terrorism in the U.S. Code*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/about-us/investigate/terrorism/terrorism-definition>.

<sup>8</sup> See 18 U.S.C. § 2332b (2012); also see FED. BUREAU OF INVESTIGATION, *supra* note 6.

<sup>9</sup> Downie, *supra* note 3; Francis Robles, *Dylann Roof Photos and a Manifesto are Posted on Website*, WASH. POST (June 20, 2015) [http://www.nytimes.com/2015/06/21/us/dylann-storm-roof-photos-website-charleston-church-shooting.html?\\_r=1](http://www.nytimes.com/2015/06/21/us/dylann-storm-roof-photos-website-charleston-church-shooting.html?_r=1).

<sup>10</sup> Robles, *supra* note 10.

<sup>11</sup> Marcy Wheeler, *Dylann Roof Should be Tried as a Terrorist: America’s Disturbing Double-Standard on Political Violence (and Why it Matters)*, SLATE (June 24, 2015) [http://www.salon.com/2015/07/24/dylann\\_roof\\_should\\_be\\_tried\\_as\\_a\\_terrorist\\_americas\\_disturbing\\_double\\_standard\\_on\\_political\\_violence\\_and\\_why\\_it\\_matters/](http://www.salon.com/2015/07/24/dylann_roof_should_be_tried_as_a_terrorist_americas_disturbing_double_standard_on_political_violence_and_why_it_matters/).

determine whether or not any federal charges relating to terrorism made sense—or were available.<sup>12</sup>

Even when the USA Patriot Act, post 9/11, redefined terrorism to include domestic crimes, the provision simply allowed the government to investigate more broadly what it called “terrorism.”<sup>13</sup> Actually charging someone with domestic terrorism remains a separate matter. Even criminals who use bombs or send money to ISIS — or Boston Marathon bomber Dzhokhar Tsarnaev — are not charged with the crime of terrorism. Because Tsarnaev used bombs, the 30 federal charges against him — unlike Roof’s case — included charges of “using a weapon of mass destruction,” which is one of the few crimes specified in the U.S. criminal code section for terrorism.<sup>14</sup> So it was accurate to say he was charged as a terrorist.

But shootings, regardless of motivation, intention or number of deaths, likely don’t count. “It doesn’t seem like a shooting would fit,” says Faiza Patel, co-director of the Brennan Center’s Liberty and National Security Program. “Or else a lot of crime would get caught up” in the terrorism net, she tells me.<sup>15</sup> “The discrepancy in the way authorities handle mass shootings by different actors reflects distinctions that are baked into the criminal code,” she later wrote in a blog post on the legal blog Just Security.<sup>16</sup> “At the end of the day, Roof’s alleged crimes didn’t align with any that would qualify as terrorism.”<sup>17</sup> “There is no singular crime of domestic terrorism encompassing acts of politically motivated violence,” she continued.<sup>18</sup> “Instead, federal law specifies a wide array of crimes as terrorism-related offenses, regardless of intent, including hijacking an airplane, assassinating a government official, detonating certain kinds of explosives or chemical weapons, or bombing a government facility.”<sup>19</sup>

There are, however, aggravating factors to be considered during sentencing, which prosecutors usually list on a formal indictment, and which can be used to determine whether the death penalty is justified,

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<sup>12</sup> Reilly, *supra* note 5.

<sup>13</sup> USA PATRIOT Act of 2001, Pub. L. No. 107–56, §802, 115 Stat 272 (2001); *also see* 18 U.S.C. § 2331 (2012).

<sup>14</sup> Indictment at 13, *United States v. Tsarnaev*, 780 F.3d 14 (1st Cir. 2015) (No. 1:13CR10200), 2013 WL 3215742.

<sup>15</sup> Telephone Interview with Faiza Patel, Co-Director, Brennan Center for Justice Liberty and National Security Program (July 22, 2015).

<sup>16</sup> Faiza Patel & Adrienne Tierney, *The Reasons Why Dylann Roof Wasn’t Charged With Terrorism*, JUST SEC. BLOG (July 30, 2015, 9:16 AM), <https://www.justsecurity.org/25071/reason-dylann-roof-charged-terrorism/>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

and those include “substantial planning and premeditation,” to “cause the death of a person” or “commit an act of terrorism.”<sup>20</sup>

In Roof’s case, the DOJ did not mention terrorism as an aggravating factor, but did reference “substantial planning and premeditation to cause the death of a person” for several of his charges.<sup>21</sup> “When a prosecutor is writing an indictment, that’s what he or she has to prove at trial,” explains Michael German, a former FBI domestic terrorism investigator who now also works in the Brennan Center’s Liberty and National Security Department. “Rather than making a complex argument [and] getting into a big discussion on what terrorism is, they’ll make a simple argument.”<sup>22</sup>

Lynch did not explain why “terrorism” was not listed as an aggravating factor in Roof’s indictment, though she did emphasize that the DOJ views hate crimes as “the original domestic terrorism.”<sup>23</sup> She noted that Roof’s case, including his “discriminatory views towards African Americans” and his decision to target “parishioners at worship,” made his crime a clear-cut case of a federal hate crime.<sup>24</sup>

Courts can also apply a “terrorism enhancement,” created in the mid-1990s, after sentencing, which would allow them to increase the penalty for the crime.<sup>25</sup> This, writes Wadie E. Said, a law professor at the University of South Carolina, “also affords prosecutors and courts a vehicle of an expressive nature, to comment on their deep disapproval and condemnation of terrorism in a general sense.”<sup>26</sup>

Mike German believes that even the enhancement could be “questionable” in Roof’s case.<sup>27</sup> “If it had been a federal building rather than a church, a pipe bomb and not a gun . . . “ he says. “It’s not distinguished by ideology, it’s distinguished by the nature of the crime. But I don’t have all the evidence.”<sup>28</sup>

Some white supremacists have been charged with the terrorism enhancement in the past. In 2010, for example, neo-Nazi Wayde Lynn Kurt plotted an attack involving assassinating President Obama in

<sup>20</sup> 18 U.S.C. § 3592(c)(9) (2012).

<sup>21</sup> Indictment of Dylann Roof, United States v. Roof, No. 2015-CR-00472 (D.S.C. July 20, 2015).

<sup>22</sup> Telephone Interview with Michael German, Fellow, Brennan Center for Justice (July 22, 2015).

<sup>23</sup> Loretta Lynch, Attorney General, U.S. Dep’t of Justice, Press Conference Following Indictment of Dylann Roof (July 22, 2015) *available at* <http://www.c-span.org/video/?327281-1/attorney-general-loretta-lynch-news-conference>.

<sup>24</sup> *Id.*

<sup>25</sup> Wadie E. Said, *Sentencing Terrorist Crimes*, 75 OHIO ST. L.J. 477 (2014).

<sup>26</sup> *Id.* at 480.

<sup>27</sup> Michael German, *supra* note 23.

<sup>28</sup> *Id.*

Spokane, Washington, which he described as the “final solution,” and federal prosecutors added the enhancement to his sentence successfully.<sup>29</sup>

For German and others, the issue is more about the importance of placing Roof’s crime against African American churchgoers in the realm of terrorism alongside radical Islamists and ISIS. “Calling it a hate crime instead of terrorism seems to suggest it’s less serious,” he says.<sup>30</sup> “Rhetoric is important.”<sup>31</sup> Patel echoes this notion: “It’s more of a question of the narrative of the issue. If you call what he did terrorism, you connect it to the broader definition of acts of terrorism.”<sup>32</sup>

In general, however, Patel cautions against creating a specific domestic terror charge, because there are already too many crimes being labeled as terrorism that may be nonviolent or exercising freedom of speech.<sup>33</sup> “You have all these acts that are terrorist but already criminalized,” she says.<sup>34</sup> “[The crime of] providing material support to a foreign terror organization is already problematic. It captures things that are nonviolent.”<sup>35</sup> And that, she believes, “comes close to the line of the first amendment.”<sup>36</sup>

Another danger of lumping crimes of terrorism together is extremely harsh mandatory minimum sentencing—which often doesn’t take into account the individual circumstances of a crime, including violence. If a crime of identity theft is accompanied by a federal crime of terrorism, or “terrorism predicated offenses”—a guilty verdict will result in at least five years in prison.<sup>37</sup> Experts, lawyers, and academics have routinely said mandatory minimums don’t work to deter future crime—and are actually oppressive.<sup>38</sup>

According to Said, special sentencing enhancements for terrorism haven’t been around that long.<sup>39</sup> Before the 1990s, criminals who were politically motivated were prosecuted for their specific crimes—rather than their intentions in committing those crimes.<sup>40</sup> “Even when the law

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<sup>29</sup> *Terror From the Right*, S. POVERTY L. CTR. (Nov. 1, 2015) <https://www.splcenter.org/20100126/terror-right>.

<sup>30</sup> Michael German, *supra* note 23.

<sup>31</sup> *Id.*

<sup>32</sup> Faiza Patel, *supra* note 16.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> CHARLES DOYLE, CONG. RESEARCH SERV., R2100, MANDATORY MINIMUM SENTENCING: FEDERAL AGGRAVATED IDENTITY THEFT 1 (2015)

<sup>38</sup> Andrea Jones, *The Nation’s Shame: the Injustice of Mandatory Minimums*, ROLLING STONE (Oct. 7, 2014).

<sup>39</sup> Said, *supra* note 25, at 499.

<sup>40</sup> *Id.* at 477.

shifted to begin to recognize certain crimes as terrorist in nature—airplane hijacking being the prime example—sentencing remained relatively uncontroversial from a legal perspective, since the underlying conduct being punished was violent at its core,” he wrote.<sup>41</sup> But lengthy sentencing enhancements, he explains, later became a weapon in the tool belt of federal investigators in the war on terror, “even in situations where there was no link to an act of violence.”<sup>42</sup> “By far the most common terrorism-related charge is material support for terrorism, which doesn’t necessarily involve any violent activity, but does carry the heavy penalties typically associated with terrorism,” wrote Patel on Just Security.<sup>43</sup>

But trying to charge Roof with a similar charge for any association to domestic white supremacist groups could be even more problematic. “Extending the material support framework to cover Roof’s alleged activities, particularly section 2339B, would open a Pandora’s box of problems,” wrote Patel.<sup>44</sup>

The charge depends on identifying particular terrorist organizations that are banned from receiving support. If extended to domestic groups, the political aspect of such a designation (already fraught in the international context) would carry enormous First Amendment risks. Because terrorism is inherently a political crime, extending material support would allow the government to assign the label to groups with unpopular beliefs.”<sup>45</sup>

Concern about targeting domestic groups as terrorism has happened multiple times in U.S. history, including when the FBI targeted animal rights activists and so-called “eco-terrorists” or environmentalists. And in many cases, there’s doubt as to whether those charged with terrorism related crimes really had any intention or ability of to carry out an attack in the first place—as some suffer from mental illness, or were provided with large amounts of assistance and encouragement by undercover agents.<sup>46</sup>

Lynch, in a press conference about Roof’s charges, was asked whether or not there should be a federal domestic terrorism penalty to

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Patel & Tierney, *supra* note 13.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Glenn Greenwald, *Why does the FBI Have to Manufacture Its Own Plots if Terrorism and ISIS Are Such Grave Threats?*, THE INTERCEPT (Feb. 26, 2015) <https://theintercept.com/2015/02/26/fbi-manufacture-plots-terrorism-isis-grave-threats/>.

help bridge the gap between crimes like the shooting of five military personnel in Chattanooga, Tennessee — which was immediately branded as terrorism, by law enforcement and media alike — and Roof's case, which was not.<sup>47</sup> Lynch acknowledged the argument that leaving out the word terrorism may cause people to feel like the government "doesn't consider those crimes as serious."<sup>48</sup> But she doesn't agree.

I want to be clear that nothing could be farther from the truth. This type of crime in particular, racially motivated violence for which a federal law was specifically enacted to cover, is of grave importance. . . . Sometimes people like to focus on the terminology. Since 9/11 there has been a great focus on [terrorism.] But it should in no way signify that this particular murder or any federal crime is of lesser significance.<sup>49</sup>

But the pressure to widen the scope of crimes of terrorism isn't over. In December, activists urged Lynch to label Robert Dear's murderous rampage on a Planned Parenthood clinic in Colorado Springs as domestic terrorism, too.<sup>50</sup>

NARAL Pro-Choice America, CREDO Action, Ultraviolet and Courage Campaign called on the FBI to investigate the crime as an act of domestic terrorism.<sup>51</sup> Ilyse Hogue said during a press teleconference, "these attacks [against Planned Parenthood] meet the definition of domestic terrorism. This is not a random shooting . . . and it must be called out as such."<sup>52</sup>

More recently, commentators took to Twitter and Op-Eds columns to ask why the Oregon occupiers—Ammon Bundy and company—weren't being labeled as terrorists—even though they forcibly occupied a government building with a deep-seated dedication to their ideology, willing to die, or commit violence, if it came to that.<sup>53</sup> And the FBI itself has said that it takes ideology into account when it investigates crimes.

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<sup>47</sup> Loretta Lynch, *supra* note 24.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Jenna McLaughlin, *Activists Urge Attorney General to Call Attack On Planned Parenthood Clinic an Act of Terror*, THE INTERCEPT (Dec. 2, 2015) <https://theintercept.com/2015/12/02/activists-urge-attorney-general-to-call-attack-on-planned-parenthood-clinic-an-act-of-terror/>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Jannell Ross, *Why Aren't We Calling the Oregon Occupiers 'Terrorists,'* WASH. POST (Jan. 3, 2016) <https://www.washingtonpost.com/news/the-fix/wp/2016/01/03/why-arent-we-calling-the-oregon-militia-terrorists/>.



Following the San Bernardino shooting, FBI official David Bowdich noted that “The FBI defines terrorism very specifically, and that is the big question for us: What is the motivation for this?,” suggesting that it was premature to describe the act as terrorism—though the killers used guns and not bombs, likely restricting their ability to actually charge it as such.<sup>54</sup>

Ultimately, the federal statutes associated with terrorism seem to give law enforcement a wider investigative berth, and allow for heavier mandatory sentences—but don’t address all of the most despicable, ideological crimes.

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<sup>54</sup> Earl Ofari Hutchinson, *The San Bernardino Massacre is Domestic Terrorism and Should Be Called That*, HUFFINGTON POST (Dec. 7, 2015) [http://www.huffingtonpost.com/earl-ofari-hutchinson/the-san-bernardino-massac\\_b\\_8720840.html](http://www.huffingtonpost.com/earl-ofari-hutchinson/the-san-bernardino-massac_b_8720840.html).