One Size Does Not Fit All: Reforming the Federal Sentencing Guidelines' Terrorism Enhancement

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Following the 1993 bombing of the World Trade Center, Congress directed the U.S. Sentencing Commission to amend its Sentencing Guidelines to prescribe a steeper penalty for acts that involve or intend to promote international terrorism. The result is the terrorism sentencing enhancement, which automatically sets a floor of 210 to 262 months when calculating the recommended sentence for defendants before other adjustments. But this one-size-fits-all penalty, while appropriate for the worst offenders intending mass murder, sweeps too broadly and recommends severe sentences for any defendants accused of anti-government conduct. Prosecutors request the terrorism enhancement not only for terrorists intending mass murder or bodily harm, but also for unruly protestors intending small-scale property damage and civil disobedience. This Comment proposes reforming the enhancement by implementing a tiered system that recommends sentencing adjustments for anti-government criminal conduct according to the offense type and the degree of intended or actual violence and property damage.

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INTRODUCTION

On May 28, 2020, Colinford Mattis and Urooj Rahman, two New York City attorneys, were swept up in the national wave of mourning and outrage that followed the death of the unarmed George Floyd.[1] Distraught by the video of Floyd's murder at the hands of Minneapolis police officers, Mattis and Rahman exchanged text messages calling for social change and retaliatory displays of force.[2] The pair made plans to join ongoing riots and protests in other parts of the city and purchased gasoline, beer

1. *See* United States Gov't Sent'g Memorandum, United States. v. Mattis, No. 20-203 (E.D.N.Y. Dec. 9, 2022) [hereinafter Sent'g Memorandum].
2. *See id.* at 2.

bottles, and cloth to assemble into Molotov cocktails.[3] Later that night, the duo finally turned their outrage into violent conduct by throwing one of the cocktails at a parked New York Police Department vehicle, incinerating the vehicle but causing no injuries.[4] The two were arrested shortly thereafter.[5]

Mattis and Rahman were unique among criminals for their backgrounds—accomplished attorneys, one with a degree from Princeton[6]—but not in their political outrage and violent conduct. In June 2020, two other activists-turned-rioters, Corey Smith and Elaine Carberry, set fire to an NYPD van.[7] The conduct at issue was nearly identical to the conduct of Mattis and Rahman: both pairs of activists, frustrated with the lack of progress in ameliorating police brutality and racial disparity in the deployment of force by police officers, chose to express their outrage by torching police vehicles.[8]

Despite their similar conduct and lack of criminal histories, the two pairs of arsonists were threatened with different sentencing recommendations under the United States Federal Sentencing Guidelines (Guidelines), a set of non-binding sentencing recommendations for criminal convictions created by the United States Sentencing Commission (Sentencing Commission). The initial Guidelines' recommendation for Mattis was 235 to 293 months before the statutory maximum reduced the recommendation to 60 months.[9] In contrast, the Guidelines' recommendation for Carberry was 36 months.[10] The key difference lies in the prosecution's decision to seek an upward adjustment for

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3. *See id.* at 1–2.
4. *Id.* at 3.
5. *Id.*
6. *See* Hurubie Meko & Rebecca Davis O'Brien, *During George Floyd Protests, 2 Lawyers' Futures Went Up in Flames*, N.Y. TIMES (Jan. 26, 2023), https://www.nytimes.com/2023/01/26/nyregion/lawyers-sentenced-molotov-police-car.html (on file with the *Columbia Journal of Law & Social Problems*).
7. *See* Press Release, U.S. Att'ys Office, S.D.N.Y., Brooklyn Residents Plead Guilty To Conspiring To Commit Arson In Connection With Burning Of NYPD Homeless Outreach Unit Vehicle (Sept. 22, 2021), https://www.justice.gov/usao-sdny/pr/brooklyn-residents-plead-guilty-conspiring-commit-arson-connection-burning-nypd [https://perma.cc/7A2U-5RUC].
8. *See* Matthew Russell Lee, *Six Months Prison For Pouring Fluid on NYPD Van As Carberry & Smith Cite Black Lives*, INNER CITY PRESS (Feb. 18 2022), https://www.innercitypress.com/sdny64blimantequilanypdicp021822.html [https://perma.cc/8N8N-V53J]; Sent'g Memorandum, *supra* note 1, at 3.
9. *See* Sent'g Memorandum, *supra* note 1, at 5.
10. *See* Lee, *supra* note 8.

terrorism under § 3A1.4 of the Guidelines for Mattis and Rahman, but not for Carberry and Smith.[11]

While the Guidelines generally aim to serve as a mechanical calculation to promote fairness and enhancing judicial uniformity, the terrorism adjustment's discretionary application diverges from this principle. The need for strict sentencing reflects the very real threat terrorism poses to human life, but the adjustment's one-two combination of a wide sweep and a sledgehammer penalty creates a mixed prosecutorial and judicial appetite for applying the enhancement at its boundaries. This uncertainty and hesitation in applying the Guidelines' terrorism enhancement injects discretion into what is intended to be a non-discretionary process, which in turn creates a lack of uniformity and an arbitrary appearance.

Part I of this Comment begins with a history of the terrorism adjustment, focusing on how it has been applied in the federal sentencing framework since the Supreme Court's landmark decision in *United States v. Booker*[12] rendered the Guidelines advisory. Part II critiques the adjustment as overbroad and inflexibly severe, arguing that these qualities lead to excessive prosecutorial and judicial discretion and insufficient uniformity. Part III considers three potential solutions: eliminating the enhancement, narrowing the enhancement, or replacing the enhancement with a tiered system based on the degree of intended or actual violence, property damage, or type of crime. This Comment concludes by endorsing the multi-tiered approach as an improvement over the current one-size-fits-all status quo in light of the existing federal sentencing factors and the Guidelines' larger goals of promoting uniformity and fairness in sentencing defendants.

11. *Compare id. with* Sent'g Memorandum, *supra* note 1, at 5.
12. 543 U.S. 220 (2005).

I. THE HISTORY OF THE TERRORISM ADJUSTMENT AND THE POST-*BOOKER* SENTENCING LANDSCAPE

A. THE UNITED STATES SENTENCING GUIDELINES, POST-*BOOKER* SENTENCING PRACTICE, AND THE 3553(A) SENTENCING FACTORS

The Sentencing Commission—an independent federal agency created "to establish sentencing policy and practices for the federal criminal justice system"[13]—developed and introduced the Guidelines in 1987 pursuant to a congressional directive in the Sentencing Reform Act of 1984.[14] The Guidelines aim to promote an effective and fair national sentencing system by promoting transparency and national uniformity in sentencing, which was traditionally left to the widely variant practices of federal judges sitting all over the country.[15] Deriving a recommended sentencing range from the Guidelines is simple in theory: determine and assign a number corresponding to the severity of the offense,[16] determine and assign numerical values corresponding to the offender's criminal history,[17] apply any relevant adjustments to those levels,[18] and follow the Guidelines table to find the final recommended sentencing range.[19] Finally, 18 U.S.C. § 3553(a), which also originates in the Sentencing Reform Act, lists the factors judges must consider before imposing a sentence on an individual.[20]

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13. U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A (U.S. SENT'G COMM'N 2024).

14. *See id.*

15. *See id.* ("Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system. . . . Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.").

16. *See id.* at ch. 2.

17. *See id.* at § 4A1.1.

18. For example, these adjustments consider whether the victim was particularly vulnerable, *see id.* at § 3A1.1, whether the defendant accepted responsibility for the conduct, *see id.* at § 3E1.1, and whether the conduct involved or promoted terrorism, *see id.* at § 3A1.4.

19. *See id.* at ch. 5.

20. *See* 18 U.S.C. § 3553(a) (2024). Among others, these factors include "the nature and circumstances of the offense and the history and characteristics of the defendant" and the need for the sentence to "reflect the seriousness of the offense"; "to afford adequate deterrence to criminal conduct"; "to protect the public from further crimes of the defendant";

While the Guidelines sentencing prescriptions were originally mandatory, following *United States v. Booker*,[21] the Guidelines are now only advisory.[22] A subsequent opinion, *Gall v. United States*,[23] set the current procedure for a federal district judge to sentence a defendant. The judge must calculate the applicable Guidelines range, hear arguments from the parties, consider the 18 U.S.C. § 3553(a) sentencing factors, and explain the reasoning behind the final sentence.[24] This regime aims to promote national uniformity and fairness while still respecting the autonomy and individualized circumstances of every defendant. A judge may depart or vary from the Guidelines to serve the overarching goals of 3553(a), but the judge must still correctly compute the Guidelines and explain any departures or variances. The resulting sentence is subject to an abuse-of-discretion standard of review at the appellate level.[25]

B. THE TERRORISM ADJUSTMENT AND DEFINING "FEDERAL ACTS OF TERRORISM"

The Sentencing Commission created the terrorism adjustment in the wake of the 1993 bombing of the World Trade Center, one of the most notorious terrorist attacks in American history.[26] As part of a comprehensive bill aimed at reducing nationwide crime, Congress ordered the Sentencing Commission "to amend its sentencing guidelines to provide an appropriate enhancement for any felony, whether committed within or outside the United

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and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment[.]" *Id.*

21. 543 U.S. 220 (2005).

22. *See id.* at 245; *see also* Kimbrough v. United States, 552 U.S. 85, 91 (2007) (upholding below-Guidelines sentence imposed on basis of disagreement with Guidelines' disproportionate treatment of crack versus powder cocaine offenders).

23. 552 U.S. 38 (2007).

24. *See id.* at 47 ("As an initial matter, we note that the District Judge committed no significant procedural error. He correctly calculated the applicable Guidelines range, allowed both parties to present arguments as to what they believed the appropriate sentence should be, considered all of the § 3553(a) factors, and thoroughly documented his reasoning."); *see also Kimbrough*, 552 U.S. at 108–11.

25. *See, e.g.*, United States v. Cavera, 550 F.3d 180, 187 (2d Cir. 2008) ("After *Booker,* appellate courts were to review sentences for 'unreasonableness.' . . . Review for 'unreasonableness' amounts to review for abuse of discretion.").

26. *See* Madeline Johl, Note, *Activism or Domestic Terrorism? How the Terrorism Enhancement Is Used to Punish Acts of Political Protest*, 50 FORDHAM URB. J.L. 465, 471 (2023).

States, that involves or is intended to promote international terrorism[.]"[27]

The Commission responded to the directive by enacting Section 3A1.4, which reads:

> **§ 3A1.4. Terrorism**
> (a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by **12** levels; but if the resulting offense level is less than level **32**, increase to level **32**.
> (b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.[28]

Section 3A1.4 operates by increasing the offense level of an underlying crime if that crime qualifies as a "federal crime of terrorism" under 18 U.S.C. § 2332b(g)(5).[29] Two elements are required for an offense to qualify. First, the crime must be "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct[.]"[30] Second, the crime must be one of roughly 50 designated crimes that range from homicide and the manufacture of weapons of mass destruction to simple property damage like the destruction of communication lines or vehicles involved in interstate commerce.[31]

The adjustment first establishes a high floor for the offense severity by adding 12 levels to the base offense level and setting a minimum level of 32 out of the maximum of 43.[32] The adjustment then requires that the defendant be treated as having a criminal history of Category VI—the highest possible category—even if they in fact have no prior history.[33] Taken together, these requirements

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27. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 120004, 108 Stat. 1796, 2022.

28. U.S. SENT'G GUIDELINES MANUAL § 3A1.4 (U.S. SENT'G COMM'N 2024).

29. *Id.* at § 3A1.4 cmt. n.1; 18 U.S.C. § 2332b(g)(5) (2024).

30. 18 U.S.C. § 2332b(g)(5)(A) (2024).

31. *See* 18 U.S.C. § 2332b(g)(5)(B) (2024).

32. U.S. SENT'G GUIDELINES MANUAL § 3A1.4 (U.S. SENT'G COMM'N 2024). The offense level is intended to value the severity of the crime. For example, first degree murder carries a base offense level of 43, the maximum. *See id.* at § 2A1.1. Whereas, run of the mill trespass carries a base offense level of four. *See id.* at § 2B2.3.

33. *See id.* at § 3A1.4.

recommend a minimum sentence of 210 to 262 months before other adjustments are taken into account.[34]

The severity of the Guidelines' recommendation for sentencing terrorist conduct matches our post-9/11 intuitions. Terrorism remains one of the gravest threats facing the nation. Beyond the immediate mass fatalities, injuries, and property destruction wrought by attacks like the 1993 World Trade Center bombing, the 1995 Oklahoma City bombing, the 1998 embassy bombings, and the worst terrorist attack in American history on September 11, 2001, terrorist attacks create deeply traumatic psychological shockwaves that can permanently alter the psychology of the nation.[35] It is important to recognize that by challenging the current iteration of the terrorism adjustment, this Comment does not aim to downplay the continuing dangers posed by terrorism and the important interests the government has in preventing attacks and punishing terrorists. Equally important, however, is recognizing that there should be a more flexible toolkit for punishing, deterring, and rehabilitating those actors than a single all-powerful hammer.

II. THE INFIRMITIES AND CHALLENGES OF THE EXISTING TERRORISM ENHANCEMENT

A. THE "AVERAGE" TERRORISM CASE AND THE 3553(A) FACTORS

To evaluate the possible shortcomings of the existing terrorism enhancement, it is useful to first examine a mine-run terrorism case to demonstrate the enhancement's expected use. In *United States v. Benkahla*,[36] the defendant lied to the FBI about his attendance at a radical jihadist training camp run by Lashkar-e-Taiba, a specially designated terrorist organization.[37] Benkahla was subsequently convicted of obstruction of justice following an FBI investigation into his associates and several Islamic terrorist organizations.[38] A Sentencing Committee note states that obstruction of justice in connection with a federal crime of

34. *See id.* at ch. 5. pt. A.

35. *See* Hannah Hartig & Carroll Doherty, *Two Decades Later, the Enduring Legacy of 9/11*, PEW RSCH. CTR. (Sept. 2, 2021), https://www.pewresearch.org/politics/2021/09/02/two-decades-later-the-enduring-legacy-of-9-11/ [https://perma.cc/QXX9-B6G3].

36. 530 F.3d 300 (4th Cir. 2008).

37. *See id.* at 303.

38. *See id.*

terrorism qualifies as promoting a federal crime of terrorism, so the district court applied the terrorism enhancement to Benkahla at sentencing.[39] The enhancement skyrocketed the recommended sentencing range from 33 to 41 months to 210 to 262 months.[40]

When reviewing and affirming the district court's application of the enhancement, the Fourth Circuit cited no evidence of Benkahla causing direct physical harm but instead stated the obvious: "All the evidence indicates that Benkahla attended a jihadist training camp abroad, was acquainted with a network of people involved in violent jihad and terrorism, and lied about both facts. Moreover, the sentencing judge, after a meticulous review of the evidence, concluded that '[i]n the same investigation in which Defendant was questioned, eight individuals to whom he was connected went to foreign jihad training camps and one was convicted of soliciting treason to fight against the United States.'"[41]

Viewed through the lens of the most relevant 3553(a) sentencing factors, *Benkahla* demonstrates the terrorism enhancement working as intended. The first factor to consider is "the nature and circumstances of the offense and the history and characteristics of the defendant."[42] The defendant lied about his participation in a jihadist training camp and extensive connections with terrorists, and his "falsehoods not only delayed some parts of the investigation, but wholly frustrated others."[43] The second factor requires the sentence to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," "to afford adequate deterrence to criminal conduct," "to protect the public from further crimes of the defendant," and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."[44]

Terrorism sentences will rarely if ever satisfy the second factor goals of deterrence and rehabilitation. First, as a general matter, empirical evidence supporting the efficacy of using harsh

39. *See id.* at 311.
40. *See id.* at 305–06.
41. *Id.* at 313 (quoting United States v. Benkahla, 501 F. Supp.2d 748, 755 (E.D. Va. 2007)).
42. 18 U.S.C. § 3553(a)(1) (2024).
43. United States v. Benkahla, 530 F.3d 300, 313 (4th Cir. 2008).
44. 18 U.S.C. § 3553(a)(2) (2024).

sentences to deter crime is notoriously weak and muddled.[45] Second, the motivations of terrorists are likely to be less responsive to traditional disincentives and fear of punishment. Very few terrorists, if any, are motivated by traditional economic aspirations, and mass publicity of the crime is often the point.[46] Avoiding capture or punishment is only a secondary objective of many extremists, and in some cases, capture and punishment themselves become desirable to advance publicity goals. Furthermore, as noted by the Second Circuit in *United States v. Ceasar*,[47] no government deradicalization or terrorist disengagement programs exist to justify a longer sentence as providing needed educational or vocational training to promote reentry into society.[48]

Still, strengthening sentences for crimes related to terrorism advances 3553(a)'s goals of reflecting the severity of the offense, promoting respect for the rule of law, providing just punishment for the offense, and protecting the public from future harm. Terrorism-related offenses demand the strongest public signals of denunciation and severity. In 2020, 74% of Americans agreed that tackling terrorism is a top priority for the federal government.[49] There is virtually no public appetite for leniently sentencing terrorists.[50] And to the degree that terrorist actors are uniquely resistant to both deterrence and rehabilitation efforts, the argument for a lengthy incapacitation of defendants connected to terrorism is all the more convincing. Finally, the terrorism enhancement's high sentencing floor promotes uniformity and

45. *See, e.g.*, Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. ECON. LITERATURE 5, 32 (2017) ("To date, the degree to which offenders are deterred by harsher sanctions remains an open question. Undoubtedly deterrence can exist in extreme circumstances in which the punishment is immediate and harsh. However, within the range of typical changes to sanctions in contemporary criminal justice systems, the evidence suggests that the magnitude of deterrence is not large and is likely to be smaller than the magnitude of deterrence induced by changes in the certainty of capture.").

46. *See, e.g.*, Tyler Cowen, *Terrorism as Theater: Analysis and Policy Implications*, 128 PUB. CHOICE 233, 236–37 (2006).

47. 10 F.4th 66 (2d Cir. 2021).

48. *See id.* at 77.

49. *See* Hartig & Doherty, *supra* note 35.

50. Consider, for example, the continued public acceptance for the indefinite detention of prisoners in Guantanamo Bay. *See, e.g.*, Justin McCarthy, *Americans Continue to Oppose Closing Guantanamo Bay*, GALLUP (June 13, 2014), https://news.gallup.com/poll/171653/americans-continue-oppose-closing-guantanamo-bay.aspx [https://perma.cc/5DCX-WZF5] (showing minimal change in public opinion about closing the terrorist detention camp since 2009 as 66% of Americans continue to oppose the idea).

reduces disparity among the defendants it covers, though the penalty may be too lenient for some and too harsh for others.[51]

Therefore, in *Benkahla*, the adjustment properly recommended an increased sentence proportional to the gravity of his conduct. While the district court eventually departed from the Guidelines range and sentenced the defendant to only 121 months,[52] the severity of this sentence was still far greater than the Guidelines would have suggested without the enhancement. The threat of terrorism to human life is immense, as demonstrated by the 9/11 attacks. While the government has succeeded in thwarting most subsequent plots, the threat posed by would-be terrorists remains serious and worthy of greater punishment. And radical Islamic extremism like that at issue in *Benkahla* is far from the only terroristic threat faced by the United States. The terrorism adjustment was fairly applied to other cases involving, for example, the supply of drugs and money to the United Self Defense Force of Colombia[53] and a conspiracy to blow up a bridge in support of the "Occupy" movement of 2011.[54]

B. OVERBREADTH, LACK OF UNIFORMITY, AND A SINGLE DRACONIAN SENTENCING PRESCRIPTION

Though the terrorism enhancement bears well on the heartland of terrorism defendants, it falters when applied in edge cases. The enhancement has three interlocking flaws. First, it is overbroad and captures conduct that should not be labeled "terrorism." The enhancement can apply to virtually any political protest or unrest that turns destructive without regard to the extent of intended harm and social context. Second, this breadth makes the enhancement difficult to apply with uniformity, giving judges and prosecutors too much discretion in determining who gets labeled a terrorist. Third, even when the conduct is properly labeled as

51. *See* 18 U.S.C. § 3553(a)(6) (2024) (factoring in "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" when imposing a sentence).

52. United States v. Benkahla, 501 F. Supp.2d 748, 762 (E.D. Va. 2007).

53. *See* United States v. Puerta, 249 F.App'x 359, 359 (5th Cir. 2007) (affirming application of terrorism sentencing enhancement to a defendant who attempted to trade drugs and money to supply weapons to the United Self Defense Force of Colombia, a designated terror organization).

54. *See* United States v. Wright, 747 F.3d 399, 404 (6th Cir. 2014) (affirming application of the terrorism sentencing enhancement to defendants convicted for a conspiracy to detonate explosives under a bridge in Brecksville, Ohio).

terrorism, the enhancement's extreme penalty can make it a poor fit for fringe and minor offenders. Even when the terrorism enhancement should apply, it can fail to proportionally sentence defendants. This disproportionality makes prosecutors and judges hesitate to apply the enhancement to the most fringe and loosely connected participants, even when they exhibit a clear intention to commit or promote terrorist behavior.

In a student Note titled *Activism or Domestic Terrorism? How the Terrorism Enhancement is Used to Punish Acts of Political Protest*, Madeline Johl highlights two cases showcasing the difficulties district courts face in deciding which acts of ideologically-driven criminality should fall under the terrorism enhancement.[55] First, consider the case of Jessica Reznicek, an environmental activist opposed to the completion of the Dakota Access Pipeline.[56] After months of protests, Reznicek and a confederate lit construction equipment on fire and damaged valves on the pipeline with blowtorches to delay its completion.[57] The pair then owned up to their actions and expressed in a press conference that the property destruction was their idea of a peaceful protest to counter the threat of imminent environmental harms.[58] The district court applied the terrorism enhancement to Reznicek, increasing her recommended Guidelines sentence from 37 to 46 months to 210 to 246 months, before varying from the Guidelines and finally sentencing her to 96 months.[59]

Johl then contrasts the treatment of Reznicek with that of Guy Wesley Reffitt, one of the January 6th rioters.[60] The demographic makeup, intentions, and degree of planning for the participants on January 6th were far from uniform. Some were highly organized extremist militiamen that set out for Washington, D.C. with the explicit goal of overturning the election by force.[61] Others were

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55. *See* Johl, *supra* note 26, at 466–68.

56. *See id.* at 466; *see also* United States v. Reznicek, 2022 WL 1939865 at *1 (8th Cir. June 6, 2022).

57. *See* Johl, *supra* note 26, at 466–67; *Reznicek*, 2022 WL 1939865 at *1.

58. *See* Johl, *supra* note 26, at 466–67.

59. *Reznicek*, 2022 WL 1939865 at *1 ("Over Reznicek's objection, the district court applied a terrorism enhancement under U.S.S.G. § 3A1.4 that increased her Guidelines range from 37–46 months to 210–240 months. It then varied downward and sentenced her to 96 months in prison and [three] years of supervised release.").

60. Johl, *supra* note 26, at 467–68.

61. *See, e.g.*, Lindsay Whitehurst, *Feds: Oath Keepers Sought 'Violent Overthrow' of Government*, ASSOCIATED PRESS (Nov. 18, 2022, 6:04 PM), https://apnews.com/article/capitol-siege-biden-donald-trump-government-and-politics-c7390defc9c99dfd29760a04693948a6 [https://perma.cc/PYN7-BBVR]; Ryan J. Reilly, *Judge*

normal citizens who showed up to show support for President Trump, only to get caught up and swept away in the rabid political fervor.[62] Reffitt looked like the former, showing up to the Capitol with a "handgun, body armor, a helmet, radio, and flex cuffs[.]"[63] But despite Reffitt's intention to help overturn the election by a combination of force, coercion, and intimidation, and his subsequent conviction on firearms, civil disorder, and obstruction charges, the district judge declined to apply the terrorism enhancement.[64] Johl concludes that the inconsistent application of the terrorism enhancement to defendants like Reznicek and Reffitt demonstrates the difficulty of differentiating domestic terrorism from criminal conduct in furtherance of political protest.[65]

The same cases highlight the challenge of applying the enhancement uniformly. While all the cases discussed could properly fit under the terrorism enhancement's wide definitional umbrella, prosecutors can hesitate to request, and judges can hesitate to apply, the enhancement to lesser criminal acts arising from traditional political protests. The divergent prosecutorial and judicial appetites for the terrorism enhancement's breadth create a lack of fairness and uniformity when choosing whether to apply the enhancement to similarly situated defendants across ideological spectrums. For example, this Comment began with the story of two pairs of arsonists with substantially similar conduct and motives—but only one set was threatened with the terrorism enhancement.[66] Similarly, while a few January 6th participants received the terrorism enhancement, others received leniency as

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Locks Up 'Three Percenter' Militia Members in Jan. 6 Obstruction Case, NBC NEWS (Apr. 19, 2024, 5:35 PM), https://www.nbcnews.com/politics/justice-department/judge-locks-three-percenter-militia-members-jan-6-obstruction-case-rcna148456 [https://perma.cc/LS3T-63HH].

62. *See, e.g.*, Robert A. Pape & Keven Ruby, *The Capitol Rioters Aren't Like Other Extremists*, ATLANTIC (Feb. 2, 2021), https://www.theatlantic.com/ideas/archive/2021/02/the-capitol-rioters-arent-like-other-extremists/617895/ (on file with the *Columbia Journal of Law & Social Problems*).

63. Johl, *supra* note 26, at 467.

64. *See id.* at 468; Daniel Barnes & Ryan J. Reilly, *Capitol Rioter Guy Reffitt Gets Longest Jan. 6 Sentence, But No Terrorism Enhancement*, NBC NEWS (Aug. 1, 2022, 4:44 PM), https://www.nbcnews.com/politics/justice-department/capitol-rioter-guy-reffitt-gets-longest-jan-6-sentence-no-terrorism-en-rcna40664 [https://perma.cc/4H2M-AY5P].

65. Johl, *supra* note 26, at 468.

66. *See supra* Introduction.

district court judges declined to apply the enhancement at sentencing.[67]

Even when a terrorist motive is clear, there is still another dimension in which judges struggle to consistently apply the terrorism enhancement. Because of its severe penalty, judges hesitate to apply the enhancement to fringe defendants who should logically fall into its ambit. Little debate exists about whether the terrorist enhancement should apply to defendants who participated in jihadist training camps like *Benkahla*.[68] But what of those on the outer rings of terrorist groups, whose support is minimal, indirect, or generalized?

In *United States v. Alhaggagi*,[69] the Ninth Circuit ruled that the district court abused its discretion in applying the terrorism enhancement to a defendant who set up social media accounts for use by ISIS.[70] The court reasoned: "Generally assisting a terrorist organization with social media does not necessarily demonstrate an intention that the accounts are to be used to retaliate against a government, and there is no evidence that Alhaggagi sought revenge on any particular government or for any specific government conduct."[71] In short, while the defendant was convicted of supplying material support for ISIS and generally showed a great deal of enthusiasm for the terrorist group and its ideals, the district court needed to more specifically find that the defendant specifically intended to assist ISIS in coercing, intimidating, or retaliating against the government.[72] One commentator opined that the Ninth Circuit's decision "ma[de] it easier for terrorist organizations to connect with Americans online

67. *Compare* Press Release, Dep't of Just., Off. of Pub. Affairs, Proud Boys Leaders Sentenced to Prison for Roles in Jan. 6 Capitol Breach (Sept. 1, 2023), https://www.justice.gov/opa/pr/proud-boys-leaders-sentenced-prison-roles-jan-6-capitol-breach [https://perma.cc/P8NX-BBMV], *with* Kyle Cheney & Josh Gerstein, *Judge Rejects 'Terrorism' Sentencing Enhancement for Leader of Jan. 6 Tunnel Confrontation*, POLITICO (Feb. 27, 2023, 2:32 PM), https://www.politico.com/news/2023/02/27/judge-rejects-terrorism-sentencing-jan-6-00084592 [https://perma.cc/RZX3-ADE4].

68. *But see* Sameer Ahmed, *Is History Repeating Itself? Sentencing Young American Muslims in the War on Terror*, 126 YALE L.J. 1520 (2017) (arguing that terrorism sentences are overly punitive and should focus more on rehabilitation, especially in light of the disparate impact such sentences have on Muslim communities).

69. 978 F.3d 693 (9th Cir. 2020).

70. *See id.* at 702.

71. *Id.* at 704.

72. *See id.*

while still being far enough removed from actual terrorist attacks for the terrorism enhancement's application."[73]

The current enhancement may thus be overbroad in two different ways. Cases like Reznicek's and Reffitt's demonstrate the difficulty judges face when determining the line between unruly political protest and terrorism, while cases like *Alhaggagi* demonstrate the difficulty judges face when deciding whether to subject the outermost ring of terrorist actors to the extremely steep sentences recommended by the terrorism enhancement. The underlying obstacle is the singular nature of the Guidelines prescription. Rather than attempting to make fine gradations of offenses and adjustments, the Guidelines treat all terrorist cases as fundamentally the same. The moment a defendant is determined to fall under the increasingly broad umbrella of the enhancement, the Guidelines recommend they be hit with the sentencing equivalent of a sledgehammer—regardless of that defendant's role, background, or intended harm.

While some judges are disgruntled with the current scope of the terrorism enhancement and express policy disagreements with the Guidelines,[74] this Comment makes no claim that district and appellate courts have systematically failed to appropriately tailor sentences to the unique circumstances of defendants in terrorism cases. Mattis and Rahman were sentenced to 12 and 15 months respectively,[75] and Carberry and Smith were sentenced to six months each.[76] These sentences fell well below the Guidelines' recommendations with terrorism enhancements. In *Reznicek*, too, the district judge noted that the final sentence would have been the same if the enhancement were never applied at all.[77] One perspective might be that judges still view defendants and their circumstances fairly, regardless of the application of the terrorism

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73. Eric Barth, Case Comment, United States v. Amer Sinan Alhaggagi, 978 F.3d 693 (9th Cir. 2020), 44 SUFFOLK TRANSNAT'L L. REV. 401, 427 (2021).

74. *See, e.g.*, United States v. Graham, 275 F.3d 490, 524 (6th Cir. 2003) (Cohn, J., dissenting) (objecting to the overbreadth of the terrorism adjustment).

75. *See* Meko & O'Brien, *supra* note 6.

76. *See* Ben Feuerherd, *Judge Sentences Glam Activists for Torching NYPD Van*, NY POST (Feb. 18, 2022, 9:38 PM), https://nypost.com/2022/02/18/duo-who-torched-nypd-van-sentenced-to-six-months-in-prison/ [https://perma.cc/7E5F-Z4H7].

77. United States v. Reznicek, 2022 WL 1939865 at *1 (8th Cir. June 6, 2022) ("The district court expressly stated that its sentence 'would be the same sentence imposed if the Court did not apply the terrorism adjustment.'").

enhancement.[78] The sentences, however, might also suggest that judges are ignoring the enhancement entirely and making decisions independent of the Guidelines' recommendations. In light of the shortcomings of the existing terrorism enhancement, the overarching fairness and uniformity goals embodied in the 3553(a) factors, and the parsimony principle, this Comment sets out to do better.

III. REWORKING THE TERRORISM ADJUSTMENT TO BETTER ADVANCE THE GOALS OF THE SENTENCING GUIDELINES

This Part considers three potential reforms to the terrorism adjustment to address the overbreadth and excessive punishment concerns raised above: (1) eliminating the enhancement; (2) narrowing the enhancement by way of congressional directive; and (3) implementing a tiered enhancement system which adjusts the sentencing recommendation by the type of crime and the degree of intended or actual violence and property damage.

A. ELIMINATING THE TERRORISM ADJUSTMENT

At least one scholar has advocated abandoning the terrorism adjustment altogether.[79] At first blush, this suggestion may seem absurd for two independent reasons. First, as noted by other scholars, the political fear of being perceived as "soft on terrorism" cuts firmly against any congressional directive to eliminate the enhancement.[80] Second, even if the current sentencing enhancement is too broad and draconian, eliminating the enhancement entirely makes the opposite mistake by removing an

78. *But see* George D. Brown, *Punishing Terrorists: Congress, the Sentencing Commission, the Guidelines, and the Courts*, 23 CORNELL J.L. & PUB. POL'Y 517, 544–45 (2014) (arguing that appellate review of below-Guidelines sentencing is more stringent for cases applying the terrorism enhancement).

79. *See* James P. McLoughlin, Jr., *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 MINN. J.L. & INEQUALITY 51, 117 (2010) ("U.S.S.G. section 3A1.4, in its deviation from existing Guidelines policy and failure to account for the specific attributes of each offense and defendant, represents the worst in U.S. sentencing policy, and as such should be abandoned.").

80. *See, e.g.*, Stephen Floyd, Note, *Irredeemably Violent and Undeterrable: How Flawed Assumptions Justify a Broad Application of the Terrorism Enhancement, Contradict Sentencing Policy, and Diminish U.S. National Security*, 109 GEO. L.J. ONLINE 142, 170 (2021) ("Unfortunately, few legislators would support such a controversial position [of eliminating the terrorism adjustment], and so the recommendation is not practical.").

important mechanism for holding terrorists accountable. But it is worth taking this suggestion seriously because it comes with one distinct advantage the current arrangement lacks: it would treat the worst kind of terrorists as exceptional cases requiring exceptional sentences. In contrast, the current enhancement ignores the defendant's actual history or conduct, immediately assumes the worst about the defendants, prescribes the hammer, and relies on judges to make distinctions later.

Eliminating the enhancement flips that assumption. In a world without the enhancement, judges would instead start with the base offense level and the defendant's actual criminal history, then tailor the sentence upwards or downwards under the 3553(a) factors if the offense is connected to terrorism. It is true that judges may let some dangerous terrorists slip through the cracks under this arrangement, but judges can also be too lenient under the current regime because of the advisory nature of the Guidelines. The danger of leniency, moreover, may be overstated as judges appeared to still impose long sentences on terrorists well before the creation of the Guidelines and the terrorism enhancement.[81] While eliminating the terrorism enhancement may be challenging considering the political obstacles, the hypothetical arrangement gives us a clue to what other reforms might provide for defendants and their unique circumstances.

B. NARROWING THE APPLICATION OF THE EXISTING ENHANCEMENT

Another option is to tighten the application of the terrorism adjustment through legislative reform. This approach could work by a congressional directive to the Sentencing Commission calling for the adjustment's revision, or by revising the list of crimes qualifying as a federal act of terrorism under 18 U.S.C. § 2332b(g)(5).[82] Alternatively, reforms might set a higher

81. *See generally* Wadie E. Said, *Sentencing Terrorism Cases*, 75 OHIO ST. L.J. 477, 493–98 (2014) (documenting historical severe sentences for a variety of violent terrorists, such as nationalist extremists, religious car-bombers, and airplane hijackers, all predating the Guidelines, the terrorism enhancement, and *Booker*).

82. For proposals calling for narrowing or clarifying the scope of the terrorism enhancement, see, for example, *id.* at 527–28 (calling for "the courts, Congress, and the Sentencing Commission [to] work together on crafting clearer standards" and definitions of terrorism); Johl, *supra* note 26, at 495 (calling for the removal of most non-violent crimes from the list of qualifying crimes); Floyd, *supra* note 80, at 170–72 (calling for the removal of material support from the list of qualifying crimes).

threshold for qualification under the enhancement based on the actual or intended harm of the defendant's conduct.[83] A narrower terrorism enhancement would likely still include real or intended harm to people or large-scale property damage, but it might exclude the protestors merely meandering around on January 6th and the New York City police van arsonists in the Black Lives Matter protests. And while pushing this reform would raise the same political fears of being labeled "soft on terrorism," tightening the enhancement is more realistic because it is less radical than eliminating it altogether.

Narrowing the scope of the existing enhancement would spare the lowest offenders from the worst of the Guidelines' one-size-fits-all terrorism penalty, but it also risks letting defendants off with a recommended sentence that fails to adequately reflect the severity of their offenses. For example, eliminating one-off destruction of communication lines from the list of federal acts of terrorism may remove simple 5G conspiracy theorists[84] from the enhancement's reach, but it also might exclude more sophisticated and coordinated actors seeking to seriously disrupt the communication network. And even small-scale acts of terrorism, such as small amounts of material support, are distinguishable from ordinary crimes and deserve an enhanced penalty compared to other crimes.

C. REPLACEMENT WITH A TIERED SYSTEM

Rather than eliminating the enhancement entirely or tightening its ambit, a better solution is to make sentencing prescriptions for the terrorism enhancement more granular by implementing a tiered system. For example, one suggestion from Christina Parajon Skinner would reform the terrorism enhancement to sort defendants into two tracks, "hardcore" and "softcore" terrorists, based on their role, intent, and ideology.[85] The enhancement might also be simply divided into a two-tier system

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83. *See, e.g.*, Floyd, *supra* note 80, at 168–70 (calling for the removal of the "intended to promote" qualifier).

84. *See, e.g.*, Frank Langfitt, *5G Conspiracy Theories Trigger Attacks on Cellphone Towers*, NPR (Apr. 19, 2020, 5:06 PM), https://www.npr.org/2020/04/19/838195056/5g-conspiracy-theories-trigger-attacks-on-cellphone-towers [https://perma.cc/D22G-2QYX]. Note that under the 18 U.S.C. § 3553(a) (2024) sentencing factors, this kind of defendant may be more responsive to medical care and rehabilitative correctional treatment than, for example, defendants motivated by racial supremacist ideology or religious zealotry.

85. *See* Christina Parajon Skinner, Note, *Punishing Crimes of Terror in Article III Courts*, 31 YALE L. & POL'Y REV. 309, 364–66 (2013).

with different sentencing prescriptions according to the scope of intended or actual harm. The higher tier could be reserved for terrorism with the intention to kill or kidnap another human being, or to cause $5 million or more of property damage. This tier would cover the most severe crimes and subject offenders to long sentences in line with the gravity of terrorist conduct and the public need for incapacitation. The lower tier could be reserved for the low-grade spontaneous violence and vandalism common to unruly protests.

These two-tiered suggestions are only one possible form a reworked enhancement could take. The enhancement could include three, four, or five different levels according to empirical data and policy preferences. The tiers might be different levels of the same terrorism enhancement, or they could be split into nominally different categories like "Terrorism" and "Rioting." Such reforms could also be combined with a tightening or clarification of the enhancement's initial scope. Fringe material supporters like Alhaggagi could be sentenced according to the kind and amount of their support, by the activities they promoted, or removed from the ambit of the enhancement altogether. This Comment previously detailed the resistance of the worst kinds of terrorists to serious deterrence and rehabilitation efforts,[86] but for more sporadic rioters and fringe material supporters, these efforts may be more effective. Keeping a severe enhancement for the worst offenders reduces the threat that legislative reformers would be labeled "soft on terrorism," and the dueling applications of the adjustment to both right and left wing protestors might inspire greater bipartisan support.[87] While a tiered system would reduce the sentencing recommendations for lesser offenders, legislators might still bolster their reputations as tough on terrorism by suggesting greater penalties at the higher end. For example, they might direct the Guidelines to automatically recommend life imprisonment for the highest tier, or to impose mandatory minimums for the worst crimes.

The greatest strength of a tiered arrangement is its ability to tailor sentences to defendants' actual conduct and personal backgrounds. While the Guidelines are non-binding and do not purport to be perfect, they are intended to promote uniformity and

86. *See supra* Part II.A.

87. *See* Johl, *supra* note 26, at 502 (arguing the existence of bipartisan incentives to narrow the enhancement and reduce its penalties).

fairness when sentencing defendants. Compared to the status quo, which proposes one steep penalty to every defendant caught in its vast web, a tiered reform is likely the best solution. Such a system promotes uniformity between similarly situated defendants and fairness to the individuals by adjusting their sentences according to the severity of their actual criminal conduct, rather than by single-mindedly lumping the Rezniceks and Mattises in with the Benkahlas. Simultaneously, a tiered system will still enable Congress and the Sentencing Commission to crack down on and incapacitate the worst terrorist conduct and offenders.

CONCLUSION

Even defenders of the terrorism enhancement concede that its current form is a "judicial perfect storm" characterized by overbreadth and a single harsh draconian penalty.[88] By examining the application of the enhancement to a traditional terrorism case, *Benkahla*, this Comment illustrated the ways in which the enhancement works as intended. It assigns a severe penalty reflective of the special dangers posed by serious terrorist threats and the resistance of the worst offenders to deterrence and rehabilitation. On the other hand, cases on the definitional edge like the New York City arsonists, January 6 rioters, *Reznicek*, and *Alhaggagi*, demonstrate the overbreadth of the enhancement and the inadequacy of a one-size-fits-all sentencing prescription. Terrorist threats present a continuing danger, and any reform of the terrorism enhancement must reflect the severity of those threats. But by splitting the terrorism enhancement into a tiered system that tailors sentencing recommendations to defendants' actual conduct, the Guidelines can reduce the effects of the enhancement's overbreadth, avoid prescribing the same sentence to violent extremists and pedestrian political rioters alike, and yet still impose severe penalties on those that pose the greatest threat to public safety.

88. *See* Brown, *supra* note 78, at 518–21.