

ARTICLE

Off-Ramp Opportunities in Material Support Cases

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Abstract

Strategies to counter violent extremism in the United States have centered around preventing violent extremism before it takes hold, with an emphasis on community partnerships and counter-messaging. The need for intervention, rehabilitation, and reintegration once individuals have already headed down extremist pathways—and intersected with the criminal justice system—receives less consideration, but policymakers and practitioners are increasingly taking note of this void. Factors favoring the development of innovative off-ramp approaches include: the public safety imperative of preventing future violence and recidivism; the increased volume of investigations, rendering prosecution or long-term surveillance in every case impossible or impractical; mitigating circumstances such as the non-violent nature of some material support crimes and the youth of many offenders; and the long-term value of building trust for community partnerships. Participation in intervention initiatives need not preclude prosecution, and rehabilitation programming may occur inside and outside of the prison setting. Program development should be evidence-based, relying upon a comprehensive international analysis, while tailored to incorporate U.S. constitutional requirements and cultural norms including protection of civil rights and civil liberties. This article explores the basis and opportunities for preventing future violence when charging and sentencing defendants who are either suspected or convicted of providing material support for terrorism.

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Introduction

Policymakers in the judicial and legislative arenas should consider aligning domestic criminal justice strategies with innovative approaches to preventing terrorism that are emerging outside the criminal context. The strategy of countering violent extremism (CVE) comprises a developing set of initiatives to identify and mitigate the factors that lead individuals to embrace and act upon violent ideologies, a process sometimes referred to as radicalization.¹ Efforts in the United States center on preventing violent extremism before it takes hold, with an emphasis on community partnerships and counter-messaging.² The need for intervention, rehabilitation, and reintegration once individuals have already headed down extremist pathways receives less consideration. Because of this programming gap, “individuals who have begun to radicalize are not turned around and those who have acted violently are not rehabilitated.”³ The “next frontier of America’s CVE efforts” may include both targeted interventions for those who have begun to radicalize⁴ and rehabilitation programs for those farther along the path.

¹ Radicalization is a contentious concept, yet remains widely relied upon to describe the process of adopting an extremist ideology and supporting or engaging in violence consistent with that ideology. *See, e.g.*, Peter R. Neumann, *Prisons and Terrorism*, INT’L CTR. FOR THE STUDY OF RADICALISATION & POL. VIOLENCE 12 (2010), <http://icsr.info/wp-content/uploads/2012/10/1277699166PrisonsandTerrorismRadicalisationandDeradicalisationin15Countries.pdf>; Peter Romaniuk, *Does CVE Work?* GLOBAL CTR. ON COOPERATIVE SEC. 7–8 (Sept. 2015), http://www.globalcenter.org/wp-content/uploads/2015/09/Does-CVE-Work_2015.pdf. This Article is rooted in the basic notion of radicalization as a phenomenon warranting study, but one that does not occur through a standardized or generic process. Neither a conveyor-belt theory of radicalization nor a one-size-fits-all model underlies the arguments herein. *See* Faiza Patel, *Rethinking Radicalization*, BRENNAN CTR. FOR JUSTICE (2011), http://brennan.3cdn.net/f737600b433d98d25e_6pm6beukt.pdf; Sophia Moskalenko & Clark McCauley, *Measuring Political Mobilization*, TERRORISM AND POL. VIOLENCE 239–260 (April 2009); *but see*, Mitchell D. Silber & Arvin Bhatt, *Radicalization in the West*, N.Y. CITY POLICE DEP’T (2007). Assessments of whether radicalization is fundamentally a cognitive or a behavioral process, or both, are beyond the scope of this discussion. *See* Peter R. Neumann, *The Trouble with Radicalisation*, 89 INT’L AFF. 873 (July 2013).

² *See* Humera Khan, *Why Countering Extremism Fails*, FOREIGN AFF. (Feb. 18, 2015), <https://www.foreignaffairs.com/articles/united-states/2015-02-18/why-countering-extremism-fails>; Sarah Sewell, Remarks on Countering Violent Extremism at the Josef Korbel School of International Studies (February 29, 2016), <http://www.state.gov/j/remarks/253870.htm>; *see also* Christina Nemr, *Strategies to Counter Terrorist Narratives are More Confused Than Ever*, WAR ON THE ROCKS (March 15, 2016), <http://warontherocks.com/2016/03/strategies-to-counter-terrorist-narratives-are-more-confused-than-ever> (“Countering terrorist narratives is the new black.”).

³ Khan, *supra* note 2. Humera Khan is the Executive Director of Muflehun, a think tank specializing in countering violent extremism. In 2012, she received the FBI Director’s Community Leadership Award for her work. *See id.*

⁴ Lorenzo Vidino & Seamus Hughes, *Countering Violent Extremism in America*, GEO. WASH. U. CTR. FOR CYBER & HOMELAND SECURITY 1 (2015), <https://cchs.gwu.edu/sites/cchs.gwu.edu/files/downloads/CVE%20in%20America%20.pdf>.

The criminal justice system provides opportunities to begin filling this void. Currently, no coherent framework exists to facilitate intervention and rehabilitation at significant stages of the legal process, such as in prosecutorial charging decisions, plea agreements, and at sentencing. However, a growing body of prosecutions under the federal statutes prohibiting material support for terrorism points to critical opportunities for preventing future violence. Strategies in material support cases to avert future violence may include (1) the incorporation of intervention programs in appropriate instances, as alternative or parallel paths to prosecution, and (2) the implementation of post-conviction rehabilitation programs, to run independently from, concurrently with, or after imprisonment, depending upon the nature and severity of the crime. In some instances, such as when hardened extremists commit egregious, violent crimes, aggressive prosecutions and lengthy prison sentences are clearly warranted. Yet in cases involving material support grounded in non-violent conduct, where mitigating circumstances are present, opportunities to prevent future violence through intervention and rehabilitation should not be overlooked.

The following framework for countering violent extremism builds upon previous formulations but posits a holistic model that conceptualizes each pillar or category of initiatives in relation to criminal justice timelines⁵:

1. **Prevention** of radicalization before it occurs. Priority is placed on identifying vulnerabilities and addressing them proactively through community engagement and partnerships. Countering violent extremist messaging is a crucial focus, with emphases on negating extremist propaganda on the one hand and promoting competing democratic ideals on the other. Although law enforcement has partnered in programs, the most promising prospects for prevention arise outside the criminal context, such as when communities and non-governmental organizations promote narratives of tolerance, spotlight positive role models, and facilitate opportunities for civic engagement.⁶
2. **Intervention** after an individual has embarked on a path toward extremism, but prior to conviction for a terrorist crime or hate crime. Scholars and practitioners generally use intervention terminology to describe targeted approaches for individuals who demonstrate support for violent ideologies, but who have not acted violently.⁷ Communities

⁵ See, e.g., Khan, *supra* note 2; Vidino, *supra* note 4, at 12–13; see also Lindsay Clutterbuck, *Deradicalization Programs and Counterterrorism*, MIDDLE EAST INST. (June 10, 2015), <http://www.mei.edu/content/deradicalization-programs-and-counterterrorism-perspective-challenges-and-benefits> (“The lack of clarity and consistency that characterize how we define radicalization, violent extremism, and terrorism also extends to the measures taken to counter them.”).

⁶ See Karen J. Greenberg, *Washington Has a New Plan to Tackle Domestic Terrorism and It Probably Won't Work*, THE NATION (Aug. 3, 2015), <http://www.thenation.com/article/washington-has-a-new-plan-to-tackle-domestic-terrorism-and-it-probably-wont-work/>.

⁷ See, e.g., Vidino & Hughes, *supra* note 4, at 8–10; Simon Cottee, *The Pre-Terrorists Among Us*, THE ATLANTIC (Oct. 27, 2015),

and law enforcement each play a role. When an individual is suspected of conduct amounting to a crime, especially a non-violent or inchoate offense, and when other mitigating factors are present, law enforcement may determine whether to enlist intervention strategies instead of, or in addition to, prosecution.⁸

- Intervention may include strategies for *disengagement* (cessation of violent actions and affiliations) and *deradicalization* (renunciation of belief in violent ideology).⁹ Some European and Muslim-majority nations have a longer history with disengagement and deradicalization approaches, while a new interest is emerging in the United States.¹⁰
3. *Rehabilitation* following conviction for terrorism or another violent extremist crime. Rehabilitation strives to enhance public safety by preventing recidivism.¹¹ Like intervention, rehabilitation encompasses *disengagement* and *deradicalization* objectives.¹² It may occur inside or

<http://www.theatlantic.com/international/archive/2015/10/counterterrorism-prevention-britain-isis/412603/>.

⁸ See Caitlin Mastroe & Susan Szmania, *Surveying CVE Metrics in Prevention, Disengagement and De-Radicalization Programs*, Report to the Office of Univ. Programs, Science & Tech. Directorate, Dep't of Homeland Sec., START 10 (Mar. 2016), https://www.start.umd.edu/pubs/START_SurveyingCVEMetrics_March2016.pdf (noting that programs that take place before an individual is charged with a crime or placed in jail are often referred to as interventions).

⁹ See, e.g., Neumann, *supra* note 1, at 12 (“[W]hile de-radicalisation aims for substantive changes in individuals’ (or groups’) ideology and attitudes, disengagement concentrates on facilitating behavioural change, that is, the rejection of violent means.”); Naureen Chowdhury Fink & Ellie B. Hearne, *Beyond Terrorism*, INT’L PEACE INST. 3 (Oct. 2008), <https://www.ipinst.org/wp-content/uploads/publications/beter.pdf>.

¹⁰ Matt Apuzzo, *Only Hard Choices for Parents Whose Children Flirt With Terror*, N. Y. TIMES (Apr. 9, 2016), <http://www.nytimes.com/2016/04/10/us/parents-face-limited-options-to-keep-children-from-terrorism.html>; Priyanka Boghani, “*Deradicalization*” is Coming to America, PBS FRONTLINE (Mar. 18, 2016), <http://www.pbs.org/wgbh/frontline/article/deradicalization-is-coming-to-america-does-it-work/>.

¹¹ For example, in a more general criminal justice context, the German prison system emphasizes rehabilitation over retribution, and has a recidivism rate of about half that of the U.S. *Crime and Punishment*, CBS NEWS, 60 MINUTES (April 3, 2016), <http://www.cbsnews.com/news/60-minutes-germany-prisons-crime-and-punishment/>. See also Summarized Remarks of Matthew Levitt, *Rehabilitation and Reintegration of Returning Foreign Terrorist Fighters*, WASH. INST. (Feb. 23, 2015), <http://www.washingtoninstitute.org/policy-analysis/view/rehabilitation-and-reintegration-of-returning-foreign-terrorist-fighters> (noting that because the vast majority of those convicted of terrorist crimes will eventually be released, it is “neither ‘soft’ nor ‘weak’ to be talking about how to rehabilitate them, especially in the prison context but elsewhere as well”).

¹² See Mastroe & Szmania, *supra* note 8; Humera Khan, Testimony to the House Committee on Foreign Affairs *Women’s Education: Promoting Development and Countering Radicalism*, Hearing 4 (Apr. 3, 2014), <http://docs.house.gov/meetings/FA/FA00/20140403/102065/HHRG-113-FA00-Wstate-KhanH-20140403.pdf>.

outside the prison context, and terms of participation may be determined at sentencing.¹³

4. **Reintegration** after incarceration and release, to assist individuals in transitioning successfully into positive roles in society. The goal of reintegration is to make rehabilitation more sustainable by facilitating individuals' assumption of productive roles in their communities.¹⁴

The first pillar, prevention, has received the most substantial attention in the United States.¹⁵ This paper focuses on intervention and rehabilitation.¹⁶

The development of initiatives for individuals suspected or convicted of material support crimes would make U.S. efforts to prevent future violence more systemic and would indicate recognition of the continuing value of countering extremism even after it has taken hold.¹⁷ Participants' self-selection through demonstrated support for violent crime should allay some civil liberties concerns otherwise associated with CVE: participation would be triggered by conduct sufficient to support criminal prosecution, rather than by religious or other constitutionally protected activities or beliefs.¹⁸ Finally, the judicial system

¹³ See, e.g., Laura Yuen, *Two Men Convicted on ISIS-Related Charges Ask for Rehabilitation*, MPR NEWS, (Jun. 30, 2016), <https://www.mprnews.org/story/2016/06/30/two-men-convicted-isis-related-charges-seek-rehabilitation-deradicalization>; Debra Cassens Weiss, *Terrorism Defendants Ordered by Judge to Face Evaluation for Deradicalization Program*, A.B.A. J. (Mar. 4, 2016), http://www.abajournal.com/news/article/judge_orders_terrorism_defendants_to_face_evaluation_f_or_deradicalization_p; see also 18 U.S.C. § 3553(a) (factors to be considered in imposing sentence include protecting the public from further crimes of defendant and providing defendant with needed educational or vocational training, medical care, or other correctional treatment).

¹⁴ See Nicole Hong, *Terror Convicts Pose Dilemma After Release from Prison*, WALL ST. J. (Feb. 15, 2016), <http://www.wsj.com/articles/terror-convicts-pose-dilemma-after-release-from-prison-1455560250> (Justice Department exploring the possibility of creating specialized reintegration programs for those convicted of terrorism-related charges).

¹⁵ See Khan, *supra* note 2; see also Dana Hadra, *A How-To on Countering Violent Extremism*, BROOKINGS (Mar. 21, 2016), <https://www.brookings.edu/blog/markaz/2016/03/21/a-how-to-on-countering-violent-extremism/>. (Lorenzo Vidino noted that, unlike Europe, the U.S. lacks programs that deal with extremists or potential extremists one-on-one.)

¹⁶ Some frameworks also characterize interdiction as a pillar of CVE. See Khan, *supra* note 2; L.A. INTERAGENCY COORDINATION GROUP IN COLLABORATION WITH COMMUNITY STAKEHOLDERS, *Los Angeles Framework for Countering Violent Extremism*, 8–9 (Feb. 2015), <https://www.dhs.gov/sites/default/files/publications/Los%20Angeles%20Framework%20for%20CVE-Full%20Report.pdf>. While interdiction is the purview of traditional law enforcement, it may occur simultaneously with intervention and rehabilitation. See, e.g., Order, United States v. Yusuf, (Mar. 2, 2016) (Crim. No. 15-46); Order, United States v. Abdurahman, (Mar. 2, 2016) (Crim. No. 15-49 (05)); Order, United States v. Warsame, (Mar. 3, 2016) (Crim. No. 16-37 (01)); Order, United States v. Musse, (Crim. No. 15-49 (06)) (ordering defendants who pleaded guilty to material support offenses to submit to presentence deradicalization evaluations). Section III(B) of this Article describes in detail the intersection of traditional law enforcement with intervention and rehabilitation strategies.

¹⁷ See, e.g., Summarized Remarks of Matthew Levitt, *supra* note 11.

¹⁸ See, e.g., ACLU, Oral Statement at 31st Session of the UN Human Rights Council, *Interactive Dialogue with the Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism* (Mar. 10, 2016), <https://www.aclu.org/other/interactive-dialogue-special->

provides an arena in which CVE goals may be implemented narrowly and concretely—attributes that sometimes prove elusive in broad, community-based initiatives.

This Article explores the basis and opportunities for applying CVE principles when charging and sentencing defendants who are suspected or convicted of providing material support for terrorism. Part I traces the background and status of CVE initiatives in the United States and outlines associated civil liberties concerns. Part II discusses the background and range of U.S. prosecutions sounding in material support for terrorism, spotlighting the wide spectrum of conduct prosecuted under the same statutory prohibitions and with the same available penalties. Part III draws upon the material support context to illustrate how prospective developments in the criminal justice system could facilitate off-ramp opportunities from violent extremism. Specifically, Part III(A) outlines existing and previous models—including international programs for disengagement and deradicalization, and domestic programs to prevent gang violence—in order to roughly survey the evidence base for rigorous new approaches in the United States. Part III(B) identifies domestic opportunities for disengagement and deradicalization initiatives, evaluating how the availability of intervention programs could positively impact the charging context, while rehabilitation programs at the sentencing, incarceration, and post-release phases could promote public safety concurrently with benefits to communities and families. In conclusion, the Article argues that the criminal justice system provides vital opportunities to prevent future acts of violence by individuals who already have demonstrated support for violent extremist ideologies and groups. Practitioners, legislators, and other policymakers should jointly study these opportunities to determine how they can be realized in a rigorous and consistent manner that best protects civil liberties, engenders community support, and maximizes overall effectiveness.

I. Background and Status of CVE Initiatives

A. *International Efforts and Foundational Concepts*

As U.S. policymakers strive to prevent extremist violence through increasingly proactive strategies, they are grappling with tensions that European and other nations have confronted for years.¹⁹ Internationally, government programs to diminish violent extremism by addressing its root causes span back

rapporteur-promotion-and-protection-human-rights-while-countering (“[G]overnment monitoring of beliefs that challenge societal orthodoxies poses significant risk to the freedoms of thought, association, and expression.”). However, this argument has less force in the context of sting operations, in which law enforcement will have selected the target prior to his or her commission of some or all of the potentially illegal conduct.

¹⁹ See Vidino & Hughes, *supra* note 4, at 1 (“The United States has lagged behind many European countries in creating a comprehensive CVE approach, largely because its homegrown violent extremist threat is relatively low.”).

over a decade.²⁰ For example, in its 2004 Plan of Action on Combating Terrorism²¹ and 2005 Counter-Terrorism Strategy,²² the European Union committed to preventing terrorism in part by tackling the underlying factors leading to radicalization and recruitment. The UN Global Counter-Terrorism Strategy of 2006 similarly incorporated “soft power” principles by outlining measures to address the conditions conducive to the spread of terrorism.²³ European initiatives provide a crucial backdrop for consideration of CVE initiatives in the United States, inviting consideration by American policymakers of tailored versus broad approaches; the respective roles of law enforcement, public agencies and officials, and community organizations; and the tensions arising from the interplay of risk and vulnerability assessments with freedom of speech and expression.²⁴

Lorenzo Vidino and James Brandon, in a policy report published by the International Centre for the Study of Radicalisation and Political Violence, observed in 2012 that although most European countries employed some form of counter-radicalization, the only four countries with “a comprehensive, nationwide counter-radicalization strategy enshrined in an official, publicly available document,” were the United Kingdom, the Netherlands, Denmark, and Norway.²⁵ Those nations were “the most advanced in the field, their initiatives predating and being more extensive than those of other European countries.”²⁶ In contrast, Belgium was described, in the wake of the March 2016 terror attacks in Brussels, as lagging behind and “still in the discussion phase” of CVE,²⁷ but it is working to

²⁰ See Romaniuk, *supra* note 1, at 1–2.

²¹ *EU Plan of Action on Combating Terrorism*, COUNCIL OF THE EUR. UNION 69 (Jun. 15, 2004), <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2010586%202004%20INIT>.

²² *The European Union Counter-Terrorism Strategy*, COUNCIL OF THE EUR. UNION 3 (Nov. 30, 2005),

<http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2014469%202005%20REV%204>;

Romaniuk, *supra* note 1.

²³ See G.A. Res. 60/288, at 4 (Sept. 20, 2006), <http://www.ipu.org/splz-e/unga07/counter.pdf>;

Romaniuk, *supra* note 1, at 1–2.

²⁴ See Vidino & Hughes, *supra* note 4, at 1 (“CVE trends in various European countries, where authorities have implemented ambitious strategies for over a decade, offer useful pointers to U.S. officials.”); see also WHITE HOUSE, STRATEGIC IMPLEMENTATION PLAN FOR EMPOWERING LOCAL PARTNERS TO PREVENT VIOLENT EXTREMISM IN THE UNITED STATES, 13 (Dec. 2011), <https://www.whitehouse.gov/sites/default/files/sip-final.pdf> (In early efforts toward building expertise, the “United States Government held regular exchanges of best practices with Australia, Canada, Denmark, Germany, the European Union, the Netherlands, the United Kingdom, and other partners to gain comparative insights about what might be effective in the Homeland.”). Part III(A) provides a review of global models that specifically target disengagement and deradicalization objectives, in contrast to the more general, instant overview of CVE programs provided in this Part.

²⁵ Lorenzo Vidino & James Brandon, *Countering Radicalization in Europe*, INT’L CTR. FOR THE STUDY OF RADICALISATION AND POL. VIOLENCE 8 (2012), <http://icsr.info/wp-content/uploads/2012/12/ICSR-Report-Countering-Radicalization-in-Europe.pdf>.

²⁶ *Id.*

²⁷ Julia Ioffe, *Could a Toll-Free Number Have Saved Brussels?*, FOREIGN POL’Y (Mar. 24, 2016), <http://foreignpolicy.com/2016/03/24/could-a-toll-free-number-have-saved-brussels/> (quoting Daniel Koehler).

develop a more effective program.²⁸ Numerous other initiatives have sprung up around the globe, and continue in various stages of development.²⁹

The United Kingdom's program to counter violent extremism has come under fire for alienating British Muslims through flawed implementation, and its initial approach provides cautionary lessons for other nations' programs.³⁰ Following the London bombings in 2005, the United Kingdom implemented Prevent, the counter-radicalization strand of its CONTEST counterterrorism strategy, which had been implemented in 2003.³¹ With the goal of stopping people from becoming terrorists or supporting terrorism,³² the laws of the United Kingdom impose a "Prevent duty" upon specified public-facing bodies, including local authorities and governments, criminal justice officials, educators, those responsible for health and social care, and police officials.³³ This duty includes risk assessments; schools and childcare providers, for example, must "assess the risk of children being drawn into terrorism, including support for extremist ideas that are part of terrorist ideology."³⁴ Frequent criticism holds that the program

²⁸ See Matthew Levitt, *The Islamic State, Extremism, and the Spread of Transnational Terrorism* 10 (Apr. 12, 2016) http://www.foreign.senate.gov/imo/media/doc/041216_Levitt_Testimony.pdf (Testimony submitted to the United State Senate Committee on Foreign Relations); Matthew Levitt, *My Journey to Brussels' Terrorist Safe Haven*, POLITICO (Mar. 27, 2016), <http://www.politico.com/magazine/story/2016/03/brussels-attacks-terrorist-safe-haven-213768>.

²⁹ See, e.g., U.S. DEP'T OF STATE, BUILDING A GLOBAL MOVEMENT TO ADDRESS VIOLENT EXTREMISM, Fact Sheet (Sept. 29, 2015), <http://www.state.gov/r/pa/prs/ps/2015/09/247449.htm>; WHITE HOUSE, LEADERS' SUMMIT TO COUNTER ISIL AND VIOLENT EXTREMISM, Fact Sheet (Sept. 29, 2015), <https://www.whitehouse.gov/the-press-office/2015/09/29/fact-sheet-leaders-summit-counter-isil-and-violent-extremism>.

³⁰ See, e.g., Damien Gayle, *Prevent Strategy "Could End Up Promoting Extremism,"* THE GUARDIAN (Apr. 21, 2016), <http://www.theguardian.com/politics/2016/apr/21/government-prevent-strategy-promoting-extremism-maina-kiai>; David Batty, *Prevent Strategy "Sowing Mistrust and Fear in Muslim Communities,"* THE GUARDIAN (Feb. 3, 2016), <https://www.theguardian.com/uk-news/2016/feb/03/prevent-strategy-sowing-mistrust-fear-muslim-communities>; William McCants & Clint Watts, *U.S. Strategy for Countering Violent Extremism: An Assessment*, FOREIGN POL'Y RES. INST. (Dec. 2012), <http://www.fpri.org/article/2012/12/u-s-strategy-for-countering-violent-extremism-an-assessment/>.

³¹ HM GOV'T, COUNTERING INTERNATIONAL TERRORISM: THE UNITED KINGDOM'S STRATEGY (July 2006), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272320/6888.pdf; see also, HM GOV'T, CHANNEL DUTY GUIDANCE 3 (2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/425189/Channel_Duty_Guidance_April_2015.pdf.

³² HM GOV'T, *Prevent Strategy*, 6, 23–25 (2011), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97976/prevent-strategy-review.pdf.

³³ See Counter-Terrorism and Security Act 2015, sec. 26 (Gr. Brit.), <http://www.legislation.gov.uk/ukpga/2015/6/schedule/6/enacted>.

³⁴ See HM GOV'T, THE PREVENT DUTY, DEPARTMENTAL ADVICE FOR SCHOOLS AND CHILDCARE PROVIDERS 5 (June 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/439598/prevent-duty-departmental-advice-v6.pdf; see also HM GOV'T, PREVENT DUTY GUIDANCE IN ENGLAND AND WALES 2 (July 16, 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445977/3799_Revised_Prevent_Duty_Guidance__England_Wales_V2-Interactive.pdf.

stigmatizes Muslims, shuts down open debate in schools, and provides insufficient guidance for educators and agencies who must implement the statutory requirements.³⁵ Additionally, some scholars argue that the framework Prevent uses to assess radicalization risks has not been subjected to proper scientific scrutiny and public critique.³⁶ The U.K.'s Independent Reviewer of Terrorism Legislation has suggested a government review of Prevent, which might lead to "a future strategy in which all can have confidence."³⁷

In the United States, public focus similarly is sharpening on CVE as one component of a more comprehensive approach to preventing terrorism, and a corresponding new terminology is emerging.³⁸ The shift toward CVE stems from widening recognition that military campaigns to defeat violent extremists, while necessary at times, often provide incomplete and unsustainable solutions.³⁹ Law enforcement's role in finding and prosecuting those who commit terrorist crimes

³⁵ See *Eroding Trust*, OPEN SOCIETY JUSTICE INITIATIVE 15 (2016), https://www.opensocietyfoundations.org/sites/default/files/eroding-trust-20161017_0.pdf, (concluding Prevent is flawed in design and application, rendering it both unjust and counterproductive); *Schoolgirl's 'Syria Death' Prompts Call for Prevent Review*, BBC NEWS (Aug. 13, 2016), <http://www.bbc.com/news/uk-37061189>; Sima Kotecha, *More Than 400 Children Under 10 Referred for 'Deradicalisation'*, BBC NEWS (Jan. 21, 2016), <http://www.bbc.com/news/uk-35360375>; Arun Kundnani, *A Decade Lost: Rethinking Radicalisation and Extremism* (2015), <http://www.claystone.org.uk/wp-content/uploads/2015/01/Claystone-rethinking-radicalisation.pdf>; but see Sara Khan, *Not All U.K. Muslims Are Against the Prevent Counter-terrorism Strategy*, NEWSWEEK (Oct. 18, 2016), http://www.newsweek.com/prevent-extremism-uk-counter-terrorism-muslims-510807?rx=us&utm_content=buffer1aac1&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer

³⁶ See *Anti-Radicalisation Strategy Lacks Evidence Base in Science*, THE GUARDIAN (Sept. 28, 2016) (Open Letter), <https://www.theguardian.com/politics/2016/sep/29/anti-radicalisation-strategy-lacks-evidence-base-in-science>; see also ARUN KUNDNANI, *A DECADE LOST: RETHINKING RADICALISATION AND EXTREMISM* 39 (2015), <http://www.claystone.org.uk/wp-content/uploads/2015/01/Claystone-rethinking-radicalisation.pdf> (advocating an end to the Prevent policy "in light of a more authoritative understanding of radicalisation" and clarification that information about the risks of radicalisation "should be shared with authorities only once it crosses the line to incitement to violence, financing of terrorism or an intention to commit acts of violence.").

³⁷ *Supplementary Written Evidence Submitted to Home Affairs Comm.*, (Jan. 29, 2016), <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/countering-extremism/written/27920.pdf> (evidence submitted by David Anderson, Q.C., Ind. Reviewer of Terrorism Leg.).

³⁸ See, e.g., Peter Beinart, *What Does Obama Really Mean by "Violent Extremism"?*, THE ATLANTIC (Feb. 20, 2015), <http://www.theatlantic.com/international/archive/2015/02/obama-violent-extremism-radical-islam/385700/>.

³⁹ See, e.g., JESSICA STERN, HOOVER INST., *DERADICALIZATION OR DISENGAGEMENT OF TERRORISTS* (2010), http://www.hoover.org/sites/default/files/research/docs/futurechallenges_stern.pdf (citing Gary LaFree & Laura Dugan, *Research on Terrorism and Countering Terrorism*, 38 CRIME & JUST. 413 (2009)); J. Scott Carpenter, Matthew Levitt, & Michael Jacobson, *Confronting the Ideology of Radical Extremism*, 3 J. OF NAT'L SEC. L. & POL. 301 (2010), http://jnsplp.com/wp-content/uploads/2010/08/05_CARPENTER-ET-AL.pdf.

likewise is necessary but not sufficient to address contemporary threats.⁴⁰ CVE therefore supplements traditional approaches with long-term measures to stop violent extremism's spread.⁴¹

Another basic tenet underlying current approaches to preventing extremist violence is that no single, standard path leads individuals to embrace and support violent ideologies.⁴² Rather, unique combinations of “push” and “pull” factors serve as motivators.⁴³ Drivers of violent extremism display some common themes, but vary across geographic regions, communities, and individuals.⁴⁴ Push factors include structural grievances such as marginalization, alienation, and social disaffection—and globally, they may include prolonged conflict, disenfranchisement, underdevelopment, weak governance, and human rights violations.⁴⁵ Pull factors include features positively attracting adherents to an ideology, such as group bonds, social connections, excitement, cultural appeal, perceived glory, a sense of belonging, and a sense of purpose.⁴⁶ Individual characteristics and circumstances, including family and social dynamics, also play a role.⁴⁷ In the case of the so-called Islamic State (referred to herein as ISIS), European officials have noted a trend of “Islamized radicals” rather than “radical Islamists,” meaning that recruits drawn from society's outer margins seek an “opportunity to justify their violence and criminality” through the adoption of a

⁴⁰ See, e.g., Brian Michael Jenkins, *Would-Be Warriors*, RAND CORP. 10 (2010), http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP292.pdf (“Traditional law enforcement, in which authorities attempt to identify and apprehend a perpetrator *after* a crime has been committed, is inadequate to deal with terrorists who are determined to cause many deaths and great destruction and who may not care whether they themselves survive.”).

⁴¹ See, e.g., Mastroe & Szmania, *supra* note 8, at 2; See Naureen Chowdhury Fink, *Something Old, Something New*, INSIGHTS, U.S. INST. OF PEACE (Spring 2014) at 5, <http://www.usip.org/sites/default/files/Insights-Spring-2014.pdf>; Hadra, *supra* note 15.

⁴² See e.g., Jenkins, *supra* note 40, at 7; STERN, *supra* note 39, at 4; see also LORENZO VIDINO & SEAMUS HUGHES, GEO. WASH. U., ISIS IN AMERICA 5 (2015), <https://cchs.gwu.edu/sites/cchs.gwu.edu/files/downloads/ISIS%20in%20America%20-%20Full%20Report.pdf> (“Defying any cookie-cutter profile of the American ISIS supporter, these . . . individuals constitute an incredibly heterogeneous group.”).

⁴³ See, e.g., USAID, THE DEVELOPMENT RESPONSE TO VIOLENT EXTREMISM AND INSURGENCY 3–4 (Sept. 2011), https://www.usaid.gov/sites/default/files/documents/1870/VEI_Policy_Final.pdf.

⁴⁴ See generally GUILAIN DENOEU, USAID, GUIDE TO THE DRIVERS OF VIOLENT EXTREMISM (Feb. 2009), http://pdf.usaid.gov/pdf_docs/Pnadt978.pdf.

⁴⁵ See Fink, *supra* note 41, at 5; Sarah Sewell, Under Sec'y of Civilian Sec., Democracy, and Human Rights, *Combating Terrorism: Looking Over the Horizon*, Remarks at SAIS, John Hopkins University (Mar. 10, 2015), <http://www.state.gov/j/remarks/238749.htm>.

⁴⁶ See, e.g., Thomas Hegghammer, *The Soft Power of Militant Jihad*, N.Y. TIMES (Dec. 18, 2015), http://www.nytimes.com/2015/12/20/opinion/sunday/militant-jihads-softer-side.html?_r=0; see also ALEX P. SCHMID, INT'L CTR. FOR COUNTER-TERRORISM, RADICALISATION, DE-RADICALISATION, COUNTER-RADICALISATION 25–28 (Mar. 2013), <https://www.icct.nl/download/file/ICCT-Schmid-Radicalisation-De-Radicalisation-Counter-Radicalisation-March-2013.pdf>; STERN, *supra* note 39, at 5–9.

⁴⁷ See DENOEU, *supra* note 44, at 71–73; GEORGIA HOLMER, U.S. INST. OF PEACE, COUNTERING VIOLENT EXTREMISM: A PEACEBUILDING PERSPECTIVE 2 (Sept. 2013), <http://www.icnl.org/research/library/files/Transnational/CVEUSIP.pdf>.

violent ideology.⁴⁸ Recognizing the singularity of each person’s “radicalization recipe,” counter-extremism efforts must achieve correspondingly high levels of individualization.⁴⁹

B. *The Progress of CVE in the United States*

In August 2011, President Barack Obama released the federal government’s first official domestic CVE strategy, *Empowering Local Partners to Prevent Violent Extremism in the United States*.⁵⁰ The plan outlines pathways for the government to support communities in building resilience to violent extremist ideologies, including: sharing information about the threat of radicalization; strengthening cooperation with local law enforcement; and helping communities better protect themselves against extremist propaganda.⁵¹ The strategy envisions community leadership; government serves as a “facilitator, convener, and source of information.”⁵²

To implement these strategies, the White House released its *Strategic Implementation Plan for Empowering Local Partners to Prevent Violent Extremism in the United States* (“2011 SIP”), in December 2011.⁵³ The 2011 SIP applies to all forms of violent extremism, but prioritizes the prevention of terrorism “inspired by al-Qa’ida and its affiliates and adherents”⁵⁴ and identifies disengagement from violent extremism as one priority among “gaps that need to be addressed through additional research and analysis.”⁵⁵ Violent extremism in the correctional setting provides another area for expanded research.⁵⁶ In late

⁴⁸ Joby Warrick & Greg Miller, *New ISIS Recruits Have Deep Criminal Roots*, WASH. POST (Mar. 23, 2016), https://www.washingtonpost.com/world/national-security/new-isis-recruits-have-deep-criminal-roots/2016/03/23/89b2e590-f12e-11e5-a61f-e9c95c06edca_story.html (quoting Ali Soufan); see also Olivier Roy, *France’s Oedipal Islamist Complex*, FOREIGN POL’Y (Jan. 7, 2016), <http://foreignpolicy.com/2016/01/07/frances-oedipal-islamist-complex-charlie-hebdo-islamic-state-isis/>.

⁴⁹ Interview by Audie Cornish with Daniel Koehler, *All Things Considered*, NAT’L PUB. RADIO (Mar. 13, 2015), <http://www.newsjs.com/url.php?p=http://www.npr.org/2015/03/13/392845800/german-program-helps-families-de-radicalize-members-prone-to-extremism>.

⁵⁰ *Empowering Local Partners to Prevent Violent Extremism in the United States*, WHITE HOUSE (Aug. 2011), https://www.whitehouse.gov/sites/default/files/empowering_local_partners.pdf. In contrast to domestic programs, counter-radicalization played an earlier role in American foreign policy. See generally Samuel Rascoff, *Establishing Official Islam?*, 64 STAN. L. REV. 125, 127 (2012).

⁵¹ *Empowering Local Partners*, *supra* note 50, at 5–7.

⁵² *Id.* at 3.

⁵³ *Strategic Implementation Plan for Empowering Local Partners to Prevent Violent Extremism in the United States*, WHITE HOUSE (Dec. 2011), <https://www.whitehouse.gov/sites/default/files/sip-final.pdf>.

⁵⁴ *Id.* at 2.

⁵⁵ *Id.* at 13.

⁵⁶ The SIP detailed future activities including continued DHS collaboration with the FBI, the Bureau of Prisons (BOP), and the National Counterterrorism Center (NCTC) to: (1) improve awareness of the risk of violent extremism in correctional systems; (2) enhance screening of new inmates to detect associations with violent extremist groups; (3) improve detection of recruitment

October 2016 (as this Article was being finalized), the White House released an updated version of the SIP that “responds to the current dynamics of violent extremism and reflects experiences and knowledge acquired” over the past five years.⁵⁷ The 2016 SIP sets out new intervention goals, including support for local multidisciplinary intervention teams for those who have not yet engaged in criminal activity, and disengagement and rehabilitation programs for potential use by the criminal justice sector.⁵⁸

In September 2014, the Department of Justice (DOJ), in partnership with the Department of Homeland Security (DHS) and the National Counterterrorism Center (NCTC), launched CVE pilot programs in Boston, Los Angeles, and Minneapolis-St. Paul.⁵⁹ The DOJ indicated these regions were selected “based on their existing achievements with community engagement.”⁶⁰ The government selected the Twin Cities, describing them as home to the largest Somali population in North America, in particular because overseas terror organizations, including Al Shabaab and ISIS, have targeted their citizens with propaganda, and the community “expressed a desire to see this cycle of recruiting end.”⁶¹

The three regions aim to develop intervention initiatives along with those for prevention, but progress in funding and rolling out programs has been slow.⁶²

efforts within the correctional environment; and (4) increase information sharing, as appropriate, with Federal, State, and local law enforcement about inmates who may have adopted violent extremist beliefs and are being released. *See Strategic Implementation Plan for Empowering Local Partners to Prevent Violent Extremism in the United States*, *supra* note 53, at 14. Since 2011, it is “unclear what progress has been made in these efforts” due to a lack of publicly available information. *Terror Inmates: Countering Violent Extremism in Prison and Beyond: Hearing Before the H. Comm. on Homeland Sec., Subcomm. on Counterterrorism & Intelligence* (2015) (statement of Jerome P. Bjelopera, Specialist in Organized Crime and Terrorism), <http://docs.house.gov/meetings/HM/HM05/20151028/104102/HHRG-114-HM05-Wstate-BjeloperaJ-20151028.pdf>. (As of October 2015, American prisons had “produced almost no post-9/11 jihadist terrorists” yet the “extent of violent jihadist radicalization behind bars is unknown.”).

⁵⁷ *Strategic Implementation Plan for Empowering Local Partners to Prevent Violent Extremism in the United States*, WHITE HOUSE, 1 (Oct. 2016) [hereinafter 2016 SIP], https://www.whitehouse.gov/sites/default/files/docs/2016_strategic_implementation_plan_empowering_local_partners_prev.pdf.

⁵⁸ *See id.* at 11–12.

⁵⁹ *Attorney General Holder Announces Pilot Program to Counter Violent Extremists*, U.S. DEP’T OF JUSTICE (Sept. 15, 2014), <https://www.justice.gov/opa/pr/attorney-general-holder-announces-pilot-program-counter-violent-extremists>; *Pilot Programs Are Key To Our Countering Violent Extremism Efforts*, U.S. DEP’T OF JUSTICE (Feb. 18, 2015), <https://www.justice.gov/opa/blog/pilot-programs-are-key-our-countering-violent-extremism-efforts>.

⁶⁰ *Pilot Programs Are Key To Our Countering Violent Extremism Efforts*, *supra* note 59.

⁶¹ *Id.*; *see also A New Approach to Countering Violent Extremism*, FBI (Oct. 7, 2014), <https://leb.fbi.gov/2014/october/a-new-approach-to-countering-violent-extremism-sharing-expertise-and-empowering-local-communities> (“Terrorism organizations often target this group of Somalis to encourage their young men to become foreign fighters.”); *Building Community Resilience*, U.S. ATTORNEY’S OFFICE, D. MINN. (Feb. 2015), <https://www.justice.gov/usao-mn/file/642121/download>.

⁶² *See Philip Marcelo, A Federal Pilot Effort to Combat Extremist Recruitment in Boston, Los Angeles and Minneapolis Has Been Slow to Start Since It Was Announced Nearly Two Years Ago*,

The Twin Cities plan includes an intervention component in which community members and leaders work directly with families “before law enforcement is ever involved.”⁶³ Planning materials for the Boston framework also indicate a commitment to intervention,⁶⁴ including programs in which, “counselors or religious leaders try to steer people off a path to radicalization.”⁶⁵ Strategies include specialized support for people convicted of hate crimes before and after release from prison.⁶⁶ Similarly, the Los Angeles framework includes an intervention component emphasizing off-ramps for individuals moving down a path toward violent extremism.⁶⁷ The program seeks to provide these individuals with needed care including access to social services, mental health, and faith-based services.⁶⁸

The programs have progressed slowly, as has their funding.⁶⁹ Minneapolis has progressed farthest past the planning stage, perhaps in part because local programs have received additional federal and private funding.⁷⁰ As of March 2016, the U.S. Attorney for Minnesota had reported that a prevention program was coming soon, while interventions were farther off.⁷¹

The U.S. federal government and local governments also have engaged in complementary initiatives for international collaboration. The White House drew increased global attention to CVE in February 2015 by hosting a three-day

U.S. NEWS (Mar. 24, 2016), <http://www.usnews.com/news/us/articles/2016-03-24/effort-in-3-us-cities-to-combat-extremism-off-to-slow-start>.

⁶³ See *Building Community Resilience*, *supra* note 61.

⁶⁴ *A Framework for Prevention and Intervention Strategies*, U.S. ATTORNEY’S OFFICE, D. MASS., 13 (Feb. 2015), <https://www.justice.gov/sites/default/files/usao-ma/pages/attachments/2015/02/18/framework.pdf>.

⁶⁵ Mila Koumpilova, *In Boston, Los Angeles and Minneapolis, Federal Anti-Terror Programs Stoke Community Interest and Criticism*, STAR TRIB. (Feb. 9, 2016), <http://www.startribune.com/in-boston-los-angeles-and-minneapolis-federal-anti-terror-pilots-stoke-community-interest-and-criticism/368091441/>.

⁶⁶ See *Fact Sheet: A Framework for Prevention and Intervention Strategies*, U.S. ATTORNEY’S OFFICE, D. MASS. (Feb. 2015), <https://www.dhs.gov/sites/default/files/publications/Boston%20Framework%20for%20CVE-Fact%20Sheet.pdf>.

⁶⁷ *Los Angeles Framework for Countering Violent Extremism*, L.A. INTERAGENCY COORDINATION GROUP IN COLLABORATION WITH COMMUNITY STAKEHOLDERS, 7–8 (Feb. 2015), <https://www.dhs.gov/sites/default/files/publications/Los%20Angeles%20Framework%20for%20CVE-Full%20Report.pdf>.

⁶⁸ See *id.*

⁶⁹ Marcelo, *supra* note 62; see also Stevan Weine & Ahmed Younis, *Aligning Research and CVE*, START CONSORTIUM (Feb. 27, 2015), <https://www.start.umd.edu/news/aligning-research-and-cve>.

⁷⁰ See Philip Marcelo, *Federal Effort to Combat Terrorism in Boston Slow to Start*, BOS. GLOBE (Mar. 24, 2016), <https://www.bostonglobe.com/news/politics/2016/03/24/federal-effort-combat-terrorism-boston-slow-start/hle2UdANUuatYduMrO5vSO/story.html>.

⁷¹ Matt Apuzzo, *Who Will Become a Terrorist*, N.Y. TIMES (Mar. 27, 2016), http://www.nytimes.com/2016/03/28/world/europe/mystery-about-who-will-become-a-terrorist-defies-clear-answers.html?_r=0.

summit for stakeholders from more than sixty countries.⁷² Government ministers, law enforcement officials, community and faith leaders, educators, and private sector representatives attended.⁷³ In remarks at the summit, William Braniff, Executive Director of the National Consortium for the Study of Terrorism and Responses to Terrorism (START), acknowledged the now often-cited need for CVE practices to become more evidence-based, so that programs derive from a pragmatic understanding of what works.⁷⁴ U.S. municipalities are directly participating in CVE efforts by coordinating with cities on a global level through the Strong Cities Network to share best practices and maximize international learning at the local level.⁷⁵ On September 29, 2015, immediately following the UN Leaders' Summit on Countering ISIL and Violent Extremism, the Strong Cities Network was launched at the UN to strengthen the resilience of communities internationally.⁷⁶ At least eight American cities and one county are currently participating, including Los Angeles, Minneapolis, and New York.⁷⁷

Although terrorism accounts for only a small fraction of violent crime in the United States,⁷⁸ widespread concerns about attempts to inflict casualties on a

⁷² See *White House Summit to Counter Violent Extremism Ministerial Meeting Statement*, U.S. DEP'T OF STATE (Feb. 19, 2015), <http://www.state.gov/j/ct/cvesummit/releases/237673.htm>.

⁷³ See *White House Summit on Combating Terrorism*, C-SPAN (Feb. 18, 2015), <https://www.c-span.org/video/?324398-2/white-house-summit-combating-terrorism-international-law-enforcement-leaders&start=1438>; *White House Summit to Counter Violent Extremism Ministerial Meeting Statement*, *supra* note 72.

⁷⁴ Williams Braniff, Dir. of Nat'l Consortium for the Study of Terrorism and Responses to Terrorism, U. of Maryland, Remarks at the White House Summit (Feb. 18, 2015), <http://www.c-span.org/video/?c4528752/william-braniff-rising-superstar>; see also Weine & Younis, *supra* note 69 ("Many of the new CVE programs being developed and piloted . . . are not being consistently monitored and evaluated, as is a common practice in other fields such as public health. Also of concern is that the current discourse among policymakers and practitioners focuses more on sharing best practices and less on formulating comprehensive prevention and intervention models based upon sound theory and empirical evidence."); Romaniuk, *supra* note 1, at v–vi ("Contextualized assessments and stakeholder consultations are critical to effective programming but remain underutilized. Ongoing investments in gathering and analyzing data need to be sustained and increased.").

⁷⁵ See generally *Strong Cities Network*, INST. FOR STRATEGIC DIALOGUE, <http://strongcitiesnetwork.org/strong-cities/> (last visited Nov. 5, 2016).

⁷⁶ *Launch of Strong Cities Network to Strengthen Community Resilience Against Violent Extremism*, U.S. DEPARTMENT OF JUSTICE (Sept. 28, 2015), <https://www.justice.gov/opa/pr/launch-strong-cities-network-strengthen-community-resilience-against-violent-extremism>.

⁷⁷ *Strong Cities Network Member Cities*, INST. FOR STRATEGIC DIALOGUE, <http://strongcitiesnetwork.org/strong-cities/member-cities/> (last visited Nov. 5, 2016). Participating American municipalities include Atlanta, Georgia; Aurora, Colorado; Chattanooga, Tennessee; Denver, Colorado; Los Angeles, California; Minneapolis, Minnesota; Montgomery County, Maryland; and New York, New York.

⁷⁸ See Julia Jones & Eve Bower, *American Deaths in Terrorism vs. Gun Violence in One Graph*, CNN (Dec. 30, 2015), <http://www.cnn.com/2015/10/02/us/oregon-shooting-terrorism-gun-violence/> (using data from the Centers for Disease Control and Prevention and determining that from 2001 to 2013, 406,496 people died by firearms on U.S. soil, while 3,030 people were killed in domestic acts of terrorism during the same period); see also M. Steven Fish, *No, Islam Isn't Inherently Violent, and the Math Proves It*, THE DAILY BEAST (Feb. 15, 2015),

massive scale, such as that of the 9/11 attacks, persist.⁷⁹ Reflecting heightened public concern, and the substantial resources already invested, CVE as a field “is maturing, and it will be here in some form for the foreseeable future.”⁸⁰ In January 2016, indicating its strong commitment to CVE, the U.S. Government announced a new interagency CVE Task Force, administratively housed at DHS, to coordinate agency efforts across the executive branch.⁸¹

C. *Civil Liberties Implications and the Terminology of CVE*

Groups and constituencies including civil liberties and civil rights advocates, along with some Muslim-American and other religiously affiliated organizations, have voiced concerns about governmental overreach in CVE initiatives.⁸² Critics argue that predictive analyses focusing on who is vulnerable to radicalization are flawed and discriminatory, in part because pathways to terrorism are highly individualized.⁸³ With extremism emanating from many sources—including far right-wing violence, which has continued to inflict substantial casualties⁸⁴—CVE programs are criticized for disproportionately

<http://www.thedailybeast.com/articles/2015/02/15/no-islam-isn-t-inherently-violent-and-the-math-proves-it.html> (“[T]he risk of an American being killed by any act of terrorism in a given year is roughly one in 3.5 million.”).

⁷⁹ See, e.g., Rebecca Riffkin, *Americans Name Terrorism as No. 1 U.S. Problem*, GALLUP (Dec. 14, 2015), <http://www.gallup.com/poll/187655/americans-name-terrorism-no-problem.aspx>; see also Brian Michael Jenkins, *U.S. More Able Than Ever to Combat Terrorism*, THE RAND BLOG, (Sept. 26, 2016), <http://www.rand.org/blog/2016/09/us-more-able-than-ever-to-combat-terrorism.html> (observing that “today’s terrorist threat is different” from past threats because “[t]errorists are determined to kill in quantity and seemingly more willing to kill indiscriminately,” and Americans may be “more anxious”).

⁸⁰ Romaniuk, *supra* note 1, at Exec. Summary, vi.

⁸¹ U.S. DEP’T OF JUSTICE OFFICE OF PUB. AFFAIRS & U.S. DEP’T OF HOMELAND SECURITY OFFICE OF PUB. AFFAIRS, *Countering Violent Extremism Task Force* (Jan. 8, 2016), <https://www.dhs.gov/news/2016/01/08/countering-violent-extremism-task-force> (noting that, as one of its major responsibilities, the Task Force “will work with CVE stakeholders to develop multidisciplinary intervention programs”).

⁸² See, e.g., Letter to Bill DeBlasio from the American Civil Liberties Union and twenty other groups (Sept. 21, 2015), <http://www.capitalnewyork.com/sites/default/files/092115%20Coalition%20Letter%20to%20Mayor%20Re%20CVE.pdf>; Letter to Lisa O. Monaco from the American Civil Liberties Union and 26 other groups (Dec. 18, 2014), <https://www.aclu.org/other/coalition-letter-obama-administration-countering-violent-extremism-cve-program>; Letter to Lisa O. Monaco from Muslim Justice League and five other groups (Feb. 13, 2015), <https://www.brennancenter.org/sites/default/files/analysis/Boston%20Organizational%20Letter%20re%20CVE%20Concerns.pdf>.

⁸³ See, e.g., Faiza Patel, *Rethinking Radicalization*, BRENNAN CTR. FOR JUSTICE 8 (Mar. 8 2011), <https://www.brennancenter.org/sites/default/files/legacy/RethinkingRadicalization.pdf> (“Despite the impetus to find a terrorist profile or hallmarks of radicalization to hone in on incipient terrorists, empirical research has emphatically and repeatedly concluded that there is no such profile and no such easily identifiable hallmarks.”).

⁸⁴ Since September 11, 2001, fifty people have been killed in attacks in the United States linked to far right-wing extremists, according to data from the New America Foundation. In the same time period, ninety-four people in the U.S. were killed in violent Jihadist attacks. See *Data from the International Security Program*, NEW AMERICA <http://www.newamerica.org/in-depth/terrorism-in-america/what-threat-united-states-today> (last visited Dec. 13, 2016).

targeting and stigmatizing American Muslim communities.⁸⁵ Further, by blurring the boundaries between community engagement and intelligence-gathering, programs may degrade community relationships with law enforcement to a state of perpetual distrust. In the wake of the NYPD Intelligence Division's post-9/11 covert surveillance program in Muslim neighborhoods, conducted with CIA input,⁸⁶ the federal government's role in CVE programs is perceived as counterproductive.⁸⁷ Critics express concern that CVE guidelines may violate constitutional norms by rendering suspect political and religious expression protected under the First Amendment.⁸⁸ To advocate for increased transparency and enforce requests under the Freedom of Information Act, the Brennan Center for Justice at New York University commenced an action for injunctive relief in January 2016 against the DOJ and DHS, seeking the release of agency records concerning CVE.⁸⁹

On the opposite side of the spectrum, some critics argue that initiatives to counter violent extremism should not focus more broadly on all extremist violence, but rather should concentrate more narrowly on countering "Islamic" or "Islamist" extremism, and should employ correspondingly specific terminology.⁹⁰ This perspective holds that "countering violent extremism" is a euphemism premised in political correctness, which seeks to avoid stigmatizing or offending law-abiding Muslim individuals and constituencies at the cost of a more accurate

⁸⁵ See, e.g., *Brief on Countering Violent Extremism*, COUNCIL ON AMERICAN-ISLAMIC RELATIONS (July 9, 2015), <https://www.cair.com/government-affairs/13063-brief-on-countering-violent-extremism-cve.html>; *Countering Violent Extremism: Myths and Fact*, BRENNAN CTR. FOR JUSTICE,

<https://www.brennancenter.org/sites/default/files/analysis/102915%20Final%20CVE%20Fact%20Sheet.pdf> (last visited Oct. 26, 2015); Bridge Initiative Team, *FBI's "Don't Be a Puppet" Website Stigmatizes Muslims as Extremists*, THE BRIDGE INITIATIVE (Nov. 4, 2015), <http://bridge.georgetown.edu/fbis-dont-be-a-puppet-website-stigmatizes-muslims-as-extremists/>.

⁸⁶ See Matt Apuzzo & Adam Goldman, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, ASSOCIATED PRESS (Aug. 23, 2011), <http://www.ap.org/Content/AP-In-The-News/2011/With-CIA-help-NYPD-moves-covertly-in-Muslim-areas>.

⁸⁷ See Dlala Shamas & Nermeen Arastu, *Mapping Muslims: NYPD Spying and its Impact on American Muslims*, Long Island City, NY: MUSLIM AMERICAN CIVIL LIBERTIES COALITION, AND CREATING LAW ENFORCEMENT ACCOUNTABILITY & RESPONSIBILITY (CLEAR) PROJECT (2013), <http://aaldef.org/Mapping%20Muslims%20NYPD%20Spying%20and%20its%20Impacts%20on%20American%20Muslims.pdf> (describing negative impacts of the NYPD program on American Muslim communities including an atmosphere of mistrust toward law enforcement and others, and a chilling effect upon freedom of speech).

⁸⁸ See, e.g., Letter to Lisa O. Monaco from the American Civil Liberties Union (Sept. 19, 2014), <https://www.aclu.org/aclu-urges-civil-liberties-agenda-white-house-summit-countering-violent-extremism>.

⁸⁹ See Complaint for Injunctive Relief, Brennan Ctr. for Just. v. Dep't of Homeland Sec., No. 16-cv-672 (filed Jan. 29, 2016), <https://www.brennancenter.org/sites/default/files/160129%20-%20BCJ%20v%20DHS%20Complaint%20AS%20FILED.pdf>.

⁹⁰ See, e.g., *Lieberman, Collins React to Administration Strategy to Counter Violent Extremism*, U.S. SEN. COMM. ON HOMELAND SEC. & GOV'TL AFF. (Aug. 3, 2011), <https://www.hsgac.senate.gov/media/lieberman-collins-react-to-administration-strategy-to-counter-violent-extremism>.

description and targeted focus.⁹¹ Similarly, some argue that clear identification of the specific threat posed by violent Islamist extremism is crucial to countering it effectively.⁹²

While countering violent Islamist groups such as Al Qaeda and ISIS has been the major focus of CVE efforts in the United States to date,⁹³ the more inclusive “violent extremist” terminology and focus are significant. In the domestic arena, a generalized mandate preserves flexibility to develop programming that counters various forms of violent extremism beyond jihadist-inspired ideologies. For example, far right wing extremists continue to pose a significant threat in the United States.⁹⁴ Far right-wing extremist movements espouse racism and radical anti-government views, with ideological affiliations including white supremacy, the sovereign citizens movement, militias, the Ku Klux Klan, and neo-Nazis, among others. In Boston, CVE organizers reportedly brought in representatives from a program that emerged after a white supremacist killed six people at a Sikh temple in Wisconsin to counter perceptions that CVE only addresses Islamist extremism.⁹⁵ A Chicago-based nonprofit, Life After Hate, is one example of an exit program supporting former white supremacists through disengagement and reintegration initiatives. While international events and high profile attacks have led to a sharp focus on jihadist-inspired extremist violence, a flexible CVE framework supporting more diverse initiatives such as Life After Hate and others would lead to expertise-sharing across arenas and increased

⁹¹ See Peter Beinart, *What Does Obama Really Mean by ‘Violent Extremism’?*, THE ATLANTIC (Feb. 20, 2015), <http://www.theatlantic.com/international/archive/2015/02/obama-violent-extremism-radical-islam/385700/>; Michael Rubin, *Countering Violent Extremism? ‘It’s the Theology, Stupid,’* AM. ENTERPRISE INST. (Feb. 12, 2015), <https://www.aei.org/publication/countering-violent-extremism-its-the-theology-stupid/>;

Lieberman, Collins React to Administration Strategy to Counter Violent Extremism, *supra* note 90.
⁹² See, e.g., *Lieberman, Collins React to Administration Strategy to Counter Violent Extremism*, *supra* note 90.

⁹³ See *Countering Violent Extremism (CVE): A Resource Page*, BRENNAN CTR. FOR JUSTICE (Feb. 12, 2015), <https://www.brennancenter.org/analysis/cve-programs-resource-page> (“[W]hile purportedly aimed at rooting out all violent extremism, [CVE programs] have previously focused only on Muslims, stigmatizing them as a suspect community.”); see also Todd C. Helmus, Erin York, & Peter Chalk, *Promoting Online Voices for Countering Violent Extremism*, RAND CORP. (2013), http://www.rand.org/content/dam/rand/pubs/research_reports/RR100/RR130/RAND_RR130.pdf.

⁹⁴ The Oklahoma City bombing in 1995 killed 168 people. See Andrew Gumbel, *Oklahoma City Bombing: 20 Years Later, Key Questions Remain Unanswered*, THE GUARDIAN (Apr. 13, 2015), <https://www.theguardian.com/us-news/2015/apr/13/oklahoma-city-bombing-20-years-later-key-questions-remain-unanswered>. Since the September 11 attacks, jihadist extremists have killed ninety-four people inside the U.S., while far right-wing extremists have killed fifty people. *Data from the International Security Program*, *supra* note 84. See also Charles Kurzman & David Schanzer, *Law Enforcement Assessment of the Violent Extremism Threat*, TRIANGLE CTR. ON TERRORISM & HOMELAND SECURITY, 12 (June 25, 2015), https://sites.duke.edu/tcths/files/2013/06/Kurzman_Schanzer_Law_Enforcement_Assessment_of_the_Violent_Extremist_Threat_final.pdf (finding local law enforcement agencies in early 2014 perceived terrorism inspired by “al-Qaeda and like-minded terrorist organizations as less of a threat than other forms of violent extremism, principally anti-government extremism”).

⁹⁵ Koumpilova, *supra* note 65.

violence prevention overall.⁹⁶ Internationally, broad terminology reduces the risk of alienating America's Sunni Arab allies and impeding their abilities to collaborate on anti-terrorism initiatives.⁹⁷ President Obama has expressed reluctance to use terms that reinforce the idea that America and other Western nations are at war with Islam, which can bolster terrorist recruitment and appear to grant terrorists "religious legitimacy,"⁹⁸ while also exerting divisive effects domestically.⁹⁹

Because intervention and rehabilitation strategies focus on individuals who attract law enforcement's attention through suspected criminal conduct, these approaches should trigger fewer concerns about discrimination than prevention models relying on predictive risk assessments.¹⁰⁰ One commentator noted:

Counter-radicalization policies fail because they look for signs of radicalization that are in reality meaningless . . . They have helped to create more illiberal societies without challenging jihadism, nurturing a mind-set in which a 4-year-old child can be viewed as a potential jihadist, while real terrorists slip the net.¹⁰¹

⁹⁶ See 2016 SIP, *supra* note 57, at 12 (noting that National Institute of Justice funded a partnership between Life After Hate/Exit USA and the Research Triangle Institute to examine individual-level pathways into and out of violent extremism); Ryan Lenz, *Life After Hate*, S. POVERTY LAW CTR. (Feb. 17, 2016), <https://www.splcenter.org/fighting-hate/intelligence-report/2016/life-after-hate>; See also Audie Cornish, *German Program Helps Families De-Radicalize Members Prone to Extremism*, NAT'L PUB. RADIO (MAR. 13, 2015), <http://www.npr.org/2015/03/13/392845800/german-program-helps-families-de-radicalize-members-prone-to-extremism>; see also Dina Temple-Raston, *Methods for Reforming Neo-Nazis Help fight the Radicalization of Muslims*, NAT'L PUB. RADIO (May 10, 2016), <http://www.npr.org/sections/parallels/2016/05/10/477043520/methods-for-reforming-neo-nazis-help-fight-the-radicalization-of-muslims> (quoting Julia Berczyk and Quintan Wiktorowicz).

⁹⁷ See Braniff, *supra* note 74.

⁹⁸ See *Remarks by the President in Closing of the Summit on Countering Violent Extremism*, WHITE HOUSE OFFICE OF THE PRESS SECRETARY (Feb. 18, 2015), <https://www.whitehouse.gov/the-press-office/2015/02/18/remarks-president-closing-summit-countering-violent-extremism>.

⁹⁹ See also Daniella Diaz, *Obama: Why I Won't Say 'Islamic Terrorism,'* CNN POLITICS (Sept. 29, 2016), <http://www.cnn.com/2016/09/28/politics/obama-radical-islamic-terrorism-cnn-town-hall/> ("I have been careful . . . to make sure that we do not lump these murderers into the billion Muslims that exist around the world, including in this country, who are peaceful, who are responsible, who, in this county, are fellow troops and police officers and fire fighters and teachers and neighbors and friends.").

¹⁰⁰ See Stephen Montemayor and Mila Koumpilova, *Terror Suspects Will Test Deradicalization Program*, STAR TRIB. (Mar. 2, 2016), <http://www.startribune.com/judge-orders-de-radicalization-study-for-4-terror-defendants/370806141/> (quoting Faiza Patel of New York University's Brennan Center for Justice as stating that she has "less problems with trying out approaches that are . . . untested when you are working with individuals that have already pleaded guilty to a crime," but noting that Ms. Patel still doubts such evaluations can pinpoint how radical a person is or how likely they are to engage in future violence).

¹⁰¹ Kenan Malik, *The Little We Know About the Jihadists in Our Midst*, N.Y. TIMES (Mar. 30, 2016), http://www.nytimes.com/2016/03/31/opinion/the-little-we-know-about-the-jihadists-in-our-midst.html?_r=0.

Off-ramp initiatives would avoid letting some violent extremists slip the net, and would not rely upon predictors of violent extremism, but rather, upon evidence of it. An inclusive scope and terminology for programming, with the flexibility to focus on all forms of violent extremism rather than only jihadist-inspired extremism, entails a diminished risk of violating constitutional protections, better opportunities to work cooperatively with allies and communities, and more pragmatic opportunities to prevent violence inspired by a range of ideologies.¹⁰²

II. Prohibiting Material Support for Terrorism: A Strategic Centerpiece

Two key federal statutes criminalize the provision of “material support or resources” for terrorists and acts of terrorism. First, 18 U.S.C. § 2339A outlaws the provision of material support for the preparation or commission of any designated terrorist offense. Second, 18 U.S.C. § 2339B disallows the provision of material support to any designated Foreign Terrorist Organization (FTO). Violating Sections 2339A or 2339B subjects the offender to a maximum prison term of 15 or 20 years for each count respectively, “and, if the death of any person results,” then to prison “for any term of years or for life.”¹⁰³ Two related but less frequently employed statutes, 18 U.S.C. §§ 2339C and 2339D, prohibit fundraising for terrorism and receiving military-type training from a designated FTO, respectively.¹⁰⁴ Finally, 18 U.S.C. § 2339 criminalizes the act of harboring or concealing a terrorist.¹⁰⁵

Prosecutors view the material support statutes as preventive in nature, and often rely upon these laws to charge defendants who have not engaged directly in the commission of terrorist violence.¹⁰⁶ The statutes prohibit a broad range of conduct; at the lowest end of the spectrum, infractions may encompass non-

¹⁰² See Beinart, *What Does Obama Really Mean by “Violent Extremism”?*, *supra* note 38.

¹⁰³ 18 U.S.C. § 2339A (2012); 18 U.S.C. § 2339B (2012).

¹⁰⁴ See P. Scott Rufener, *Prosecuting the Material Support of Terrorism: Federal Courts, Military Commissions, or Both?*, 5 U. MASS. L. REV. 151, 158–59 (Jan. 2010); U.S. DEP’T OF JUSTICE, *Counterterrorism Efforts*, <https://www.justice.gov/usao/priority-areas/national-security/counterterrorism-efforts> (describing 18 U.S.C. §§ 2339A and 2339B as the “two primary material support statutes” but noting that §§ 2339C and 2339D also have been used to combat terrorism); *Case by Case: ISIS Prosecutions in the United States*, CTR. ON NAT’L SECURITY AT FORDHAM LAW 2, 13 (July 2016), <https://static1.squarespace.com/static/55dc76f7e4b013c872183fea/t/577c5b43197aea832bd486c0/1467767622315/ISIS+Report+-+Case+by+Case+-+July2016.pdf>; see also *Terrorist Trial Report Card*, CTR. ON L. AND SEC., N.Y.U., 7, 13–14 (2011), <http://www.lawandsecurity.org/wp-content/uploads/2011/09/TTRC-Ten-Year-Issue.pdf> (listing most frequently charged statutes).

¹⁰⁵ See *Terrorist Trial Report Card*, CTR. ON L. AND SEC., N.Y.U., 7, 18 (2011), <http://www.lawandsecurity.org/wp-content/uploads/2011/09/TTRC-Ten-Year-Issue.pdf>, (noting violation of this statute had been charged in only 21 cases).

¹⁰⁶ See Andrew Peterson, *Addressing Tomorrow’s Terrorists*, 2 J. NAT’L SEC. L. & POL’Y 297, 299–300 (2008), <http://jnslp.com/wp-content/uploads/2011/01/peterson-finalpageproofs-12-2-08.pdf>; U.S. DEP’T OF JUSTICE, *Attorney General Holder Urges International Effort to Confront Threat of Syrian Foreign Fighters* (July 8, 2014), <https://www.justice.gov/opa/pr/attorney-general-holder-urges-international-effort-confront-threat-syrian-foreign-fighters>.

violent acts that provide little or no actual benefit to any terrorist organization or act. The preemptive nature of the prohibitions, coupled with the increased government reliance upon them in recent years to prosecute many youthful defendants, renders the realm of material support cases an appropriate context in which to explore the potential benefits of intervention and rehabilitation initiatives within the criminal justice system.¹⁰⁷

The prominence of material support laws has increased dramatically in recent years.¹⁰⁸ Federal prosecutors rarely charged defendants with providing material support for terrorism prior to the attacks of September 11, 2001.¹⁰⁹ In the wake of those attacks, material support has become the most frequently charged terrorism offense¹¹⁰ and a valued cornerstone of counterterrorism policy.¹¹¹ According to an analysis of jihadist-inspired terrorism cases by the Center on Law and Security at New York University, the government alleged material support in 11.6% of cases in 2007; that measure rose to 69.4% by 2010.¹¹² During roughly

¹⁰⁷ See, e.g., Seamus Hughes, *Domestic Counterterrorism: Material Support or Bust*, LAWFARE (Aug. 30, 2015), <https://www.lawfareblog.com/domestic-counterterrorism-material-support-or-bust>.

¹⁰⁸ See Peterson, *supra* note 106, at 300. Congress initially passed the material support laws in 1994 (§ 2339A, included in the Violent Crime Control and Law Enforcement Act) and 1996 (§ 2339B, included in the Antiterrorism and Effective Death Penalty Act), in part responding the first World Trade Center bombing in 1993, and the Oklahoma City bombing in 1995. See, e.g., Emily Goldberg Knox, *The Slippery Slope of Material Support Prosecutions: Social Media Support to Terrorists*, 66 HASTINGS L.J. 295, 303 (Dec. 2014), <http://www.hastingslawjournal.org/wp-content/uploads/Goldberg-66.1.pdf>. Other amendments to the material support prohibitions followed, notably in the USA Patriot Act following the 9/11 attacks. See, e.g., CHARLES DOYLE, CONG. RESEARCH SERV., R41333: TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. 2339A AND 2339B 2 (July 19, 2010), <https://www.fas.org/sgp/crs/natsec/R41333.pdf>.

¹⁰⁹ Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, White Paper published with HUMAN RIGHTS FIRST, 32 (May 2008), <https://www.humanrightsfirst.org/wp-content/uploads/pdf/080521-USLS-pursuit-justice.pdf>; see also *Aiding Terrorists: An Examination of the Material Support Statute Before the S. Comm. on the Judiciary*, 108th Cong. (May 5, 2004) (Statements of Orrin Hatch and Gary Bald), <https://www.gpo.gov/fdsys/pkg/CHRG-108shrg95100/html/CHRG-108shrg95100.htm> (discussing PATRIOT Act-facilitated material support prosecutions and post-9/11 focus on preventing future attacks).

¹¹⁰ Faiza Patel & Adrienne Tierney, *The Reasons Why Dylann Roof Wasn't Charged with Terrorism*, BRENNAN CTR. FOR JUSTICE (July 30, 2015), <https://www.brennancenter.org/blog/reasons-why-dylann-roof-wasnt-charged-terrorism>.

¹¹¹ See, e.g., Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT'L SEC. L. & POL'Y 5, 5–6 (2010), http://jnslp.com/wp-content/uploads/2010/08/02_ABRAMS_MASTER.pdf; Christina Parajon Skinner, *Punishing Crimes of Terror in Article III Courts*, 31 YALE L. & POL'Y REV. 308, 330–32 (2012), <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1647&context=yldr>; Wadie E. Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L.J. 543, 544 (2011), http://ilj.law.indiana.edu/articles/86/86_2_Said.pdf; U.S. DEP'T OF JUSTICE, OFFICE OF THE U.S. ATTORNEYS, *Counterterrorism Efforts*, <https://www.justice.gov/usao/priority-areas/national-security/counterterrorism-efforts>.

¹¹² *Terrorist Trial Report Card*, CTR. ON L. AND SEC., N.Y.U., 7, 19 (2011), <http://www.lawandsecurity.org/wp-content/uploads/2011/09/TTRC-Ten-Year-Issue.pdf>. The report defines jihadist defendants as those “who were formally or informally associated with an Islamist terror group – whether one with a global jihadist ideology (i.e. Al Qaeda) or a local

the first nine months of 2011, 87.5% of Jihadist-inspired terrorism cases included a material support charge. More recently, in an overview of ISIS-related cases in the U.S., the Center on National Security at Fordham Law (CNS) reviewed seventy-nine prosecutions between March 1, 2014 and February 12, 2016, finding seventy-one material support charges filed in those seventy-nine cases.¹¹³

The breadth of the material support prohibition in 18 U.S.C. §§ 2339A and 2339B has sparked litigation and debate. The laws expressly disallow the provision of: property, service, currency, lodging, training, expert advice or assistance, safehouses, false documentation, communications equipment, facilities, weapons, lethal substances, explosives, personnel (including oneself), and transportation.¹¹⁴ In ISIS-related cases, one form of material support has involved attempting to join and fight alongside the terror group. In a highly publicized example, FBI agents arrested newlyweds Jaelyn Delshaun Young, 20, and Muhammad Oda Dakhlalla, 22, at a Mississippi airport in August 2015, on their way to join ISIS in Syria, via Turkey. Prosecutors charged Young and Dakhlalla with attempting and conspiring to knowingly provide material support and resources to ISIS, in the form of personnel; each defendant pleaded guilty in March 2016.¹¹⁵ Other clear-cut cases of material support involve raising funds for, and sending funds to, a designated FTO.¹¹⁶

Federal courts have found that conduct may amount to material support even if it is non-violent and serves in part to further humanitarian goals. In *United States v. El-Mezain*, the Fifth Circuit upheld defendants' convictions for raising funds through a corporate entity (the Holy Land Foundation) and funneling them to the charitable wing of Hamas.¹¹⁷ In *Holder v. Humanitarian Law Project* (hereinafter "*HLP*"), plaintiffs challenged the material support prohibition because they sought to contribute to non-violent activities of two FTOs—the Kurdistan Workers' Party (PKK) and Liberation Tigers of Tamil Eelam.¹¹⁸ Specifically, plaintiffs sought to train PKK members to use humanitarian and

Islamist movement (i.e. Hamas)" as well as those "unaffiliated with a terror group who aspired to such affiliation or who subscribed to a global jihadist ideology." *Id.* at 7, n.1.

¹¹³ This figure includes twelve charges under 18 U.S.C. § 2339A, fifty-eight charges under § 2339B, and one charge under § 2339D. *ISIS Cases in the United States*, CTR. ON NAT'L SEC. AT FORDHAM L., <http://static1.squarespace.com/static/55dc76f7e4b013c872183fea/t/56be4881b654f9af652ea926/1455310977496/ISIS+Statistical+Overview+%26+Names+02-12-16.pdf>.

¹¹⁴ 18 U.S.C. § 2339A (2012).

¹¹⁵ Criminal Complaint, *United States v. Jaelyn Delshaun Young*, No. 3:15MJ32-SAA (N.D. Miss. Aug. 8, 2015), <https://www.justice.gov/opa/file/705906/download>; Joshua Berlinger & Catherine E. Shoichet, *Mississippi Woman Pleads Guilty on Charge that She Tried to Join ISIS*, CNN (Mar. 30, 2016), <http://www.cnn.com/2016/03/30/us/mississippi-isis-guilty-plea-jaelyn-young/>.

¹¹⁶ *See, e.g.*, *United States v. Amina Ali*, No. 10-187(1), 2013 D. Minn WL 3110721 (Trial Motion, Memorandum and Affidavit) (Apr. 19, 2013); Michael Taxay, *Trends in the Prosecution of Terrorist Financing and Facilitation*, in *Terrorist Financing*, Vol. 62, No. 5, 7, U. S. ATTORNEYS' BULL. (Sept. 2014) (citing cases).

¹¹⁷ 664 F.3d 467, 486 (5th Cir. 2011) ("[A]id to Hamas's social wing critically assists Hamas's goals while also freeing resources for Hamas to devote to its military and political activities.").

¹¹⁸ 130 S. Ct. 2705 (2010).

international law to resolve disputes peacefully, to teach PKK members to petition the United Nations and other representative bodies for relief, and to engage in political advocacy on behalf of Kurds in Turkey and Tamils in Sri Lanka.¹¹⁹ The Supreme Court upheld the constitutionality of the material support prohibition as applied, rejecting arguments that the proscriptions on providing training, expert advice or assistance, service, and personnel violated plaintiffs' First Amendment rights to free speech and association, and were impermissibly vague under the Fifth Amendment's Due Process Clause. In part, the Court relied on Congress's finding that foreign terrorist organizations "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."¹²⁰ Yet the Court clarified that the statute "reaches only material support *coordinated with or under the direction of* a designated foreign terrorist organization"; independent advocacy is not covered.¹²¹

The line between material support and independent advocacy was tested in *United States v. Mehanna*.¹²² The defendant, a Massachusetts pharmacist, translated jihadist materials including Al Qaeda recruitment videos and documents, and posted them on the extremist at-Tibyan website. Mehanna also traveled to Yemen in an unsuccessful attempt to obtain military-type training in support of Al Qaeda. A jury convicted Mehanna of conspiring to violate 18 U.S.C. § 2239B by providing material support to Al Qaeda, violating and attempting to violate 18 U.S.C. § 2239A by providing material support to terrorists, and conspiracy to do so. The First Circuit held that the lower court's jury instructions "captured the essence of the controlling decision in *HLP*," and observed, "[t]he court appropriately treated the question of whether enough coordination existed to criminalize the defendant's translations as factbound and left that question to the jury."¹²³ The First Circuit did not determine whether defendant's translation activities alone could have supported a conviction, because the "cluster of activities surrounding the defendant's Yemen trip supplied an independently sufficient evidentiary predicate for the convictions"¹²⁴ The Supreme Court denied certiorari in October 2015, leaving intact Mehanna's conviction and seventeen and a half year sentence.¹²⁵

As preventive prosecutions, material support cases target a wide range or spectrum of conduct.¹²⁶ "[T]he problem is that the defendants found at one end of

¹¹⁹ *Id.* at 2716.

¹²⁰ *Id.* at 2724–25.

¹²¹ *See id.* at 2726 (emphasis added); *See also id.* at 2721–23.

¹²² *United States v. Mehanna* 735 F.3d 32 (1st Cir. 2013).

¹²³ *Id.* at 49 (finding the lower court "explained to the jury in no fewer than three different ways that independent advocacy for either an FTO or an FTO's goals does not amount to coordination").

¹²⁴ *Id.* at 50.

¹²⁵ *Mehanna v. United States*, 135 S. Ct. 49 (2014).

¹²⁶ *See Holder v. Humanitarian Law Project*, *supra* note 118, at 2727 ("The material-support statute is, on its face, a preventive measure—it criminalizes not terrorist attacks themselves, but aid that makes the attacks more likely to occur."); *see also Skinner*, *supra* note 111, at 329 (indicating that the material support statutes codified a "preventative prosecutorial strategy").

this spectrum will not have done all that much.”¹²⁷ Training members of a terrorist organization in peaceful conflict resolution methods clearly constitutes material support after *HLP*. Moreover, *Mehanna* leaves open the possibility that translating and posting recruitment materials for a terrorist organization, with only tangential “coordination,” likewise may form a basis for a conviction.¹²⁸ Material support charges reportedly have included conduct no more extensive than raising \$300 for Al Shabaab.¹²⁹ Other cases involve far more cooperation with terrorist groups, as well as conduct with more immediate links to violence, such as providing lethal substances or explosives directly to an FTO. In 2002, the government charged two Pakistani nationals and one U.S. citizen with material support, alleging that they had arranged to exchange 600 kilograms of heroin and five metric tons of hashish for cash and four Stinger anti-aircraft missiles, which in turn, defendants intended to sell to Al Qaeda in Afghanistan.¹³⁰ In 2009, Ali Saleh Kahlah Al-Marri pleaded guilty to conspiracy to provide material support to Al Qaeda. Al-Marri was essentially a sleeper operative who researched the use of chemical weapons, potential targets and maximum casualties, and took direct instructions from Khalid Sheikh Mohammed.¹³¹ Addressing this wide range of culpability and conduct, courts have confronted challenges in imposing consistent sentences.¹³² It is precisely the sweeping scope of the material support statutes, and the non-violent and preparatory nature of the acts that fall at the lowest end of the spectrum, that demonstrate how strategies to counter violent extremism may contribute positively to the charging and sentencing phases of material support cases.¹³³

¹²⁷ George D. Brown, *Notes on a Terrorism Trial*, 4 HARV. NAT. SEC. J. 1, 3 (2013), <http://harvardnsj.org/wp-content/uploads/2013/01/Vol-4-Brown-FINAL.pdf>.

¹²⁸ See Emily Goldberg Knox, *The Slippery Slope of Material Support Prosecutions*, 66 HASTINGS L.J. 295, 313 (Dec. 2014) <http://www.hastingslawjournal.org/wp-content/uploads/Goldberg-66.1.pdf>.

¹²⁹ *Terrorist Trial Report Card*, *supra* note 112, at 20.

¹³⁰ Attorney General John Ashcroft, Press Conference (Nov. 6, 2002), <https://www.justice.gov/archive/ag/speeches/2002/110602newsconferenceoperationwhiteterror.htm>.

¹³¹ See Plea Agreement and Stipulation of Facts at 9–17, *United States v. Al-Marri*, No. 09-CR-10030 (C.D. Ill. 2009); U.S. DEP’T OF JUSTICE, Press Release, *Ali Al-Marri Pleads Guilty to Conspiracy to Provide Material Support to Al-Qaeda* (Apr. 30, 2009), <https://www.justice.gov/opa/pr/ali-al-marri-pleads-guilty-conspiracy-provide-material-support-al-qaeda>.

¹³² See Said, *supra* note 111, at 544; Joanna Baltes et al., Remarks at the J. Nat’l Sec. L. & Pol’y Symposium: Trial and Terrorism, *Convicted Terrorists: Sentencing Considerations and Their Implications on Foreign Policy* (Feb. 11, 2015) (printed in 8 J. Nat’l Sec. L. & Pol’y 347, 355–58, 367–69 (2016), http://jnsllp.com/wp-content/uploads/2016/04/Sentencing_Considerations_and_Their_Implications_on_Foreign_Policy_2.pdf).

¹³³ See Baltes et al., *supra* note 132, at 355–56 (Remarks by Karen Greenberg); Hughes, *supra* note 107; Esme Murphy, *German Expert: U.S. Way Behind in Terrorism De-Radicalization*, CBS LOCAL (Sept. 21, 2016), <http://minnesota.cbslocal.com/2016/09/21/deradicalization-expert/>.

III. How CVE Applies in Cases of Material Support for Terrorism

A. *Precedents for Disengagement and Deradicalization Programs*

Once an individual embraces a violent extremist ideology, targeted programs to prevent him or her from committing or supporting acts of violence do not exist at any significant scale in the United States.¹³⁴ Yet isolated efforts are beginning to attract attention, and the critical role for off-ramp initiatives is receiving new recognition.¹³⁵ The borderless spread of ISIS's ideology (notwithstanding its territorial losses) and increased numbers of ISIS-related cases in the United States suggest that these programs are likely to gain traction.¹³⁶ Additional factors favoring the development of alternative criminal justice approaches include: the public safety imperative of preventing recidivism and future violent acts by those known to subscribe to violent extremist ideologies; the attenuated nature of some material support crimes; the youth of many offenders; and the long-term value of building trust for community partnerships with law enforcement.

1. Overview of International Approaches to Off-Ramp Programming

In considering the development of disengagement and deradicalization programs in the United States, similar initiatives around the globe provide useful starting points for analysis.¹³⁷ There are as many as forty such programs worldwide,¹³⁸ administered by NGOs, governments, or jointly by both.¹³⁹ Intervention and rehabilitation programs for non-terrorist offenders in the United States, particularly programs to counter gang violence, also may provide useful data and insights.¹⁴⁰ If American policymakers pursue an evidence-based

¹³⁴ See Seamus Hughes, *Islamic State is Successfully Radicalizing Americans*, L.A. TIMES (May 18, 2016), <http://www.latimes.com/opinion/op-ed/la-oe-hughes-stop-isis-recruit-radicalization-20160517-snap-story.html>; See also Mastroe & Szmania, *supra* note 8, at 11 (finding no published academic outcome evaluation of a U.S. disengagement or deradicalization program).

¹³⁵ See, e.g., Eric Rosand, *Taking the Off-Ramp: A Path to Preventing Terrorism*, WAR ON THE ROCKS, (July 1, 2016), <http://warontherocks.com/2016/07/taking-the-off-ramp-a-path-to-preventing-terrorism/>; Shannon Green, *Terrorism Has Been Democratized, So Too Must Counterterrorism*, BOS. GLOBE, (Sept. 19, 2016), <https://www.bostonglobe.com/opinion/2016/09/19/terrorism-has-been-democratized-too-must-counterterrorism/KeWS88NAmwpKidExZByJOO/story.html>.

¹³⁶ See Apuzzo, *supra* note 10; Seamus Hughes, *Domestic Counterterrorism: Material Support or Bust*, LAWFARE, (Aug. 30, 2015), <https://www.lawfareblog.com/domestic-counterterrorism-material-support-or-bust>.

¹³⁷ See Fink & Hearne, *supra* note 12, at 11 (“With all the emphasis on radicalization, few have recognized the commonalities between the processes of deradicalization and disengagement across geographical boundaries or its impact on reducing the size of violent groups.”).

¹³⁸ John G. Horgan, *De-Radicalization Programs Offer Hope in Countering Terrorism*, L.A. TIMES (Feb. 13, 2015), <http://www.latimes.com/opinion/op-ed/la-oe-0215-horgan-terrorist-deradicalization-20150215-story.html>.

¹³⁹ See EUROPEAN COMM’N RADICALISATION AWARENESS NETWORK, EXIT STRATEGIES (2015), http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/radicalisation_awareness_network/ran-best-practices/docs/exit_strategies.pdf.

¹⁴⁰ See Katie Zavadski, *Group With No Jihadi Experience Rehabs ISIS Recruit*, THE DAILY BEAST (Aug. 24, 2015), <http://www.thedailybeast.com/articles/2015/08/24/judge-orders-isis-recruit-to->

approach to these undeveloped areas of CVE, essential questions will include: (1) what criteria exist for judging a program's success (generally linked to some measure of recidivism)¹⁴¹; (2) based on the specified criteria, what success rates have been recorded for existing and previous programs; and (3) whether identifiable, common characteristics differentiate successful programs from unsuccessful ones.¹⁴² While context and culture exert crucial influences over programs in their unique geopolitical settings, and some approaches may not be replicable or suitable in the United States,¹⁴³ domestic efforts to advance evidence-based practices nonetheless stand to benefit from analysis of comparable programs. A comprehensive review of disengagement and deradicalization initiatives is beyond the scope of this paper. The summaries that follow outline a small selection of previously developed programs, highlighting major themes and challenges to date.

Several Muslim-majority countries have developed initiatives for deradicalization and disengagement, though approaches and commitment levels vary.¹⁴⁴ For example, programs have emerged in Algeria, Bangladesh, Egypt, Indonesia, Jordan, Malaysia, Morocco, Pakistan, Saudi Arabia, and Yemen. Egypt pioneered a soft power, collective approach in the late 1990s. Saudi Arabia's program is one of the most advanced in the international arena, and is discussed in detail below.¹⁴⁵ While some components of the Saudi initiative are highly specific to that country, other aspects of the program may yield relevant models for study, such as the holistic approach program administrators apply to the life situation of each participant.¹⁴⁶

rehab-not-jail.html (reporting that Mubin Shaikh, a deradicalization scholar and former extremist, noted similar techniques have been used in gang prevention for decades).

¹⁴¹ See Mastroe & Szmania, *supra* note 8, at 9, 12 (finding direct outcome assessments tied to recidivism rates, while "metrics most often provided as program outputs for disengagement and de-radicalization" are participant numbers and, in some cases, completion rates); Marisa L. Porges, *The Saudi Deradicalization Experiment*, COUNCIL ON FOREIGN REL. (Jan. 22, 2010), <http://www.cfr.org/radicalization-and-extremism/saudi-deradicalization-experiment/p21292>

(Saudi officials used recidivism rates as indicator of success).

¹⁴² See, e.g., HAMED EL-SAID, INT'L CTR. FOR THE STUDY OF RADICALISATION & POL. VIOLENCE, DE-RADICALISING ISLAMISTS (Jan. 2012), <http://icsr.info/wp-content/uploads/2012/10/1328200569ElSaidDeradicalisation1.pdf>; STERN, *supra* note 39. Caitlin Mastroe and Susan Szmania have begun to address these questions in a March 2016 working paper that "provides a systematic review of the existing empirical, theoretical and policy work on CVE evaluations." See Mastroe & Szmania, *supra* note 8, at 2.

¹⁴³ See John Horgan & Mary Beth Altier, *The Future of Terrorist De-Radicalization Programs*, 13 GEO. J. OF INT'L AFF. 83, 86 (2012), http://www.academia.edu/3882144/The_Future_of_Terrorist_De-Radicalization_Programs.

¹⁴⁴ See, e.g., EL-SAID, *supra* note 142; SELINA ADAM KHAN, U.S. INST. OF PEACE, DERADICALIZATION PROGRAMMING IN PAK. (Sept. 14, 2015), <http://www.usip.org/publications/2015/09/14/deradicalization-programming-in-pakistan>; Katherine Seifert, *Can Jihadis Be Rehabilitated*, 17 THE MIDDLE EAST Q. 21 (Spring 2010), <http://www.meforum.org/2660/can-jihadis-be-rehabilitated>.

¹⁴⁵ See, e.g., Porges, *supra* note 141.

¹⁴⁶ See, e.g., CHRISTOPHER BOUCEK, EXTREMIST RE-EDUCATION AND REHABILITATION IN SAUDI ARABIA in LEAVING TERRORISM BEHIND 223 (Tore Bjorgo & John Horgan eds., 2009) (This and

European initiatives in previous decades focused heavily on facilitating the transitions of right-wing violent extremists, such as neo-Nazis and nationalist extremists, out of those movements. Prominent examples include disengagement initiatives known as Exit programs in Norway, Sweden, and Germany.¹⁴⁷ Recently, increased European programming also has developed for Jihadist-inspired extremists. French Prime Minister Manuel Valls announced in May 2016 that France will open a dozen de-radicalization centers.¹⁴⁸ HAYAT-Germany (hereinafter “Hayat”) is one of several organizations partnering with Germany’s Federal Office for Migration and Refugees to counter violent Islamist extremism using a counseling approach.¹⁴⁹ And the European Union is supporting Nigeria’s deradicalization program for former Boko Haram members.¹⁵⁰ Many other programs warrant consideration, such as the UK’s Channel initiative, the Danish model in Aarhus, and in North America, the newly created Centre for the Prevention of Radicalization Leading to Violence in Montreal, Canada.¹⁵¹ Although the U.S. lacks comprehensive programs domestically,¹⁵² the American military pursued deradicalization strategies through Task Force 134 for detainee operations in Iraq under the leadership of Major General Douglas Stone.¹⁵³

2. Programmatic Themes: Saudi and European Approaches

Disengagement and deradicalization programs share common priorities of enhancing public safety from terrorist acts, while also benefitting communities and families, by providing individuals with opportunities to turn away from

similar programs warrant greater attention in the West, and hold lessons for other nations struggling with extremism.)

¹⁴⁷ See Fink & Hearne, *supra* note 9, at 4–5.

¹⁴⁸ See *France’s PM Valls Unveils New 40 Million Plan to Fight Radicalisation*, FRANCE 24 (May 9, 2016), <http://www.france24.com/en/20160509-france-valls-new-anti-terrorism-plan-rehabilitation-centres-radicalisation>.

¹⁴⁹ See Florian Endres, *The Advice Centre on Radicalisation of the Federal Office for Migration and Refugees*, 2 J. EXIT-DEUTSCHLAND (2014), at 6, <http://journals.sfu.ca/jed/index.php/jex/article/viewFile/68/98>; Dina Temple-Raston, *Methods for Reforming Neo-Nazis Help fight the Radicalization of Muslims*, NAT’L PUB. RADIO (May 10, 2016), <http://www.npr.org/sections/parallels/2016/05/10/477043520/methods-for-reforming-neo-nazis-help-fight-the-radicalization-of-muslims>.

¹⁵⁰ *Nigeria: EU Votes N20 Billion for Rehabilitation of Captured Boko Haram Members, Others*, ALLAFRICA (Apr. 12, 2016), <http://allafrica.com/stories/201604120972.html>.

¹⁵¹ See generally Mastroe & Szmania, *supra* note 8; see also Hughes, *supra* note 134.

¹⁵² See Hughes, *supra* note 134; see also Mastroe & Szmania, *supra* note 8, at 11.

¹⁵³ See AMI ANGELL & ROHAN GUNARATNA, *TERRORIST REHABILITATION: THE U.S. EXPERIENCE IN IRAQ* (2011). The United States also engaged in detention-based deradicalization efforts in Afghanistan. MADELINE MORRIS ET AL., DUKE U. INST. FOR HOMELAND SECURITY SOLUTIONS, *DERADICALIZATION: A REVIEW OF THE LITERATURE WITH COMPARISON TO FINDINGS IN THE LITERATURES ON DEGANING AND DEPROGRAMMING* (May 2010), https://sites.duke.edu/ihss/files/2011/12/Morris_Research_Brief_Final.pdf; FRANK CILLUFFO ET AL., *HOMELAND SECURITY POL’Y INST., GEO. WASH. U., DETAINEE RELEASE AND GLOBAL PUBLIC SAFETY* 3 (Jun. 6, 2014), <https://cchs.gwu.edu/sites/cchs.gwu.edu/files/downloads/Issue%20Brief%202022%20Detainee%20R%20release%20and%20Global%20Public%20Safety.pdf>.

violence toward more positive, law-abiding paths.¹⁵⁴ Programs may emphasize disengagement from violent groups and behavior, deradicalization from individually held extremist beliefs, or both.¹⁵⁵ Experts who emphasize disengagement point out that many people who hold extremist beliefs do not act violently, and for those who do engage in violence, other powerful motivators may exist apart from ideology.¹⁵⁶ Understanding individual motivators for engagement and disengagement from terrorism is crucial to recognizing the initiatives that are likely to reduce recidivism.¹⁵⁷ With these conceptual frameworks in mind, researchers should examine existing programs through a common lens, considering challenges such as: (1) the extent to which each initiative is limited to its own cultural, legal, and geopolitical context, and the extent to which it offers transferable insights; (2) the programs' metrics for success, and the rigor applied in implementing those metrics and collecting data; (3) who is interacting directly with participants, and the basis of their credibility with those participants; and (4) how the qualifications and reliability of program administrators, including former extremists, are assessed.

Saudi Arabia has garnered international attention for its well-funded and relatively long-running deradicalization initiative. Its program has reported success rates between eighty-seven and ninety percent,¹⁵⁸ but it has also suffered high profile failures.¹⁵⁹ Commencing in 2004 after a series of domestic terrorist

¹⁵⁴ See, e.g., Steven Weine & David Eisenman, *How Public Health Can Provide Initiatives to Counter Violent Extremism*, START CONSORTIUM (Apr. 5, 2016) (discussing “the kind of life saving help that public health can potentially provide for some persons on a path to violent extremism”).

¹⁵⁵ See, e.g., Horgan & Altier, *supra* note 143, at 88.

¹⁵⁶ See *id.*; but cf. ANNE SPECKHARD, SOCIAL SCIENCES SUPPORT TO MILITARY PERSONNEL ENGAGED IN COUNTER-INSURGENCY AND COUNTER-TERRORISM OPERATIONS: REPORT OF THE NATO RESEARCH AND TECHNOLOGY GROUP, PRISON AND COMMUNITY-BASED DISENGAGEMENT AND DE-RADICALIZATION PROGRAMS FOR EXTREMISTS INVOLVED IN MILITANT JIHADI TERRORISM IDEOLOGIES AND ACTIVITIES 11–1 (Laurie Fenstermacher & Anne Speckhard eds., Jan. 2011) (“[W]ithout an ideological shift de-radicalization does not occur and those who have disengaged from terrorism appear to just as easily re-engage.”).

¹⁵⁷ See Horgan & Altier, *supra* note 143.

¹⁵⁸ See, e.g., ASSOCIATED PRESS, *Saudi Arabia Sends Convicted Terrorists to a Cushy Rehab Center*, in N.Y. POST (June 24, 2015), <http://nypost.com/2015/06/24/saudi-arabia-sends-convicted-terrorists-to-a-cushy-rehab-center/> (reporting eighty-seven percent success); Taylor Luck, *Returning Jihadis*, CHRISTIAN SCIENCE MONITOR (May 17, 2015), <http://www.csmonitor.com/World/Middle-East/2015/0517/Returning-jihadis-At-luxurious-rehab-center-a-Saudi-cure-for-extremism> (reporting eighty-eight percent success); Benjamin Barthe, *Saudi Correctional Centre Claims Success with Former Jihadists*, THE GUARDIAN (Sept. 27, 2014), <http://www.theguardian.com/world/2014/sep/27/mohammed-bin-nayef-centre-rehabilitation-jihadists> (reporting ninety percent success).

¹⁵⁹ Moreover, limited data is available to support the reported recidivism rate, but it is apparently “based on anecdotal evidence of individual cases of re-engagement” rather than a systematic, long-term follow-up effort. See Horgan & Altier, *supra* note 143, at 85; see also BOUCEK, *supra* note 146, at 222 (Saudi officials reported a failure rate of 20 percent when including those detainees who refused to participate in the program along with those who did not pass, and officials “admit . . . that there could be more individuals who have been released through the program who have yet to be discovered reoffending.”).

attacks, the program initially took the form of in-prison counseling and religious “reeducation.” Early successes led to growth, and a plan was adopted to open five centers countrywide.¹⁶⁰ In Riyadh, the Mohammed bin Nayef Center for Advice, Counseling and Care has treated roughly 3,000 men since opening in 2007, including those released to Saudi custody from Guantanamo Bay.¹⁶¹ In-prison initiatives continue as well, tailored toward more than 5,000 inmates charged with terrorism offenses.¹⁶²

The Saudi program’s methodology is based upon a “presumption of benevolence” rather than vengeance or retribution.¹⁶³ The Riyadh center is structured as a “halfway house” between prison and release, where psychologists, sociologists, and imams provide participants with social services as well as religious counseling and instruction.¹⁶⁴ Clerics and respected Islamic scholars correct what they consider warped interpretations of Islam; the clerics’ religious status and that of Saudi Arabia more generally contribute to the perceived legitimacy of their messages in the eyes of some inmates.¹⁶⁵ Program officials have reported that the vast majority of participants did not receive a religious education during their childhoods.¹⁶⁶ In addition to marshaling the state’s own “considerable religious authority to confer legitimacy on the process,” the inclusion of a number of former militants on the program’s Advisory Committee “adds further legitimacy for some prisoners.”¹⁶⁷ Participants engage in recreational activities such as art therapy, sports, and video games, and may receive vocational training. Program administrators enlist support from participants’ families and extended social networks.¹⁶⁸ Among other requirements, successful completion of the program entails the graduate’s renunciation of violent extremist beliefs, as well as a similar renunciation from the head of the graduate’s family.¹⁶⁹ After release, graduates receive assistance

¹⁶⁰ See Ellen Knickmeyer, *Saudi Center Aims for “Life After Jihad,”* WALL ST. J. (Apr. 24, 2013), <http://blogs.wsj.com/middleeast/2013/04/24/saudi-rehab-center-aims-to-shape-life-after-jihad>; AFP, *Saudi Arabia Opens Luxury Rehab Center for Qaeda Terrorists*, YNET NEWS (Apr. 21, 2013), <http://www.ynetnews.com/articles/0,7340,L-4370252,00.html>.

¹⁶¹ Barthe, *supra* note 158; ASSOCIATED PRESS, *supra* note 158.

¹⁶² Ben Hubbard, *Inside Saudi Arabia’s Re-education Prison for Jihadists*, N.Y. TIMES (Apr. 9, 2016), <http://www.nytimes.com/2016/04/10/world/middleeast/inside-saudi-arabias-re-education-prison-for-jihadists.html?ref=world>.

¹⁶³ BOUCEK, *supra* note 146, at 215.

¹⁶⁴ See Andreas Casptack, *Deradicalization Programs in Saudi Arabia*, MIDDLE EAST INSTITUTE (June 10, 2015), <http://www.mei.edu/content/deradicalization-programs-saudi-arabia-case-study>; Susan Mohammad, *To Deprogram a Jihadist*, MACLEAN’S (Feb. 2, 2009), <http://www.macleans.ca/news/world/to-deprogram-a-jihadist/#more-1718>.

¹⁶⁵ See Casptack, *supra* note 164; Christopher Boucek, *Saudi Arabia’s “Soft” Counterterrorism Strategy*, CARNEGIE PAPERS (Sept. 2008), 15, http://carnegieendowment.org/files/cp97_boucek_saudi_final.pdf.

¹⁶⁶ See BOUCEK, *supra* note 146, at 215.

¹⁶⁷ See *id.* at 216.

¹⁶⁸ See *id.* at 212.

¹⁶⁹ See *id.* at 216; Mohammad, *supra* note 164.

reintegrating into society; this may include help with finding housing, employment, and even arranging a marriage.¹⁷⁰

The Saudi program has suffered significant setbacks including recidivism and an apparent failure to reach certain populations. Roughly 310¹⁷¹ to 390¹⁷² graduates have “relapsed” into extremism. In one infamous example, Said al-Shihri, who participated in and completed the program after his 2007 release from Guantanamo, subsequently became the deputy leader of Al Qaeda in the Arabian Peninsula. He played a direct role in the 2008 bombing of the American embassy in Sana’a, and reportedly was killed by a U.S. drone in 2012.¹⁷³ Some participants who came from American detention in Guantanamo or Iraq, and others considered especially dangerous, may refuse to cooperate, remaining “beyond the reach of any deradicalization program.”¹⁷⁴ Yet reports do not document differentiated approaches for hard core extremists with entrenched beliefs, and those who might be more reachable.

The religious reeducation component of the Saudi program would not be culturally viable in the United States or legally replicable under the First Amendment of the U.S. Constitution—most notably, the Establishment Clause.¹⁷⁵ In addition to its inconsistencies with U.S. cultural norms and laws, the Saudi program sparks contention on its merits. Critics argue that participants are indoctrinated with Salafist ideas “only slightly less extreme” than the radical ideologies they held before.¹⁷⁶ Relatedly, the Saudis are criticized for the radicalizing elements in their society and educational system that lead individuals

¹⁷⁰ Barthe, *supra* note 158; Christopher Boucek, *The Saudi Process of Repatriating and Reintegrating Guantanamo Returnees*, COMBATING TERRORISM CENTER AT WEST POINT (Dec. 15, 2007), <https://www.ctc.usma.edu/posts/the-saudi-process-of-repatriating-and-reintegrating-guantanamo-returnees>.

¹⁷¹ Luck, *supra* note 158.

¹⁷² ASSOCIATED PRESS, *supra* note 158.

¹⁷³ Bill Roggio, *AQAP Confirms Deputy Emir Killed in U.S. Drone Strike*, LONG WAR J. (July 17, 2013), http://www.longwarjournal.org/archives/2013/07/aqap_confirms_deputy.php. Other examples include Yousef al-Sulaiman, a Saudi program graduate who blew himself up in August 2015 inside a mosque used by the security forces, killing at least fifteen people; examples also include forty-four of the seventy-seven suspects in a deadly attack on a Shiite mosque in 2014. See Hubbard, *supra* note 162.

¹⁷⁴ See Casptack, *supra* note 164; see also, John Horgan & Kurt Braddock, *Rehabilitating the Terrorists?*, TERRORISM AND POLITICAL VIOLENCE, 22:267–91, 279 (Taylor and Francis Group, 2010) (preliminary study indicates higher rates of relapse and re-arrest among Guantanamo returnees); see also SPECKHARD, *supra* note 156, at 11.4.1 (indicating that when clerics from Saudi program were invited to speak with Saudi prisoners in Guantanamo and Iraq, their program was far less effective against “hard core” Al Qaeda prisoners).

¹⁷⁵ See Rascoff, *supra* note 50, at 129–30 (“[O]f particular concern is the manner in which counter-radicalization may contribute to the ‘establishment’ of . . . ‘Official Islam’: a government-sponsored account of ‘mainstream Islam’ offered by the state in place of radical doctrinal alternatives.”) (footnote omitted).

¹⁷⁶ See AFP, *supra* note 160 (quoting social scientist Khaled al-Dakheel); see also, Seifert, *supra* note 145 (noting that Wahhabism, the religious tradition followed by Saudi Arabia, is “arguably one of the most extreme versions” of Islam).

to turn toward extremism in the first place.¹⁷⁷ Nonetheless, other elements of the Saudi program such as enlisting family support, post-release reintegration, and robust follow-up efforts, warrant further evaluation.

In Europe, disengagement and deradicalization programs were launched in the 1990s to help individuals transition out of violent, far right-wing and neo-Nazi groups. Tore Bjorgo and colleagues compiled an illuminating comparison of these Exit programs in Norway, Sweden, and Germany.¹⁷⁸ Dr. Bjorgo, a professor of Police Science at the Norwegian Police University College, had initiated the Norwegian Exit project together with preventive police officers, and in close collaboration with a group of affected parents and youth. The program developed methods and strategies, and trained practitioners, rather than working individually with affected youth. Researchers found the Norwegian approach successful in integrating with ongoing activities of public agencies, so that when the allotted three years concluded, police and municipalities were equipped to continue the efforts independently.¹⁷⁹ Exit-Norway also demonstrated that parental network groups proved highly effective in countering extremism by facilitating information sharing among affected families.¹⁸⁰ In Exit-Sweden, the first program head and many staff members were former members of the Neo-Nazi or White Power movements. Shared backgrounds imbued staff with legitimacy in the eyes of participants, and made it easier to establish contact with individuals considering disengagement.¹⁸¹ Germany has struggled extensively with extreme right-wing groups, and developed an array of related programs. Co-founded by a former criminologist and a former neo-Nazi leader, EXIT-Germany is an NGO reporting a recidivism rate of approximately three percent since its founding in 2000.¹⁸²

In their holistic approaches and enlistment of family members, the European strategies exhibit similarities with the Saudi program. The programs in Norway, Sweden, and Germany holistically address “the general life situation of the clients, rather than giving priority to changing racist and extremist attitudes,” and involve family members in their efforts.¹⁸³ For example, Exit-Sweden provides hands-on support for those seeking to separate from an extremist group

¹⁷⁷ See ASSOCIATED PRESS, *supra* note 158 (quoting John Horgan and Mohammed al-Nimr).

¹⁷⁸ Tore Bjorgo, Jaap van Donselaar & Sara Grunenberg, *Exit from Right-Wing Extremist Groups*, in LEAVING TERRORISM BEHIND 135, 138 (Tore Bjorgo and John Horgan, eds., Routledge 2008).

¹⁷⁹ See *id.* at 136.

¹⁸⁰ See *id.* Participants in these groups included parents of teenage children in racist or other violent groups, who collaborated with other parents in similar situations.

¹⁸¹ See *id.* at 151. An American organization, Life After Hate, fosters relationships in which former members of far right-wing extremist groups work with individuals seeking disengagement. While the U.S. has not yet delved deeply into intervention and rehabilitation, its efforts in counter-messaging have endured criticism for the absence of credible messengers whose voices resonate with the target audience.

¹⁸² See EXIT-DEUTSCHLAND, <http://www.exit-deutschland.de/english> (last visited Dec. 6, 2016); see also Mastroe & Szmania, *supra* note 8, at Appendix I, 17 (program claims to have supported 280 individuals including eight who returned to extremism).

¹⁸³ Bjorgo, Donselaar & Grunenberg, *supra* note 178, at 150.

“by cooperating with various housing corporations, the police, social services, legal system and also with the client’s own family and friends.”¹⁸⁴ Analyses of these programs should evaluate critically, however, whether sufficient controls are in place to address any irregularities, including misdeeds or recidivism by former extremists who assume active roles in the programs.¹⁸⁵ The programs’ metrics for success and data collection methods also warrant analysis, particularly in light of high success rates such as the three percent recidivism reported by EXIT-Germany.¹⁸⁶

More recently, additional European programming has developed for individuals who have headed down pathways toward violent Islamist extremism.¹⁸⁷ For example, Germany’s Federal Office for Migration and Refugees established a national hotline for radicalization counseling. The hotline accepts calls and directs them to non-governmental partners. One non-governmental partner, Hayat, has received international attention for its work counseling individuals on a path toward Jihadist-inspired violent extremism, but focuses especially on the personal networks of such individuals.¹⁸⁸ Daniel Koehler, who participated in Hayat’s work and founded the German Institute on Radicalization and De-Radicalization Studies (GIRDS), draws parallels between extreme Islamists and the extreme right wing.¹⁸⁹ Similarly, the U.K.’s Channel program targets all forms of violent extremism, including far right extremism.¹⁹⁰ Individuals considered at risk for radicalization are assessed, and some are

¹⁸⁴ EXIT FRYSHUSET, <http://exit.fryshuset.se/english> (last visited Dec. 6, 2016).

¹⁸⁵ For example, Anders Högström, who founded the Swedish, neo-Nazi movement known as the National Socialist Front, ostensibly renounced extremism and took on a “major role” in Exit Motala in Sweden. See Cecilia Englund, *Exit Motala – Case Study*, EXPO FOUNDATION, 11 (Stockholm, Dec. 2002), http://expo.se/www/download/exit_motala_case_study_sweden.pdf. Yet Högström later was implicated in the theft of the infamous “Arbeit Macht Frei” sign from above the Auschwitz concentration camp gate. See WORLD JEWISH CONG., *Former Swedish Neo-Nazi Confirms Involvement in Auschwitz Sign Robbery* (Jan. 8, 2010), <http://www.worldjewishcongress.org/en/news/former-swedish-neo-nazi-confirms-involvement-in-auschwitz-sign-robbery?printable=true>.

¹⁸⁶ See Mastroe & Szmania, *supra* note 8, at 11–14.

¹⁸⁷ See *id.* at 11.

¹⁸⁸ See HAYAT-GERMANY, <http://hayat-deutschland.de/english> (last visited Dec. 6, 2016); Ruth Bender, *After an Attack, Germans Question Efforts to Dissuade Young Islamists*, WALL ST. J. (Jun. 30, 2016), [¹⁸⁹ See NAT’L PUB. RADIO, *supra* note 49; see also Temple-Raston, *supra* note 149 \(quoting Julia Berczyk and Quintan Wiktorowicz\).](http://www.wsj.com/article_email/after-an-attack-germans-question-efforts-to-dissuade-young-islamists-1467311059-lMyQjAxMTI2NzAwMTgwMTEzWj; Klaus Jansen, German Program Triggers International Deradicalization Network, DW (Mar. 9, 2014), http://www.dw.com/en/german-program-triggers-international-deradicalization-network/a-17898077; Daniel Koehler, De-radicalization and Disengagement Programs as Counter-Terrorism and Prevention Tools, in COUNTERING RADICALISATION AND VIOLENT EXTREMISM (Marco Lombardi et al., eds., 2015).</p>
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¹⁹⁰ See, e.g., Josh Halliday, *Almost 4,000 People Referred to UK Deradicalisation Scheme Last Year*, THE GUARDIAN (Mar. 20, 2016), <http://www.theguardian.com/uk-news/2016/mar/20/almost-4000-people-were-referred-to-uk-deradicalisation-scheme-channel-last-year>; Advice Centre website, WEST MIDLANDS POLICE, <http://www.west-midlands.police.uk/advice-centre/help-and-advice/radicalisation/index.aspx>.

required to attend deradicalization sessions. In 2015, the program received referrals for nearly 4,000 people.¹⁹¹ For the West Midlands region, where the highest number of referrals reportedly originated,¹⁹² 293 out of 788 individuals referred that year were Muslims, and 354 of the 788 referrals were made by a school or educational establishment.¹⁹³

The British practice of referring young children for deradicalization has proven controversial and damaging to public perceptions of the Channel program, which received criticism for referring 415 children age ten and under in the last four years.¹⁹⁴ Monitoring students for signs of extremism falls outside the traditional role of educators, may impede open discussion in the classroom, and referrals are often perceived as stigmatizing and discriminatory.¹⁹⁵ These concerns have been exacerbated by high profile instances of mistaken and unwarranted referrals based upon misinterpretations of children's innocent statements.¹⁹⁶ Other weaknesses in European programs also warrant analysis, including concerns about effectiveness. In one egregious failure, a 16-year old participant in the German counter radicalization program, Wegweiser, was implicated in the bombing of a Sikh temple in Essen, in which three people were injured.¹⁹⁷ Program analyses must account for such weaknesses, including: perceived discrimination and infringement upon speech rights, both of which also diminish community support; acts of violence committed concurrently with the perpetrator's enrollment in an

¹⁹¹ NAT'L POLICE CHIEFS' COUNCIL (NPCC) (UK), publication in response to Freedom of Information Request (Mar. 7, 2016), <http://www.npcc.police.uk/Publication/NPCC%20FOI/CT/02616ChannelReferrals.pdf>; Halliday, *supra* note 190.

¹⁹² See Ben Hurst & Mike Lockley, *400 Children in West Midlands Sent to De-Radicalisation Programme*, BIRMINGHAM MAIL (Jan. 21, 2016), <http://www.birminghammail.co.uk/news/midlands-news/400-children-west-midlands-sent-10771443>.

¹⁹³ See *id.*; NPCC, *supra* note 191 (Religion was not a mandatory field and not always completed, but Muslims represented the highest number of those with recorded religions, followed by 177 for "not known," 41 recorded as Christian, eight as Sikh, one Hindu, and one Jewish).

¹⁹⁴ Sima Kotecha, *More than 400 Children Under 10 Referred for "Deradicalisation,"* BBC NEWS (Jan. 21, 2016), <http://www.bbc.com/news/uk-35360375>.

¹⁹⁵ See *id.*; Andy Burnham, *Andy Burnham Calls for 'Toxic' Prevent Strategy to be Scrapped*, THE GUARDIAN (Jun. 9, 2016), <https://www.theguardian.com/politics/2016/jun/09/andy-burnham-calls-for-toxic-prevent-strategy-to-be-scrapped>.

¹⁹⁶ See Hurst & Lockley, *supra* note 192. In other cases, according to teachers' unions, referrals were based upon indications that some young children had watched beheading videos with relatives.

¹⁹⁷ See Bender, *supra* note 188; Derek Welch, *Teenage Boys Arrested for Sikh Temple Bombing in Germany*, WORLD RELIGION NEWS (Apr. 30, 2016), <http://www.worldreligionnews.com/religion-news/islam/teenage-boys-arrested-for-sikh-temple-bombing-in-germany>; Chris Tomlinson, *Sikh Temple Bomber Was Part of Anti-Radicalisation Program*, BREITBART (Apr. 29, 2016), <http://www.breitbart.com/london/2016/04/29/sikh-temple-bomber-was-part-of-anti-radicalisation-program/>. *Wegweiser* translates as "Signpost," and is a government-sponsored program to prevent violent Islamist extremism. See Tomlinson, *supra*; Simon Shuster, *How Germany Has Resisted the Influence of ISIS*, TIME (Apr. 12, 2016), <http://time.com/4289016/germany-isis-brussels-islam-muslims-signpost>; WEGWEISER, <http://www.mik.nrw.de/verfassungsschutz/islamismus/wegweiser.html>.

intervention or rehabilitation program; and incidences of recidivism by individuals who have completed programs.¹⁹⁸ Researchers have proposed several frameworks that may be appropriate for evaluating effectiveness; evaluations should incorporate measures to account for causality (i.e., whether the program or another factor is responsible for the change in a participant's attitude or behavior).¹⁹⁹

3. Programmatic Themes: Gang Violence Prevention in the United States

In addition to international frameworks for disengagement and deradicalization, domestic approaches to preventing gang violence provide potential models from which to adapt CVE programs.²⁰⁰ Despite significant differences between gang violence and extremist violence, notably the lack of a political ideology to accompany the former,²⁰¹ scholars have observed striking similarities in individual motivations for entry and exit.²⁰² As in the case of terrorist radicalization, root causes of gang involvement have been attributed to “push” and “pull” factors,²⁰³ also called risk factors and attractions.²⁰⁴ Affiliative factors such as personal relationships, social networks, and a sense of community or belonging, play a significant role in individual decisions about participation in both terrorist organizations and gangs.²⁰⁵

Since the 1980s, the DOJ's Office of Juvenile Justice and Delinquency Prevention has developed, funded, and evaluated community-based anti-gang

¹⁹⁸ See, e.g., Joanna Pliner, *A Comparative Look at European and American Approaches to Counter Radicalization toward Violence*, in UNDERSTANDING DERADICALIZATION: PATHWAYS TO ENHANCE TRANSATLANTIC COMMON PERCEPTIONS AND PRACTICES, MIDDLE EAST INSTITUTE (Jun. 10, 2015), <http://www.mei.edu/sites/default/files/Pliner.pdf> (arguing that programs must not infringe upon individual rights, both for legal and cultural reasons, and also because doing so can prove counterproductive to program goals).

¹⁹⁹ See Mastroe & Szmania, *supra* note 8, at 13.

²⁰⁰ See STERN, *supra* note 39, at 11–12; JEROME P. BJELOPERA, CONG. RESEARCH SERV., R42553: COUNTERING VIOLENT EXTREMISM IN THE UNITED STATES 25 (Feb. 19, 2014), <https://www.fas.org/sgp/crs/homsec/R42553.pdf>; Pliner, *supra* note 199.

²⁰¹ See Peter Neumann, *Preventing Violent Radicalization in America*, NATIONAL SECURITY PREPAREDNESS GROUP, BIPARTISAN POL'Y CT.R 42 (Jun. 2011), <http://bipartisanpolicy.org/wp-content/uploads/sites/default/files/NSPG.pdf>.

²⁰² See, e.g., *If ISIS Falls, Where Will Its Fights Flee*, PBS NEWSHOUR (Oct. 13, 2016), <http://www.pbs.org/newshour/bb/isis-falls-will-fighters-flee> (comments of Peter Neumann) (“ISIS offers in many ways what gangs are offering, a strong sense of identity, power, a sense of strength . . .”).

²⁰³ See Michelle Arciaga Young & Victor Gonzalez, *National Gang Center Bulletin*, U.S. DEP'T OF JUSTICE (Jan. 2013), <https://www.nationalgangcenter.gov/Content/Documents/Getting-Out-Staying-Out.pdf>; SCOTT H. DECKER & BARRIK VAN WINKLE, *LIFE IN THE GANG: FAMILY, FRIENDS, AND VIOLENCE* (1996).

²⁰⁴ See James C. Howell, *Gang Prevention: An Overview of Research and Programs*, *Juvenile Justice Bulletin*, U.S. DEP'T OF JUSTICE (Dec. 2010), <https://www.ncjrs.gov/pdffiles1/ojdp/231116.pdf>; DECKER & VAN WINKLE, *supra* note 203; MORRIS, *supra* note 153, at 2 (noting significant consistency in motivations for entry and exit across terrorist organizations, gangs, and cults).

²⁰⁵ See MORRIS, *supra* note 153, at 2–3, 6–7.

programs that coordinate prevention, intervention, enforcement, and reentry strategies.²⁰⁶ The City of Los Angeles adopted a Gang Reduction Strategy in 2007 that may offer model components for a CVE framework.²⁰⁷ The comprehensive gang reduction strategy consists of prevention, intervention, re-entry, and suppression components.²⁰⁸ Like many disengagement and deradicalization initiatives to counter violent extremism, the Los Angeles gang reduction strategy relies upon former group members to bring credibility to its violence prevention efforts.²⁰⁹

New York State has historically emphasized evidence-based interventions in combating violence committed by youth.²¹⁰ A report by the Justice Policy Institute, contrasting approaches by different cities, described New York City's soft-power approach as follows:

One city that never embraced the heavy-handed suppression tactics chosen elsewhere has experienced far less gang violence. In New York City, a variety of street work and gang intervention programs were fielded decades ago during a period when gang violence was on the rise. These strategies were solidly grounded in principles of effective social work practices that fall outside the realm of law enforcement, and they seem to have helped dissuade city policy makers and police officials from embracing most of the counterproductive gang suppression tactics adopted elsewhere.²¹¹

The report details socially-based methods of preventing gang violence in New York dating back to the 1950s.²¹²

The literature comparing programs for disengagement and deradicalization from violent extremism with initiatives to counter gang violence is not extensive but suggests parallels in motivations for exit and entry.²¹³ Domestic gang

²⁰⁶ See *Comprehensive Anti-Gang Initiative*, U.S. DEP'T OF JUSTICE, <http://www.ojjdp.gov/programs/antigang> (last visited Dec. 6, 2016).

²⁰⁷ See Neumann, *supra* note 201, at 42.

²⁰⁸ See *id.*

²⁰⁹ See *id.* The organization Cure Violence offers another interesting model, employing a mix of prevention and intervention strategies to reduce violence using a public health approach. See Shannon Green, *supra* note 135.

²¹⁰ George E. Pataki, *Youth Violence Reduction Strategy*, N. Y. STATE DIV. OF CRIM. JUSTICE SERV. 9 (Mar. 2004) (noting evidence-based interventions may not always be effective when replicated in new locations or for new populations, but the odds of success are increased by using previously successful models), <http://www.criminaljustice.ny.gov/osp/downloads/guidingprinciplesfinalcombined2feb04.pdf>.

²¹¹ See Judith Greene & Kevin Pranis, *Gang Wars*, JUST. POL'Y INST. 6 (July 2007), http://www.justicepolicy.org/uploads/justicepolicy/documents/07-07_rep_gangwars_gc-ps-ac-jj.pdf; see also Tom Jackman, *Social Programs to Combat Gangs Seen as More Effective Than Police*, WASH. POST (July 18, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/17/AR2007071701716.html>.

²¹² See Greene & Pranis, *supra* note 211, at 15.

²¹³ See Pliner, *supra* note 198.

prevention programs provide complementary insights to those derived from international deradicalization programs, because the gang prevention programs incorporate American cultural, political, and legal norms into the fabric of their operation.

4. Data Needed for Off-Ramp Programming in the United States

While terrorism and the fear it evokes trigger demands for immediate solutions, the gravity and durability of the threat militate toward data-driven approaches. A methodology should be developed to account for past successes and failures of intervention and rehabilitation programs globally, while incorporating the priorities and constraints of U.S. laws and culture. The foregoing overview suggests that policymakers should consider the following questions in shaping initiatives for intervention and rehabilitation:

- How can initial evaluations or assessments help identify appropriate candidates for disengagement and deradicalization programs?
- What levels of funding are required for success?
- What is the ideal role for government vis-à-vis grassroots groups and NGOs in designing and administering programs?
- Should programs be housed within correctional settings, independently, or both?
- To what extent should programs respond to specific ideologies and values, religious or otherwise?
- In what ways, if at all, should programs enlist involvement from participants' personal support networks, such as family and friends?
- To what extent does messenger credibility affect success, and how can or should programs maximize the credibility of those who interact with participants?
- To what extent are strong follow-up efforts, including reintegration initiatives, critical to success?
- What are the optimal metrics for success?

Rigorous study of international and domestic precedents can offer guiding principles for an evidence-based approach to disengagement and deradicalization in the context of domestic material support cases.

B. *Opportunities for Disengagement and Deradicalization in Domestic Material Support Cases*

Material support cases provide an important, although non-exclusive, context in which to explore potential initiatives for intervention and rehabilitation. Considerations supporting alternative approaches in the material support context include: the volume of cases and investigations; the youth of many offenders; the attenuated nature of some material support crimes; the need to prevent future attacks, particularly by supporters of violent extremism already known to

authorities; and the long-term value of building community trust in partnerships with law enforcement.

The volume of ISIS prosecutions proceeding through the courts, and material support charges filed, have increased in tandem since 2014.²¹⁴ FBI Director James Comey has described a heightened terrorism threat and law enforcement response as “the new normal.”²¹⁵ By February 2015, investigations were ongoing in all fifty states into homegrown violent extremists at various stages of radicalizing.²¹⁶ In October 2015, Director Comey estimated that the FBI was conducting 900 active investigations into homegrown violent extremists, with the majority believed to be ISIS-related.²¹⁷ By May 2016, Comey reported over 1,000 active investigations, describing about 80 percent as ISIS-related.²¹⁸ Federal prosecutors had filed ISIS-related charges against 94 men and women around the country as of June 30, 2016, with 80 percent of the subjects indicted on material support charges.²¹⁹

One subset of ISIS supporters eligible for material support prosecutions are those who seek to physically join the group in Syria or Iraq. By October 2015, roughly 250 Americans had traveled or attempted to travel to the conflict zone to participate in the conflict.²²⁰ Upon return, each of those individuals who sought to support a foreign terrorist organization would be subject to prosecution under 18 U.S.C. § 2339. The rate of foreign fighters traveling to fight alongside ISIS, both

²¹⁴ While the total number of ISIS-related cases in the United States increased to 101 as of June 30, 2016, the rate of ISIS-related charges filed in federal court appears to have slowed from a peak in 2015, according to a report by CNS. *See Case by Case: ISIS Prosecutions in the United States*, CTR. ON NAT'L SECURITY AT FORDHAM LAW 2 (July 2016), <https://static1.squarespace.com/static/55dc76f7e4b013c872183fea/t/577c5b43197aea832bd486c0/1467767622315/ISIS+Report+-+Case+by+Case+-+July2016.pdf>.

²¹⁵ *See* Julia Edwards & Mark Hosenball, *FBI Says it Thwarted Islamic State-Inspired July 4 Attacks*, REUTERS (July 9, 2015), <http://www.reuters.com/article/us-usa-security-fourth-idUSKCN0PJ2AU20150709>; Tina Susman, *Islamic State Presence in the U.S. is “the New Normal,” FBI Director Says*, L.A. TIMES (Nov. 19, 2015), <http://www.latimes.com/nation/la-na-isis-us-20151120-story.html>.

²¹⁶ *Comey: Extremists Exist in All 50 States*, WASH. POST (Feb. 25, 2015), https://www.washingtonpost.com/posttv/world/national-security/comey-extremists-exist-in-all-50-states/2015/02/25/8bb6a716-bcfd-11e4-9dfb-03366e719af8_video.html.

²¹⁷ *See* Susman, *supra* note 215; VIDINO & HUGHES, *supra* note 42, at ix.

²¹⁸ *Director Comey Remarks During May 11 ‘Pen and Pad’ Briefing with Reporters*, FBI NAT'L PRESS OFFICE (May 11, 2016), <https://www.fbi.gov/news/pressrel/press-releases/director-comey-remarks-during-may-11-pen-and-pad-with-reporters> (stating rate of American recruits traveling to fight with ISIS has declined from about six to ten per month, to one per month, since August 2015).

²¹⁹ *See* CTR. ON NAT'L SECURITY AT FORDHAM LAW, *supra* note 214, at 2 (indicating that although there were 101 ISIS-related cases in total, no charges were filed in seven cases because the suspects were killed by law enforcement).

²²⁰ *See* James B. Comey, *Statement Before the Senate Committee on Homeland Security and Governmental Affairs* (Oct. 8, 2015), <https://www.fbi.gov/news/testimony/threats-to-the-homeland>; *see also* *Final Report of the Task Force on Combating Terrorist and Foreign Fighter Travel*, HOUSE OF REPRESENTATIVES, HOMELAND SECURITY COMMITTEE 6 (Sept. 2015).

from the U.S. and internationally, has declined significantly in recent months.²²¹ Recent statistics indicate that about one American per month travels to join ISIS or attempts to do so.²²² Although the rate of Americans traveling to the conflict zone has slowed, online recruitment and the potential for domestic attacks continue to pose threats. Director Comey stated in May 2016:

Their ability to motivate troubled souls, to inspire them, remains a persistent presence in the United States. We have north of a thousand cases where we're trying to evaluate where somebody is on the spectrum of consuming to acting. That number continues to tick up slowly . . . We have not seen the diminution that we see in the traveler world, in the radicalizing online world.²²³

As ongoing prosecutions work their way through the U.S. court system, new material support cases continue to emerge. In this context, and with far right-wing and other forms of violent extremism continuing to pose threats as well, the need for disengagement and deradicalization initiatives for those headed down a path toward violence has assumed heightened urgency.

1. Intervention in the Pre-Conviction Context

Prosecutions in every material support investigation are neither practical nor preferable as a long-term counterterrorism strategy.²²⁴ While aggressive prosecutions are undoubtedly warranted in some instances, long-term security and societal benefits may be attained more effectively through intervention in others, particularly in cases where mitigating circumstances exist.²²⁵ In the light of the over 1,000 active investigations into potentially violent extremists, there are presumably many unreported instances in which law enforcement opts not to pursue material support charges. The alternative of long-term surveillance in every case strains FBI resources.²²⁶ If a network of specialized programs for

²²¹ See CTR. ON NAT'L SECURITY AT FORDHAM LAW, *supra* note 214, at 4; Paul Sonne, *Flow of Fighters to Iraq, Syria to Join Islamic State Has Slowed, U.S. Says*, WALL ST. J. (Apr. 26, 2016), <http://www.wsj.com/articles/flow-of-fighters-to-iraq-syria-to-join-islamic-state-has-slowed-u-s-says-1461701387> (citing information from Air Force Maj. Gen. Peter Gersten that the rate of foreign fighters traveling to join ISIS slowed from around 2,000 per month to 200 per month); FBI NAT'L PRESS OFFICE, *supra* note 218 (responding to Speaker 23); see also Michael Isikoff, *Steep Decline in U.S. Recruits to ISIS, FBI Chief James Comey Says*, YAHOO NEWS (May 11, 2016), <https://www.yahoo.com/news/steep-decline-in-us-recruits-to-isis-fbi-chief-212138680.html>.

²²² See Isikoff, *supra* note 221.

²²³ FBI NAT'L PRESS OFFICE, *supra* note 218.

²²⁴ See Hughes, *supra* note 107.

²²⁵ See Dina Temple-Raston, *Parents Speak Out, Say FBI Arrest Saved Son on Verge of Joining ISIS*, NAT'L PUB. RADIO (Sept. 28, 2016), <http://www.npr.org/sections/parallels/2016/09/28/495804670/parents-speak-out-say-fbi-arrest-saved-son-on-verge-of-joining-isis?live=1> (quoting Lisa Monaco, Assistant to the President for Homeland Security and Counterterrorism).

²²⁶ See Apuzzo, *supra* note 10; Devlin Barrett, *FBI to Seek Counseling, Not Handcuffs, for Some Islamic State Suspects*, WALL ST. J. (Aug. 5, 2015), <http://www.wsj.com/articles/fbi-to-use-counseling-not-handcuffs-for-some-islamic-state-suspects-1438812264>; Bender, *supra* note 188

deradicalization and disengagement existed, and law enforcement could make official referrals while continuing to follow the case, authorities would have one more tool at their disposal when confronted with a borderline situation. Participation in such programs need not exclude prosecution, but could be offered as part of a non-prosecution agreement, deferred prosecution agreement, or plea agreement.²²⁷

The DOJ and DHS, as well as the FBI, appear to recognize the need for intervention approaches.²²⁸ But so far, the federal government has provided neither clarity on what shape these initiatives would take, nor transparency about its process in developing them. For example, the DOJ has considered off-ramp programs through its Alternative Dispositions Working Group, but there is a lack of available public information concerning the basic functions, composition, and mandate of this group.²²⁹ The CVE Task Force hosted by DHS identifies “multidisciplinary intervention programs” as one area for federal efforts.²³⁰ DHS also has acknowledged the importance of intervention approaches through its Office of Community Partnerships, by announcing a grant opportunity open to non-profit organizations allocating two million dollars for projects focused on managing intervention activities.²³¹

The FBI’s intervention initiative reportedly contemplated and piloted the creation of Shared Responsibility Committees (SRCs), conceptualized as voluntary, local, interdisciplinary committees to which law enforcement may refer potential violent extremists for intervention.²³² Committee members include individuals such as mental health professionals, social workers, religious and

(quoting Lorenzo Vidino: “Police can’t monitor them all so even if a program is successful in only 30% of the cases, it’s still better.”).

²²⁷ This would be a departure from current approaches to deferred prosecution agreements, which have been offered “relatively sparingly to individuals” of late. Judge Emmet Sullivan recently expressed disappointment that deferred prosecution agreements are not being used to provide opportunities to individual defendants “to demonstrate their rehabilitation without triggering the devastating collateral consequences of a criminal conviction.” See *United States v. Saena Tech Corp.*, 140 F. Supp. 3d 11, 42 (D.D.C. 2015).

²²⁸ See *CTR. ON NAT’L SECURITY AT FORDHAM LAW*, *supra* note 214, at 4 (observing a small but discernible trend towards intervention, diversion, and rehabilitation).

²²⁹ See *Event Overview, Countering Violent Extremism Through Early Interventions*, GEO. WASH. U. CTR. FOR CYBER & HOMELAND SECURITY, <https://cchs.gwu.edu/countering-violent-extremism-through-early-interventions>; Eric Rosand, *Taking the Off-Ramp: A Path to Preventing Terrorism*, WAR ON THE ROCKS (July 1, 2016), <http://warontherocks.com/2016/07/taking-the-off-ramp-a-path-to-preventing-terrorism>.

²³⁰ See *Countering Violent Extremism Task Force*, DEP’T OF HOMELAND SECURITY (Jan. 8, 2016), <https://www.dhs.gov/news/2016/01/08/countering-violent-extremism-task-force>.

²³¹ See *FY 2016 Countering Violent Extremism (CVE) Grant Program*, DEP’T OF HOMELAND SECURITY (Aug. 15, 2016), <https://www.dhs.gov/cvegrants>.

²³² Cora Currier & Mutaza Hussain, *Letter Details FBI Plan for Secretive Anti-Radicalization Committees*, THE INTERCEPT (Apr. 28, 2016), <https://theintercept.com/2016/04/28/letter-details-fbi-plan-for-secretive-anti-radicalization-committees/>; Letter to David Medine from Congressman Bennie Thompson, Apr. 29, 2016, <https://democrats-homeland.house.gov/sites/democrats.house.gov/files/sitedocuments/pclobletter.pdf>.

community leaders, educators, and others.²³³ It is difficult to evaluate the potential of these committees, because the federal government itself has released little information about them.²³⁴ While the FBI has not disclosed an official intervention program for terrorism investigations, academic and media reports indicate that law enforcement has embraced intervention on an ad hoc basis.²³⁵ The *New York Times* reported in April 2016:

The F.B.I. has quietly and slowly embraced the notion of interventions. In a few cities, agents work with parents, mental health experts, community leaders and sometimes religious figures to help minors or mentally ill people who agents believe have the intent, but not the capability, to hurt people . . . Law enforcement officials said they have offered interventions to only about a dozen people, and they acknowledge that it is too soon to say whether they work.²³⁶

More generally, CNS reported in 2015 that the FBI has tried “to follow a pattern of intervention rather than arrest” for some youthful foreign fighter aspirants.²³⁷ Further, the *Wall Street Journal* reported in August 2015 that the FBI is embarking on an intervention-oriented approach toward some terrorism suspects, which involves “putting them in counseling rather than handcuffs.”²³⁸ The updated October 2016 SIP most recently recognized that law enforcement personnel need “response options” when an individual is brought to their attention as at risk of being drawn into violent extremism, but they conclude the individual does not pose an immediate threat of violence.²³⁹ The federal government is looking to communities to lead multidisciplinary, local intervention teams in these situations.²⁴⁰

²³³ See *id.*; Michael Hirsh, *Inside the FBI’s Secret Muslim Network*, POLITICO MAG. (Mar. 24, 2016), <http://www.politico.com/magazine/story/2016/03/fbi-muslim-outreach-terrorism-213765>.

²³⁴ See Arjun Singh Sethi, *The FBI Needs to Stop Spying on Muslim Americans*, POLITICO MAG. (Mar. 29, 2016), <http://www.politico.com/magazine/story/2016/03/muslim-american-surveillance-fbi-spying-213773>; Julian Hattem, *Key Dem Wants Watchdog to Probe Little-Known FBI Program*, THE HILL (Apr. 29, 2016), <http://thehill.com/policy/national-security/278223-key-dem-wants-watchdog-to-probe-fbi>.

²³⁵ See, e.g., *Written Testimony of Seamus Hughes Before the U.S. House of Representatives Committee on Homeland Security* 4 (July 15, 2015), <http://docs.house.gov/meetings/HM/HM00/20150715/103739/HHRG-114-HM00-Wstate-HughesS-20150715.pdf> (“[T]argeted interventions so far have been deployed at the whim of local authorities, rather than via an articulated and tested methodology.”).

²³⁶ Apuzzo, *supra* note 10. The estimate that interventions had been offered to roughly a dozen people by April 2016 appears to be the most specific figure available.

²³⁷ *By the Numbers: ISIS Cases in the United States*, CTR. ON NAT’L SECURITY AT FORDHAM LAW 2 (June 25, 2015), <http://static1.squarespace.com/static/55dc76f7e4b013c872183fea/t/56b3aae8f8baf3bfd460ecb5/1454615277175/ISIS+Cases+in+the+U.S.+June+2015.pdf>.

²³⁸ Barrett, *supra* note 226.

²³⁹ See 2016 SIP, *supra* note 57, at 3.

²⁴⁰ See *id.* at 11.

One circumstance militating in favor of intervention approaches in appropriate circumstances is the youth of many individuals suspected of material support crimes in ISIS-related investigations. Suspects and offenders include minors, with an average age of twenty-six for all individuals indicted for ISIS-related crimes, and a most frequently occurring age of twenty among these individuals.²⁴¹ New America has similarly reported, in connection with Syria-related violence, that the average age of American militants is twenty-five, with one-fifth still in their teens.²⁴² Prosecuting very young defendants entails several drawbacks. Traditionally, responses to juvenile crime have focused more on rehabilitation and less on punishment than in the adult realm.²⁴³ Vulnerable youth recruited by terrorist organizations are often targeted with methods “similar to those employed by sexual predators: gaining trust and establishing rapport, fulfilling emotional needs, and then isolating a victim from family and friends.”²⁴⁴ And the “federal justice system is poorly equipped to prosecute minors.”²⁴⁵ As one law enforcement official aptly stated, “[n]obody wants to see a 15-year-old kid go to jail if they don’t have to.”²⁴⁶

Aggressive prosecutions of young offenders, particularly for non-violent offenses, are also likely to trigger a backlash toward law enforcement officials, who rely upon the partnership of communities to root out extremism.²⁴⁷ In one pending case, Sal Shafi alerted authorities that his twenty-one-year-old son, Adam Shafi, may have been recruited and had been following extremist imams online. The elder Mr. Shafi initially cooperated with an FBI investigation, but felt that his son needed counseling and hoped for an intervention. Instead, Adam Shafi was charged with attempting to provide material support to al-Nusra Front and faces a prison sentence of up to twenty years.²⁴⁸ Adam is apparently awaiting trial in administrative segregation.²⁴⁹ His father’s current message to parents who face similar situations is not to even consider involving the authorities.²⁵⁰

²⁴¹ See CTR. ON NAT’L SECURITY AT FORDHAM LAW, *supra* note 214, at 3, 10.

²⁴² Peter Bergen, Courtney Schuster & David Sterman, *ISIS in the West: The New Faces of Extremism*, NEW AMERICA 3 (Nov. 8, 2015), <https://static.newamerica.org/attachments/11813-isis-in-the-west-2/ISP-ISIS-In-The-West-Final-Nov-16-Final.66241afa9ddd4ea2be7afba9ec0a69e0.pdf>.

²⁴³ See Malcolm C. Young & Jenni Gainsborough, *Prosecuting Juveniles in Adult Court: An Assessment of Trends and Consequences*, THE SENTENCING PROJECT (Jan. 2, 2000), <http://www.prisonpolicy.org/scans/sp/juvenile.pdf>.

²⁴⁴ Mia Bloom & John Horgan, *The Rise of the Child Terrorist: The Young Faces at the Frontlines*, FOREIGN AFFAIRS (Feb. 9, 2015), <https://www.foreignaffairs.com/articles/middle-east/2015-02-09/rise-child-terrorist>.

²⁴⁵ Barrett, *supra* note 226.

²⁴⁶ *Id.*

²⁴⁷ See Hughes, *supra* note 107.

²⁴⁸ See generally Criminal Complaint, United States v. Shafi, Case No. 3-15-70856 (N.D. Cal. July 6, 2015), <https://www.justice.gov/usao-ndca/file/800816/download>; Apuzzo, *supra* note 10.

²⁴⁹ Defense counsel referred to Mr. Shafi’s conditions as solitary confinement. He is to be held separately, “to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal.” See United States v. Shafi, No. CR 15-0582 (N.D. Cal. Jan 5, 2016)

Two cases involving young women and girls in Colorado further exemplify the complex issues confronting law enforcement and communities when youth are suspected of supporting violent extremism. In the first case, Shannon Conley, a nineteen-year-old from Colorado, was arrested at a Denver Airport in April 2014 while attempting travel to Turkey, and then to join ISIS in Syria. Conley was charged, pleaded guilty to one count of conspiracy to provide material support to ISIS,²⁵¹ and was sentenced to four years in prison followed by three years of supervised release and 100 hours of community service.²⁵² In somewhat similar circumstances, the FBI declined to arrest three teenage girls from Colorado who attempted to join ISIS in Syria in October 2014. German authorities intercepted the girls—ages fifteen, sixteen, and seventeen—at a Frankfurt airport, en route to Turkey.²⁵³ The FBI questioned the girls and released them to their parents without charges.²⁵⁴ The girls' school district took the position that they were victims of online predators, and not deeply motivated by a desire to fight with ISIS.²⁵⁵ Reports do not indicate the requirement of any intervention strategies in lieu of charges. In addition to being slightly older than these girls, Shannon Conley may have been more committed to extremist violence. Law enforcement agents had repeatedly warned her in meetings that her objectives of participating in terrorist activities were illegal, and suggested that she engage in humanitarian work instead.²⁵⁶ A coherent set of principles would clarify whether any of these young people should have received the opportunity to participate in an intervention program, and under what parameters.

Intervention initiatives also may advance CVE objectives when applied to returning foreign fighters in conjunction with prosecution.²⁵⁷ In particular, some individuals returning in disillusionment from conflict zones may have

(Detention Order), <http://www.leagle.com/decision/In%20FDCO%2020160106873/U.S.%20v.%20SHAFI#>.

²⁵⁰ See Apuzzo, *supra* note 10.

²⁵¹ *Arvada Woman Pleads Guilty to Conspiracy to Provide Material Support to a Designated Foreign Terrorist Organization*, U.S. DEP'T OF JUSTICE (Sept. 10, 2014), <https://www.justice.gov/opa/pr/arvada-woman-pleads-guilty-conspiracy-provide-material-support-designated-foreign-terrorist>.

²⁵² See *Arvada Woman Sentenced for Conspiracy to Provide Material Support to a Designated Foreign Terrorist Organization*, U.S. ATTORNEY'S OFFICE, DIST. OF COLORADO (Jan. 23, 2015), <https://www.fbi.gov/contact-us/field-offices/denver/news/press-releases/arvada-woman-sentenced-for-conspiracy-to-provide-material-support-to-a-designated-foreign-terrorist-organization>.

²⁵³ See Ben Brumfield, *Officials: 3 Denver Girls Played Hooky from School and Tried to Join ISIS*, CNN (Oct. 22, 2014), <http://www.cnn.com/2014/10/22/us/colorado-teens-syria-odyssey/>.

²⁵⁴ See *id.*

²⁵⁵ See Carlos Illescas, Jesse Paul & Tom McGhee, *Officials: Teen Girls Likely Recruited Online to Join Islamic State*, DENVER POST (Oct. 22, 2014), http://www.denverpost.com/news/ci_26776829/fbi-investigation-continues-into-denver-teens-stopped-germany.

²⁵⁶ Criminal Complaint, U.S. v. Conley, Case No. 14-mj-01045-KLM 4–6, <https://cchs.gwu.edu/sites/cchs.gwu.edu/files/downloads/Conley%20Criminal%20Complaint.pdf>.

²⁵⁷ See Eva Entenmann et al., *Rehabilitation for Foreign Fighters? Relevance, Challenges and Opportunities for the Criminal Justice Sector*, ICCT POLICY BRIEF 5, 17 (Dec. 2015), <https://www.icct.nl/wp-content/uploads/2016/01/ICCT-Entenmann-Heide-Weggemans-Dorsey-Rehabilitation-for-Foreign-Fighters-December2015.pdf>.

leverageable abilities to contribute to counter-messaging.²⁵⁸ Previous terrorist fighters and supporters would be perceived as highly credible—more so than “stodgy” government messengers²⁵⁹—and could lend powerful voices to dissuade others from following the same path.²⁶⁰ The power and perceived legitimacy of messaging by former extremists has been noted in the far right-wing context as well. Prosecutors appear to be trialing this approach with a twenty-seven-year-old ISIS defector identified as “Mo,” who is in federal custody, but told his story in an NBC News television interview in May 2016.²⁶¹ In contrast, there is no public indication that prosecutors will take this approach with Asher Abid Khan, who faces charges of conspiracy and attempting to provide material support and up to fifteen years in prison. Khan flew to Turkey to join ISIS when he was nineteen, but reversed course at the Istanbul airport and returned to Texas in response to messages from his family. Khan’s attorney advocated sending him “to the mosques [to] talk about redemption.”²⁶²

The most significant danger of intervention is that if it fails, the individual might go on to violently harm others. Fearing such a risk, law enforcement might pursue prosecutions in less clear instances as an “insurance” strategy.²⁶³ These concerns highlight the need for the development of consistent guidelines and best

²⁵⁸ Brendan I. Koerner, *Why ISIS is Winning the Social Media War, Part V*, WIRED (Apr. 2016), <https://www.wired.com/2016/03/isis-winning-social-media-war-heres-beat> (“The U.S. should also give Islamic State defectors, particularly those with American roots, a chance to share their unfiltered tales of disillusionment.”); see also Zahed Amanullah, *Countering Violent Extremism: Understanding the Role of Former Extremists and Counter Messaging*, INST. FOR STRATEGIC DIALOGUE (2015), http://www.strategicdialogue.org/wp-content/uploads/2016/02/Formers_brochure_-_small.pdf; Peter R. Neumann, *Victims, Perpetrators, Assets: The Narratives of Islamic State Defectors*, INT’L CTR. FOR THE STUDY OF RADICALISATION AND POLITICAL VIOLENCE (2015), <http://icsr.info/wp-content/uploads/2015/09/ICSR-Report-Victims-Perpertrators-Assets-The-Narratives-of-Islamic-State-Defectors.pdf>; Charles Lister, *Returning Foreign Fighters: Criminalization or Reintegration?*, Policy Briefing, BROOKINGS DOHA CTR. 4 (Aug. 2015) (states should fuse criminalization approaches with those for rehabilitation and reintegration, as part of comprehensive strategies).

²⁵⁹ See *id.*

²⁶⁰ See Koerner, *supra* note 258.

²⁶¹ Richard Engel, Ben Plessner & Tracy Connor, *American ISIS Defector: ‘I’ve Let My Nation Down,’* NBC NEWS (May 23, 2016), <http://www.nbcnews.com/storyline/isis-uncovered/american-isis-defector-i-ve-let-my-nation-down-n578216>. See also Michael Weiss, *A French Recruit Tells ‘Why I Left ISIS,’* THE DAILY BEAST (Oct. 14, 2016), <http://www.thedailybeast.com/articles/2016/10/14/a-french-recruit-tells-why-i-left-isis.html>.

²⁶² See Adam Goldman, *An American Family Saved Their Son from Joining the Islamic State*, WASH. POST (Sept. 6, 2015), https://www.washingtonpost.com/world/national-security/an-american-family-saved-their-son-from-joining-the-islamic-state-now-he-might-go-to-prison/2015/09/06/2d3d0f48-44ef-11e5-8ab4-c73967a143d3_story.html; see also, *Man faces prison despite changing his mind about ISIS*, CNN, [http://www.cnn.com/videos/tv/2015/09/08/attorney-for-asher-abid-khan-tom-berg-interview-newday.cnn/video/playlists/atv-best-of-tv-original-series/\(video interview with Tom Berg, arguing that because Khan changed course, his situation presents a “question of prosecutorial discretion. Is this the right case for them to bring?”\).](http://www.cnn.com/videos/tv/2015/09/08/attorney-for-asher-abid-khan-tom-berg-interview-newday.cnn/video/playlists/atv-best-of-tv-original-series/(video%20interview%20with%20Tom%20Berg,%20arguing%20that%20because%20Khan%20changed%20course,%20his%20situation%20presents%20a%20%22question%20of%20prosecutorial%20discretion.%20Is%20this%20the%20right%20case%20for%20them%20to%20bring%20%3F%22))

²⁶³ See Goldman, *supra* note 262.

practices for when and in what form to pursue intervention.²⁶⁴ Generally, two reasons the DOJ might decline to prosecute an individual in spite of sufficient evidence are that: (1) “[n]o substantial Federal interest would be served by prosecution” and (2) “[t]here exists an adequate non-criminal alternative to prosecution.”²⁶⁵ These standards could be refined further in the specific context of intervention, with a framework to incorporate evaluations by experts such as Daniel Koehler.²⁶⁶ An exploration of liability protections for interveners also would be necessary.²⁶⁷ Selecting candidates for intervention approaches will present complex challenges for which evidence-based guidance to assist law enforcement is critical.²⁶⁸

2. Rehabilitation in the Post-Conviction Context

A criminal conviction for a material support offense by no means negates continuing the value of initiatives to counter violent extremism, but changes the mechanism and format for implementation.²⁶⁹ Indeed, some might argue that the post-conviction context is especially critical for CVE initiatives, particularly in cases of non-violent material support offenses. Individuals’ self-identification through criminal acts diminishes the potential for discriminatory or unwarranted enlistment in programs, and the individual may still be steered in a positive direction before committing more egregious crimes involving direct acts of violence.²⁷⁰ The emerging contexts for post-conviction CVE are threefold. First,

²⁶⁴ See Vidino & Hughes, *Countering Violent Extremism in America*, *supra* note 4, at 10 (noting that the use of targeted interventions has been “unsystematic and lacks a clear framework”).

²⁶⁵ See U.S. ATTORNEY’S MANUAL 9-27.220, TITLE 9: CRIMINAL, PRINCIPLES OF FEDERAL PROSECUTION (GROUNDS FOR COMMENCING OR DECLINING PROSECUTION) (1997).

²⁶⁶ Daniel Koehler, *see infra* Part III(B)(2), directs the German Institute on Radicalization and Deradicalization Studies in Berlin, and is engaged in pioneering work in the United States federal court system to provide expertise on policies related to community-based disengagement and deradicalization programs.

²⁶⁷ See Vidino & Hughes, *Countering Violent Extremism in America*, *supra* note 4, at 2.

²⁶⁸ See Koerner, *supra* note 258 (“Determining which returnees are truly no longer threats will be tricky, but deradicalization programs in Europe . . . are yielding data that can help U.S. build the right psychological assessment tools.”).

²⁶⁹ See Steve Karnowski, *German Expert Says De-Radicalizing Radicals Can Work in US*, AP THE BIG STORY (Sept. 21, 2016), <http://bigstory.ap.org/article/8e5d3c1072784a8782d63d2d05eaa193/german-expert-says-de-radicalizing-radicals-can-work-us> (attributing statement to Daniel Koehler that most terrorism offenders will get out of prison eventually, but without intervention in the meantime they will become more sophisticated about weapons and violence, radicalize others in prison, and emerge angrier and more committed to their cause).

²⁷⁰ See Robert McKenzie, *Countering Violent Extremism in America: Policy Recommendations for the Next President*, BROOKINGS (Oct. 18, 2016), <https://www.brookings.edu/research/countering-violent-extremism-in-america-policy-recommendations-for-the-next-president/> (rather than targeting so-called “vulnerable communities,” CVE policy should focus “squarely on individuals who have demonstrated sympathy for propaganda produced by foreign designated terrorist organizations”); *Addendum to Rome Memo on Legal Frameworks for Rehabilitation and Reintegration*, GLOBAL COUNTERTERRORISM FORUM (Aug. 25, 2016), <https://toolkit.thegctf.org/document-sets/addendum-rome-memo>. The argument that targeted initiatives reduce the potential for discrimination applies outside the context of sting operations. *See supra* note 18.

specialized evaluations may help judges determine appropriate sentences based upon the defendant's assessed potential for rehabilitation.²⁷¹ Second, the conditions of rehabilitation may form part of the sentence itself and may be implemented concurrently with incarceration. Finally, programs may reduce the risk of recidivism by helping those convicted of terrorism offenses reintegrate into positive roles in society after release.²⁷²

The statutory maximum penalty for an individual who provides material support to a foreign terrorist organization—or attempts or conspires to do so—is twenty years' imprisonment (or life imprisonment, if the death of any person results) and a \$250,000 fine.²⁷³ Courts look to the Federal Sentencing Guidelines (“Guidelines”) to arrive at an advisory sentencing range.²⁷⁴ Under the Guidelines, providing material support to an FTO entails a base offense level of twenty-six,²⁷⁵ which corresponds to a term of imprisonment of 63–78 months for a defendant in Criminal History Category I (the lowest category) and 120–150 months for a defendant in Criminal History Category VI (the highest category).²⁷⁶ However, the Guidelines contain a “terrorism enhancement” in Section 3A1.4, which “takes a wrecking ball to this carefully constructed edifice.”²⁷⁷ A judge, applying a preponderance-of-the-evidence standard, determines whether the terrorism enhancement applies. When applied, the enhancement requires an advisory sentence at or near the statutory maximum.²⁷⁸ It establishes a minimum offense level of 32 and an automatic Criminal History Category of VI, corresponding to a sentence of 210–262 months (or 17.5 to 21.8 years).²⁷⁹ The terrorism enhancement's application effectively dispenses with the judge's consideration of the defendant's true criminal history, or lack thereof.²⁸⁰

²⁷¹ See Karnowski, *supra* note 269; Nicole Hong, ‘Deradicalization’ Programs Face Critical Test in Islamic State Cases, WALL ST. J. (Nov. 13, 2016), <http://www.wsj.com/articles/deradicalization-programs-face-critical-test-in-islamic-state-cases-1479084156>.

²⁷² See, e.g., 2016 SIP, *supra* note 57, at 12; Robert McKenzie, *supra* note 270 (asserting that the Bureau of Prisons should lead on design and implementation of a nationwide, comprehensive rehabilitation and reintegration program); see also Rome Memorandum on Good Practices for Rehabilitation and Reintegration of Violent Extremist Offenders, 10–13, GLOBAL COUNTERTERRORISM FORUM, <https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/A/GCTF-Rome-Memorandum-ENG.pdf>.

²⁷³ 18 U.S.C. §§ 2339B, 3571; see also DOYLE, *supra* note 108, at 3 n.13.

²⁷⁴ See *United States v. Booker*, 543 U.S. 220, 245 (2005).

²⁷⁵ U.S. SENTENCING GUIDELINES MANUAL § 2M5.3(a) (2015).

²⁷⁶ See § 2A (2015).

²⁷⁷ See George D. Brown, *Punishing Terrorists*, 23 CORNELL J. OF LAW AND PUBLIC POL'Y 517, 520 (2014); U.S. SENTENCING GUIDELINES MANUAL § 3A1.4 (2015).

²⁷⁸ See Charles Doyle, TERRORIST MATERIAL SUPPORT 11 (2010).

²⁷⁹ U.S. SENTENCING GUIDELINES MANUAL §§ 3A1.4, 5A (2015).

²⁸⁰ The terrorism enhancement has been described as a “blunt instrument,” and a “sort of nonbinding mandatory minimum.” Brown, *supra* note 277, at 521 (citing Transcript of Disposition at 69, *United States v. Mehanna*, No. 09-10017-GAO (D. Mass. 2012). Courts of appeals have reversed judges who refuse to apply it or dilute it substantially. See *id.* (citing *United States v. Abu Ali*, 528 F.3d 210, 265 (4th Cir. 2008)).

In imposing a sentence, the court is required under 18 U.S.C. § 3553(a) to consider: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the four primary purposes of sentencing: retribution, deterrence, incapacitation, and rehabilitation; (3) the kinds of sentences available; (4) the sentencing range established through application of the sentencing guidelines; (5) any relevant policy statement promulgated by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to any victims of the offense.²⁸¹

Regarding the four primary purposes of sentencing, DOJ guidelines indicate that in certain cases, “one of the purposes, or a combination of purposes, may be of overriding importance.”²⁸² In terrorism cases, the interplay between the need to protect the public from future crimes, and the defendant’s rehabilitation, has assumed heightened significance. It is particularly challenging for judges to systematically evaluate the extent of defendant’s continuing commitment to violence. Judge Gerald Bruce Lee of U.S. District Court for the Eastern District of Virginia explained in a panel discussion concerning sentencing in terrorism cases:

The judge cares from the standpoint of making sure the sentence contains punishment and also takes into account forecasting. What will the future be when this person comes back home? Is he or she going to pose a risk or a danger to the public? . . . Reading about it is not the same as sitting there and seeing it and trying to decide, well, if this person is fifty years old, are they likely to come out and try to shoot up the Holocaust Museum? Are they likely to try to blow up Metro?²⁸³

Karen Greenberg of CNS echoed these concerns: “...in terrorism cases, prosecutors often argue that if the defendant is released, then who knows what the stakes could be? What harm might ensue? Could there be another 9/11 . . .”²⁸⁴ Accordingly, some assessment of terrorists’ state of mind may be “necessary to limit the risk that they will return to violence.”²⁸⁵ Formalizing these assessments in the sentencing context could respond to judicial concerns about “forecasting” by involving experts in evaluating convicted individuals who committed to violent extremist ideologies.

3. The Minnesota Terrorism Cases: Breaking New Ground

Judge Michael Davis, a federal judge for the District of Minnesota, announced just such a pioneering program on March 2, 2016, with support from

²⁸¹ U.S. SENTENCING COMM’N, FEDERAL SENTENCING: THE BASICS 2 (2015).

²⁸² See U.S. ATTORNEY’S MANUAL, *supra* note 265.

²⁸³ Joanna Baltus et al., *Convicted Terrorists: Sentencing Considerations and Their Policy Implications*, J. NAT’L SEC. L. & POL. 352–53, http://jnslp.com/wp-content/uploads/2016/01/Sentencing_Considerations_and_Their_Implications_on_Foreign_Policy.pdf.

²⁸⁴ See *id.* at 355.

²⁸⁵ See STERN, *supra* note 39, at 8.

the U.S. Attorney.²⁸⁶ The program's mission is: to supply otherwise unavailable information to the court as a basis for sentencing terrorism defendants; to provide pre-trial and post-incarceration supervision that ensures public safety by monitoring defendants to verify that they have not reverted to terrorist activities; and to further disengagement and deradicalization, while rehabilitating defendants to become successful, law-abiding citizens.²⁸⁷ The court's initiative to perform risk assessments and design rehabilitation programs for these individuals is not an alternative to incarceration.²⁸⁸

Judge Davis initially applied the program to four men who pleaded guilty in a larger, alleged conspiracy to provide material support to ISIS, but said it could expand to other defendants in terrorism cases, including those reintegrating in society after release from prison.²⁸⁹ Indeed, as of September 2016, the chief U.S. probation officer for Minnesota indicated that probation officers have begun implementing training from Daniel Koehler of GIRDS as they work with supporters of al-Shabaab who are now on supervised release and will need to integrate back into the community.²⁹⁰ Judge Davis ordered the initial four defendants who pleaded guilty in the ISIS-related conspiracy to submit to a presentence "examination and study" to assess risk and recommend rehabilitation strategies. Defendants had the option to object if they did not wish to participate.²⁹¹

Judge Davis's orders contemplated that the U.S. Probation Office for the District of Minnesota would conduct the required study and contract with Daniel Koehler of GIRDS to prepare a written report.²⁹² The Court's orders outlined the type of information to be provided in the report, concluding that the examination will "significantly aid the Court in applying the 18 U.S.C. § 3553(a) factors" for sentencing. The program also enlisted Mr. Koehler's expertise to provide

²⁸⁶ See Amy Forliti, *Federal Court in Minnesota Creates Deradicalization Program*, ASSOCIATED PRESS (Mar. 3, 2016), <http://www.bigstory.ap.org/article/c48c6df80d8c4ed2b18decfec62fb9af/judge-study-will-recommend-deradicalization-plans-4-men>; Stephen Montemayor & Mila Koumpilova, *Terror Suspects Will Test Deradicalization Program*, STAR TRIB. (Mar. 2, 2016), <http://www.startribune.com/judge-orders-de-radicalization-study-for-4-terror-defendants/370806141/>.

²⁸⁷ U.S. DIST. CT., DISTRICT OF MINN., TERRORISM DISENGAGEMENT AND DERADICALIZATION PROGRAM (Mar. 7, 2016). This is a two-page document supplied to the author by Judge Michael J. Davis's Judicial Assistant.

²⁸⁸ See CTR. ON NAT'L SECURITY AT FORDHAM LAW, *supra* note 214; Mukhtar Ibrahim & Laura Yuen, *Judge Orders Study of Terror Defendants Before Sentencing*, MPR NEWS (Mar. 2, 2016), <http://www.mprnews.org/story/2016/03/02/judge-outlines-steps-to-divert-mn-terror-defendants-islamic-state-isis-recruitment>.

²⁸⁹ See Forliti, *supra* note 286; Montemayor & Koumpilova, *supra* note 286; Ibrahim & Yuen, *supra* note 288.

²⁹⁰ See Karnowski, *supra* note 269.

²⁹¹ See Forliti, *supra* note 286.

²⁹² See, e.g., Order, *United States v. Yusuf* (D. Minn. Mar. 2, 2016) (Crim. No. 15-46); Order, *United States v. Abdurahman* (D. Minn. Mar. 2, 2016) (Crim. No. 15-49 (05)).

deradicalization training for probation officers.²⁹³ Mr. Koehler stated that while there is no “100 percent guarantee” that his methods will work, it is “better than working blindfolded without any kind of assessment or structure or protocol.”²⁹⁴

Following Judge Davis’s announcement, two additional defendants in the same ISIS-related conspiracy pleaded guilty, while three others proceeded to trial.²⁹⁵ After those remaining three defendants were convicted in May 2016, two requested to participate in the deradicalization program with Koehler.²⁹⁶ Judge Davis dismissed the motions as moot, ruling that Koehler need not conduct the additional evaluations because he had trained the probation office in his methods.²⁹⁷ Instead, the probation office would complete the evaluation as part of its presentencing investigation reports.²⁹⁸ Judge Davis was expected to proceed with sentencing in November 2016.²⁹⁹

Judge Davis had previously taken the novel approach of sending one of the above-mentioned defendants to a halfway house pending trial on material support charges. In November 2014, prosecutors charged then eighteen-year-old Abdullahi Yusuf with conspiracy to provide material support for attempting to join ISIS.³⁰⁰ Yusuf was stopped the previous May at Minneapolis/St. Paul Airport while attempting to leave for Turkey. Yusuf spent the next six months working

²⁹³ GERMAN INSTITUTE ON RADICALIZATION AND DE-RADICALIZATION STUDIES, <http://girds.org/projects>.

²⁹⁴ See Forliti, *supra* note 286.

²⁹⁵ Initially, the program was to apply to Abdullahi Yusuf, Abdirizak Warsame, Hanad Musse, and Zacharia Abdurahman. Subsequently, Adnan Farah and Hamza Ahmed also pleaded guilty, bringing the total number of defendants pleading guilty to six. The trial against three other alleged co-conspirators (Guled Omar, Abdirahman Daud, and Mohamed Farah) has commenced, while yet a tenth defendant (Abdi Nur) managed to travel to Syria. See, e.g., Nicole Hong, *Judge Tries New Approach with Terror Defendants: Deradicalization*, WALL ST. J. (May 8, 2016), <http://www.wsj.com/articles/judge-tries-new-approach-with-terror-defendants-deradicalization-1462751841>; *Six Minnesota Men Charged with Conspiracy to Provide Material Support to the Islamic State of Iraq and the Levant*, U.S. ATTORNEY’S OFFICE (Apr. 20, 2015), <https://www.fbi.gov/sandiego/press-releases/2015/six-minnesota-men-charged-with-conspiracy-to-provide-material-support-to-the-islamic-state-of-iraq-and-the-levant>; *Hamza Ahmed is 6th Alleged ISIS Recruit to Take Plea Deal*, FOX9 (Apr. 25, 2016), <http://www.fox9.com/news/132181566-story>.

²⁹⁶ *2 Convicted ISIS Recruits from Minnesota Ask Judge for De-radicalization Program*, FOX9 (July 1, 2016), <http://www.fox9.com/news/168170205-story>

²⁹⁷ See Esme Murphy, *Judge Denies Motion of Two Convicted of Trying to Join ISIS*, CBS MINNESOTA (July 5, 2016), <http://minnesota.cbslocal.com/2016/07/05/isis-convictions-motion-denied/>.

²⁹⁸ Stephen Montemayor, *Two Minneapolis Men Won’t be Seen by Deradicalization Expert*, STAR TRIB. (July 5, 2016), <http://www.startribune.com/judge-rules-that-three-convicted-of-isis-related-charges-will-also-undergo-deradicalization-study/385591301/>.

²⁹⁹ See Karnowski, *supra* note 269.

³⁰⁰ *Two Minnesotans Charged with Conspiracy to Provide Material Support to the Islamic State of Iraq and the Levant*, U.S. DEP’T OF JUSTICE (Nov. 24, 2014), <https://www.fbi.gov/minneapolis/press-releases/2014/two-minnesotans-charged-with-conspiracy-to-provide-material-support-to-the-islamic-state-of-iraq-and-the-levant>.

and attending classes before his November arrest,³⁰¹ and pleaded guilty in February 2015. At the halfway house, Yusuf met with personnel from Heartland Democracy, a civic engagement group. While Heartland did not have experience counseling those inspired by violent Islamist ideologies, its director proposed adapting the organization's existing program for gangs to Yusuf.³⁰² Judge Davis ordered Yusuf back into custody after authorities found a box cutter under his bed in April 2015, but Yusuf continued with rehabilitation in jail.³⁰³ His counselor is a local high school teacher of Somali origin.³⁰⁴ Recently, Yusuf testified as a prosecution witness in the trial of three of his alleged co-conspirators. Acknowledging this cooperation, prosecutors recommended a prison sentence of three and a half years for Yusuf.³⁰⁵

Another terrorism prosecution highlighting the prospective role for disengagement and deradicalization programs is that of Mohammed Hamzah Khan, who attempted to join ISIS in Syria by traveling through Istanbul with his two younger siblings in 2014.³⁰⁶ Law enforcement stopped the three siblings at O'Hare International Airport, and questioned but did not charge the two younger siblings, who were then sixteen and seventeen years old, respectively.³⁰⁷ However, at nineteen, Mohammed was arrested and later pleaded guilty to one count of attempting to provide material support to a foreign terrorist organization. Media reports indicate that Mohammed's younger siblings are receiving counseling. And one of the conditions of Mohammed's plea agreement requires him to participate in "[p]sychological and violent extremism counseling."³⁰⁸ The details of how Mohammed Khan's counseling arrangements unfold, like the Minnesota program, may have implications for other material support cases around the country.

³⁰¹ See Esme Murphy, *US Attorney: 2 in Minnesota Accused of Aiding ISIL*, CBS MINNESOTA (Nov. 25, 2014), <http://minnesota.cbslocal.com/2014/11/25/2-in-minnesota-suspected-of-aiding-isil/>.

³⁰² See Zavadski, *supra* note 140.

³⁰³ See *id.*

³⁰⁴ Dina Temple-Raston, *He Was Caught Trying to Join ISIS, Now He's in Jihadi Rehab*, NAT'L PUB. RADIO (May 16, 2016).

³⁰⁵ Laura Yuen, *Men in Minn. ISIS Case Seek Leniency*, MPR NEWS (Nov. 3 2016), <https://www.mprnews.org/story/2016/11/03/minnesota-isis-men-apologize-sentencing-nears>; *Prosecutors in Minn. Terror Case Finalize Sentencing Recommendations*, ABC EYEWITNESS NEWS (Nov. 6, 2016), <http://kstp.com/news/minnesota-terror-trial-sentencing-recommendations/4310527/>.

³⁰⁶ See Jason Meisner, *Bolingbrook Man Pleads Guilty to Terrorism Charge*, CHI. TRIB. (Oct. 29, 2015), <http://www.chicagotribune.com/news/local/breaking/ct-terror-case-bolingbrook-man-plea-20151029-story.html>.

³⁰⁷ See *id.*

³⁰⁸ Plea Agreement at 17, *United States v. Khan*, No. 14-CR-564 (N.D. Ill.), <https://www.justice.gov/opa/file/789326/download>.

Authorities in other states and national experts and practitioners will continue to watch the progress of the Minnesota initiative closely.³⁰⁹ Judge Davis's program is innovative in its incorporation of strategies to prevent violent extremism throughout the trajectory of each terrorism prosecution, from the pre-trial to post-conviction stages. Yet federal judges should not have to forge groundbreaking new policy pathways and programs in this area absent coordination and guidance. Rather, a comprehensive set of principles should be developed, incorporating insights derived rigorously from previous domestic and international initiatives, together with input from stakeholders and experts such as judges, defense attorneys, non-profit and community organizations, social service providers, academic experts, and government and law enforcement officials.

Conclusion

As domestic CVE efforts take shape, the role of the criminal justice system warrants substantial and immediate consideration. Innovative forms of criminal justice should comprise a crucial component of the counterterrorism equation rather than an afterthought applied on an ad hoc basis. As CVE frameworks evolve and become more holistic, their interactions with criminal law are likely to acquire greater precision and intentionality. Prosecution under the material support laws has provided a powerful but blunt counterterrorism tool. In light of the wide variation among material support crimes, nuanced approaches for prosecutors and judges to employ at charging and sentencing would better promote counterterrorism goals.³¹⁰ In particular, material support cases present circumstances in which the American public, law enforcement organizations, defendants, families, and communities all stand to benefit from the introduction of intervention and rehabilitation initiatives tailored to appropriate cases.

The U.S. government's sharpening focus on non-coercive measures to prevent the spread of extremist violence represents a conceptual step forward for national security, even as metrics for CVE's success and its very definition remain unsettled. It is illogical to pour resources into CVE measures designed in part to identify the violent extremists in our midst, yet abandon efforts to prevent violence once these individuals have self-identified by engaging in some degree of actual or suspected criminal conduct. Through data-driven study of comparable international and domestic initiatives, U.S. policymakers can begin to address this gap in countering violent extremism by developing innovative standards and programs.

Efforts to curtail the spread of extremist violence in the United States must be more holistic if they are to succeed, with increased focus on intervention, rehabilitation, and reintegration.³¹¹ The U.S. government reportedly is helping to

³⁰⁹ See e.g., *Case by Case: ISIS Prosecutions in the United States*, *supra* note 104, at 4–5; Forliti, *supra* note 286 (quoting Karen Greenberg); see also Temple-Raston, *supra* note 304; Karnowski, *supra* note 269.

³¹⁰ See generally Baltes et. al, *Convicted Terrorists*, *supra* note 283.

³¹¹ See Khan, *supra* note 2.

fund foreign governments' efforts to deradicalize and reintegrate captured foreign fighters.³¹² Worthwhile programs are needed investments not only abroad, but also at home. The criminal justice system, and cases involving material support for terrorism in particular, provide opportunities to counter violent extremism with full respect for civil rights and civil liberties. Such programs may continue to develop organically, as in the example of Judge Davis's program in Minnesota. Increased support for a rigorous, consistent, and transparent approach nationwide, driven by policy and data, would bolster the likelihood of success.

³¹² See John Hudson, *Growth of Islamic State Forces State Department Overhaul*, FOREIGN POLICY (Feb. 1, 2016), <http://foreignpolicy.com/2016/02/01/growth-of-islamic-state-forces-state-department-overhaul/>.