

COLUMBIA LAW REVIEW

SIDEBAR

VOL. 113

MAY 2, 2013

PAGES 76–87

LESSONS ON TERRORISM AND “MISTAKEN IDENTITY” FROM OAK CREEK, WITH A CODA ON THE BOSTON MARATHON BOMBINGS

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INTRODUCTION

On Sunday, August 5, 2012, Wade Michael Page opened fire on worshippers at a Sikh temple¹ in Oak Creek, Wisconsin, killing six people and ending his own life after exchanging gunshots with responding police officers.² Incidents of this sort naturally activate various individuals and entities, including the law and the media. This tragedy was no different, as it compelled legal officials to determine what laws would fit the facts, and the media to

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¹ For more information on Sikhism and Sikh-Americans, see Dawinder S. Sidhu, Sikhism in the United States, in *Asian Americans: An Encyclopedia of Social, Cultural, and Political History* (Edward J.W. Park & Xiaojian Zhao eds., forthcoming 2013) [hereinafter Sidhu, Sikhism in the United States] (on file with the *Columbia Law Review*); see also Dawinder S. Sidhu & Neha Singh Gohil, *Civil Rights in Wartime: The Post-9/11 Sikh Experience* (2009); Dawinder S. Sidhu, *Out of Sight, Out of Legal Recourse: Interpreting and Revising Title VII to Prohibit Workplace Segregation Based on Religion*, 36 N.Y.U. Rev. L. & Soc. Change 103 (2012); Dawinder S. Sidhu & Neha Singh Gohil, *The Sikh Turban: Post-9/11 Challenges to this Article of Faith*, 9 Rutgers J.L. & Religion 10 (2008); Dawinder S. Sidhu, *Oak Creek and the Future of Sikhs in America*, Wash. Post (Oct. 2, 2012, 6:19 PM), http://www.washingtonpost.com/blogs/guest-voices/post/oak-creek-and-the-future-of-sikhs-in-america/2012/10/02/0c21c1f8-0cdc-11e2-bd1a-b868e65d57eb_blog.html (on file with the *Columbia Law Review*); Dawinder S. Sidhu, *Violence Against Sikhs Stems from Ignorance and Fear*, Balt. Sun (Aug. 6, 2012), http://articles.baltimoresun.com/2012-08-06/news/bs-ed-sikh-shootings-20120806_1_sikh-temple-punjab-guru-nanak (on file with the *Columbia Law Review*); Dawinder S. Sidhu, *Hate Crimes, Terrorism, and Sikhs*, Lawfare (Oct. 5, 2012, 7:34 AM), <http://www.lawfareblog.com/2012/10/dawinder-s-sidhu-on-hate-crimes-terrorism-and-sikhs/> (on file with the *Columbia Law Review*); Dawinder “Dave” S. Sidhu, *In the Wake of the Temple Shootings, a New Call for Sikh Leadership*, Harvard Kennedy Sch. Center for Pub. Leadership (Aug. 6, 2012), http://www.centerforpublicleadership.org/index.php?option=com_k2&view=item&id=833 (on file with the *Columbia Law Review*).

² See, e.g., Erica Goode & Serge F. Kovaleski, *A Killer Who Fed and Was Fueled by Hate*, N.Y. Times, Aug. 7, 2012, at A1.

examine for public consumption why this incident occurred. With the passage of time and the dispassionate attitudes that a removed vantage point undoubtedly affords, we may now consider the sufficiency of these reactions to the tragedy. This Essay identifies two problems with these responses, regarding both the legal definition of terrorism and the media's characterizations of the incident, and suggests ways in which they may be mitigated. Without such an analysis, Oak Creek—and worse, future domestic antisocial catastrophes—will not be properly diagnosed, conceptualized, or deterred, to our own peril.

I. OAK CREEK AND THE CURRENT DEFINITION OF TERRORISM

A discussion around whether the incident at Oak Creek constituted an act of terrorism emerged in the wake of the shooting³: In fact, when speaking at a memorial service for the victims, Attorney General Eric Holder appeared to answer in the affirmative, stating that “what happened” was “an act of terrorism.”⁴ However, despite Mr. Holder's comments, the Oak Creek shooting reveals the shortcomings of the prevailing legal definitions of terrorism.

Though some commentators may want the Attorney General's assessment to be correct because of the terrible character of the shooting, it cannot be said with certainty that the incident qualifies as “terrorism” under the extant definitions of the term. While a static definition of “terrorism” is difficult to pin down,⁵ and a number of definitions for this term are found in federal law,⁶ federal terrorism statutes generally require that the act of violence be politically or ideologically motivated. For example, one federal statute provides that “the term ‘terrorism’ means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents,”⁷ another that “the term ‘Federal crime of terrorism’ means an [unlawful] offense that . . . is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct,”⁸ and still another federal statute defines “international terrorism” as violent or dangerous criminal activities that “appear to be intended . . . (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a

³. See, e.g., Amy Davidson, *Terror in Oak Creek*, *The New Yorker Close Read* (Aug. 5, 2012), <http://www.newyorker.com/online/blogs/closeread/2012/08/terror-in-oak-creek.html> (on file with the *Columbia Law Review*).

⁴. Eric Holder, Att'y Gen. of the United States, U.S. Dep't of Justice, *Speech at Oak Creek Memorial Service* (Aug. 10, 2012), <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1208101.html> (on file with the *Columbia Law Review*).

⁵. See Sudha Setty, *What's in a Name? How Nations Define Terrorism Ten Years After 9/11*, 33 *U. Pa. J. Int'l L.* 1, 6 n.12 (2011) (describing scholars' attempts to settle on single definition of “terrorism” and lack of international or domestic consensus on its meaning).

⁶. See *id.* at 18 n.56 (citing Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 *J. Legis.* 249, 249–50 (2004)) (referencing existence of “twenty-two definitions of terrorism under U.S. federal law”).

⁷. 22 U.S.C. § 2656f(d)(2) (2006).

⁸. 18 U.S.C. § 2332b(g)(5) (2006).

government by mass destruction, assassination, or kidnapping[.]”⁹ Accordingly, taking these legal definitions into account, the most basic interpretation of “terrorism,” as a federal government agency pointed out in a post-9/11 memorandum, is “criminal acts by individuals or groups . . . motivated by political or social agendas.”¹⁰

It is true that Page, the shooter, was an avowed white supremacist and had invited likeminded individuals to “get involved and become active.”¹¹ There may be a reflexive or intuitive sense, from this information, that Page went on a shooting rampage in an effort to advance his supremacist platform. While Page’s involvement with the organized white supremacy movement may provide some measure of circumstantial evidence of the requisite motive,¹² it does not automatically convert his behavior, however violent, into actionable bias or ideologically motivated conduct.¹³ As to Page’s formal connection to white supremacy, Justice Robert H. Jackson’s words are instructive: “[I]f any fundamental assumption underlies our system, it is that guilt is personal,” rather than associational.¹⁴ As to the white supremacist viewpoints themselves,

⁹ Id. § 2331(1).

¹⁰ Cong. Budget Office, *Homeland Security and the Private Sector 1* (2004), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/60xx/doc6042/12-20-homelandsecurity.pdf> (on file with the *Columbia Law Review*). These definitions are consistent with those proposed by legal scholars in that a political motivation is seen as a necessary requirement for the definition to apply. See, e.g., Phillip B. Heymann, *Terrorism and America: A Commonsense Strategy for a Democratic Society* 6 (1998) (explaining terrorism is “violence conducted as part of a political strategy by a subnational group or secret agents of a foreign state”); Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 *Harv. Int’l L.J.* 1, 12 (2002) (“Terror . . . is spread for a purpose, generally to advance or publicize a cause or to undermine public order as part of a political, ethnic, or religious struggle.”). It is also consistent with a definition proposed by a leading international political figure. See Benjamin Netanyahu, *Fighting Terrorism: How Democracies Can Defeat the International Terrorist Network* 8 (2001) (“Terrorism is the deliberate and systematic assault on civilians to inspire fear for political ends.”).

¹¹ Scott Bauer & Todd Richmond, *Gunman in Sikh Temple Attack Was White Supremacist*, Associated Press, Aug. 6, 2012, <http://bigstory.ap.org/article/gunman-sikh-temple-attack-white-supremacist> (on file with the *Columbia Law Review*).

¹² See *United States v. Skillman*, 922 F.2d 1370, 1373–74 (9th Cir. 1990) (finding individual’s interest in “skinheads” was relevant in that it “tended” to show “racial animus and that he might act on his beliefs”).

¹³ See *United States v. Magleby*, 241 F.3d 1306, 1316 (10th Cir. 2001) (noting concern that admitting testimony would amount to “permitting the factfinder to conclude that the defendant was guilty by association”); *United States v. J.H.H.*, 22 F.3d 821, 829 (8th Cir. 1994) (expressing concern that testimony attempting to link skinhead status with specific intent “comes dangerously close to permitting the factfinder to adjudge appellants guilty by association”). See generally *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982) (“For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.”); *Healy v. James*, 408 U.S. 169, 185–86 (1972) (“[T]he Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen’s association with an unpopular organization.”).

¹⁴ *Korematsu v. United States*, 323 U.S. 214, 243 (1944) (Jackson, J., dissenting); see also *Scales v. United States*, 367 U.S. 203, 224–25 (1961) (“In our jurisprudence guilt is personal”); *Uphaus v. Wyman*, 360 U.S. 72, 79 (1959) (“[G]uilt by association remains a thoroughly discredited doctrine”).

they are—however odious, fractious, or threatening to racial and social harmony—constitutionally protected speech.¹⁵ Consequently, more than a reference to Page’s white supremacist background is needed to reliably hold that Page committed this particular act specifically because of an interest in furthering an ideological agenda.

Uncertainty hinders, if not precludes, that final determination from being made. There are many possible reasons why Page did what he did. For instance, Page may have sought to kill people whom he thought were Muslims; shot the Sikhs because they were a non-white “other” or because they were Sikhs; or sought simply to kill someone—anyone—regardless of their background or characteristics.¹⁶ Page could have even been mentally unstable to the extent that he did not appreciate what he was doing. As a result, it cannot be definitively stated which of these possibilities—or perhaps which combination of them—accounts for why Page selected the victims.¹⁷ In other words, Page’s motive is unknown; this prevents any firm conclusion that the incident was motivated by a political or social purpose, a necessary element of “terrorism” under existing federal law.¹⁸ As the Oak Creek police chief admitted, “I don’t know that we’ll ever know, because when he died [from a

¹⁵. See *Brandenburg v. Ohio*, 395 U.S. 444, 444–45 (1969) (per curiam) (reversing Ku Klux Klan leader’s conviction on First Amendment grounds).

¹⁶. See generally Adam Candeub, Comment, Motive Crimes and Other Minds, 142 U. Pa. L. Rev. 2071, 2117 (1994) (suggesting attacker’s intention may not be race-based, even if attacker subscribes to racist viewpoints and victim is of race attacker disfavors).

¹⁷. Page failed, during the commission of the act, to provide us with any clues regarding his motive. Witnesses state that Page did not utter a word as he began shooting and did not respond verbally to pleas from a victim during the shooting. CBS News, Shooter Identified as Former US Military Member, CBS DC (Aug. 6, 2012), <http://washington.cbslocal.com/2012/08/06/cbs-news-shooter-identified-as-former-us-military-member/> (on file with the *Columbia Law Review*); Annysa Johnson, Temple Shooting Victim Recalls Chaotic Morning, Milwaukee J. Sentinel (Aug. 17, 2012), <http://www.jsonline.com/news/crime/temple-shooting-victim-recalls-the-chaos-of-pages-spre-at6h3b7-166601216.html> (on file with the *Columbia Law Review*).

¹⁸. Indeed, speaking at a hearing on domestic terrorism and hate crimes convened by the Senate Judiciary Subcommittee on the Constitution, Civil Rights & Human Rights, a Department of Homeland Security official acknowledged that the Oak Creek shooting “was carried out by an individual with a history of involvement in the white supremacist extremist movement, although his motives remain unknown.” Statement for the Record, United States Department of Homeland Security: Testimony on “Hate Crimes and the Threat of Domestic Extremism” Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary, 112th Cong. 6 (2012) (statement of Scott McAllister, Deputy Under Sec’y for the State and Local Program Office of Intelligence & Analysis), available at <http://www.judiciary.senate.gov/pdf/9-19-12McAllisterTestimony.pdf> (on file with the *Columbia Law Review*). It is for these same reasons that the incident cannot be affirmed as a “hate crime.” But see At Service, Holder Calls Sikh Temple Shooting a Hate Crime, CNN (Aug. 10, 2012), <http://www.cnn.com/2012/08/10/us/wisconsin-temple-shooting/index.html> (on file with the *Columbia Law Review*) (“Attorney General Eric Holder . . . labeled the attack on a Sikh temple that killed six worshippers . . . ‘a hate crime.’”). Federal hate crime statutes generally require that a victim be selected “because of” a protected trait, such as race or religion. See, e.g., 18 U.S.C. § 249(a)(1), (2) (Supp. IV 2010). The mere circumstantial evidence of a hate-based motive is, by itself, insufficient to confirm that the shooting was a “hate crime.” *Id.* Unlike terrorism, the problem with the application of hate crime statutes to this incident is evidentiary, not definitional.

self-inflicted gunshot wound], . . . what his motive was or what he was thinking [died with him].”¹⁹

The Department of Defense Antiterrorism Training validates, if not expands, the space between the federal understandings of terrorism and what occurred at Oak Creek. According to that training, terrorists generally engage in a “planning cycle,” which includes “broad target selection” (in which “terrorists collect information on numerous [potential] targets”), “intelligence and surveillance” (in which terrorists gather information and scout possible targets),²⁰ “pre-attack surveillance and planning” (in which terrorists “conduct additional surveillance to confirm previous information and gain additional details” following the selection of a single target),²¹ and, finally, rehearsing the attack itself.²² For example, each of these phases, as the Department of Defense explains, is found in Timothy McVeigh’s bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma.²³ In particular, as to broad target selection, “McVeigh wanted to attack a symbol of the federal government”; as to intelligence and surveillance, “McVeigh performed initial surveillance of the Murrah Federal Building”;²⁴ as to pre-attack surveillance and planning, “McVeigh . . . prepared for the Oklahoma City attack over a six-month period”;²⁵ and as to rehearsing, “McVeigh practiced making and detonating bombs in isolated locations” and “responses to law enforcement officers if they were encountered.”²⁶ By contrast, there is no evidence that Page engaged in *any* of these phases that are recognized and enumerated by the

¹⁹ Elaine Quijano, Question of Motive Remains in Sikh Temple Shooting, CBS News (Aug. 7, 2012) (internal quotation marks omitted), http://www.cbsnews.com/8301-18563_162-57488654/question-of-motive-remains-in-sikh-temple-shooting/ (on file with the *Columbia Law Review*). Lieutenant Brian Murphy, the heroic officer who first responded to the scene and was shot fifteen times, recalls of Page, “I’d gotten a chance to look him in the eye. There was nothing. Pure nothing. Not hate. Not anger. Not emotion.” Cal Fussman, Lieutenant Brian Murphy: What I’ve Learned, *Esquire* (Dec. 27, 2012, 11:23 AM) [hereinafter, Murphy Interview], available at <http://www.esquire.com/features/what-ive-learned/meaning-of-life-2013/brian-murphy-sikh-temple-shooting-0113> (on file with the *Columbia Law Review*).

²⁰ Terrorism Planning Cycle—Phases 1 & 2, Antiterrorism Level I Training System, U.S. Department Def. [hereinafter Terrorism Planning Cycle—Phases 1 & 2], <https://atlevel1.dtic.mil/at/at11/CONUS/intro/intro12/index.html> (on file with the *Columbia Law Review*) (last visited March 9, 2013).

²¹ Terrorism Planning Cycle—Phases 3 & 4, Antiterrorism Level I Training System, U.S. Department Def. [hereinafter Terrorism Planning Cycle—Phases 3 & 4], <https://atlevel1.dtic.mil/at/at11/CONUS/intro/intro13/index.html> (on file with the *Columbia Law Review*) (last visited March 9, 2013).

²² Terrorism Planning Cycle—Phases 5 & 6, Antiterrorism Level I Training System, U.S. Department Def. [hereinafter Terrorism Planning Cycle—Phases 5 & 6], <https://atlevel1.dtic.mil/at/at11/CONUS/intro/intro14/index.html> (on file with the *Columbia Law Review*) (last visited March 9, 2013).

²³ Terrorism Planning Cycle—Phases 1 & 2, *supra* note 20.

²⁴ *Id.*

²⁵ Terrorism Planning Cycle—Phases 3 & 4, *supra* note 21. For example, McVeigh prepared by “paying cash for items normally bought on credit” and “ma[king] several trips to the Murrah Federal Building to identify the exact place to park the truck and to select escape routes.” *Id.*

²⁶ Terrorism Planning Cycle—Phases 5 & 6, *supra* note 22.

Department of Defense as part of the “terrorist planning cycle.” This supports the notion that Oak Creek was not a terrorist event under existing law.

Federal determinations as to the contents of “terrorism” tend to emphasize not only political or social intent but also an interest in intimidating or coercing a civilian population. The White House’s National Security Strategy notes that “[t]he goal of those who perpetrate terrorist attacks is in part to sow fear.”²⁷ Similarly, speaking on the sentencing of a man for terrorism violations, the federal prosecutor announced that an act that “creates panic, chaos, and fear . . . is the definition of terrorism.”²⁸ As Page’s motivation is unclear, the shooting cannot be characterized as “terrorism” even under an analysis that would focus, to any degree, on the psychological or “fear-based” purposes of a particular act of violence. In view of the weight of these considerations, Mr. Holder’s assessment may not, ultimately, be codified into an actual legal conclusion.²⁹

II. OAK CREEK AND THE FUTURE DEFINITION OF TERRORISM

That the Oak Creek shooting cannot, because of the uncertainty surrounding the intent of the shooter, be deemed “terrorism,” despite the random killing of innocent civilians, speaks to the limitations of the existing definitions of terrorism. Relatedly, it cuts in favor of the suggestion that objective conduct should be the touchstone of the definition of terrorism and that subjective ideology or motivation should not be a necessary element for the terrorism designation to apply. As I wrote after the July 2012 shooting in Aurora, Colorado, “[t]he ‘why’ may explain and offer context, but the ‘how’ is enough for [an] incident to fall into the category of terrorism.”³⁰ If there is any incident that deserves both the significant legal consequences and the marginalizing social stigma that attaches to the label of terrorism, it is Oak Creek.³¹ The prevailing definitions of terrorism, however, would spare someone like Page from those legal ramifications and the damning social

²⁷ The White House, National Security Strategy 22 (2010), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (on file with the *Columbia Law Review*); see also President’s Council of Advisors on Sci. & Tech., *The Science and Technology of Combating Terrorism* 7 (2003), available at <http://www.whitehouse.gov/sites/default/files/microsites/ostp/pcast-03-scitechterrorism.pdf> (on file with the *Columbia Law Review*) (referring to “fear and anxiety that terrorists seek to instill”).

²⁸ Press Release, U.S. Dep’t of Justice, *Zajac Sentenced to 35 Years in Federal Prison in Connection with Explosion at Salt Lake Library 2* (Apr. 14, 2011), available at <http://www.justice.gov/usao/ut/press/releases/Zajac%20sentenced%20for%20library%20bombing.pdf> (on file with the *Columbia Law Review*).

²⁹ Given the solemn nature of the occasion on which Mr. Holder was speaking, his statement may have been the product of an attempt to provide comfort and assurance to an aggrieved audience and stung community, rather than a legal conclusion.

³⁰ Dawinder S. Sidhu, *Call the Colorado Shootings What They Were: Terrorism*, *Balt. Sun* (July 24, 2012) [hereinafter Sidhu, *Colorado Shootings*], <http://www.baltimoresun.com/news/opinion/oped/bs-ed-colorado-shooting-terrorism-20120724,0,285198.story> (on file with the *Columbia Law Review*).

³¹ Lieutenant Murphy said of Page: “[H]e was at a temple, shooting at worshippers, old men, women, and children. Who does that? Who really does that? He was not a human being at that point. He was less than human.” Murphy Interview, *supra* note 19.

sentence that should attend his actions.³² The events at Oak Creek should, therefore, produce a reevaluation and modification of the definition of terrorism, with the term defined as “the premeditated, random murder of innocent people that causes physical and psychological harm on a community, without regard to whether the perpetrator attempted to further a possible message.”³³ Such a definition would ensure that future similar incidents will be properly brought within the ambit of this powerful legal and social term.

Further demonstrating the propriety of a revised terrorism definition is the application of this proposed framework to two recent incidents that occurred subsequent to the shooting at Oak Creek: the December 14, 2012, shooting at the Sandy Hook Elementary School in Newtown, Connecticut, in which twenty-seven individuals, including twenty children under seven years of age, were killed,³⁴ and the December 24, 2012, shooting of four firefighters responding to a call in Webster, New York, which left three people dead.³⁵ In both of these incidents, there was no evidence of motive.³⁶ In both incidents, the shooters randomly killed only innocent civilians. In both incidents, the

³² There is no evidence that Page was mentally unstable to the extent that he was unable to appreciate his actions. Writing in *The Nation*, Cord Jefferson responded to my *Baltimore Sun* essay by raising the excellent point that we should be mindful of the possibility that one who commits violence against civilians may be mentally ill. Cord Jefferson, *Why Can't Terrorists Be Mentally Ill Too?*, *Nation* (July 25, 2012), <http://www.thenation.com/blog/169063/why-cant-terrorists-be-mentally-ill-too> (on file with the *Columbia Law Review*). As my proposed definition of terrorism requires premeditation as a necessary element, and as diminished mental capacity may preclude a finding of premeditation, see Model Penal Code § 4.01 (Proposed Official Draft 1962), my definition would encompass or accommodate the mental illness possibility noted by Mr. Jefferson.

³³ Sidhu, *Colorado Shootings*, *supra* note 30. Under this definition, the phases identified in the Department of Defense Antiterrorism Training, discussed *supra* text accompanying notes 19–21, may delineate types of evidence of premeditation, but should not be construed as necessary elements for the definition to apply.

³⁴ See Connor Simpson et al., *Newtown School Shooting: Live Updates*, *Atlantic Wire* (Dec. 19, 2012), <http://www.theatlanticwire.com/national/2012/12/newtown-connecticut-school-shooting/59999/> (on file with the *Columbia Law Review*) (explaining, in addition to adults and children murdered, “the shooter died at the school, and the shooter’s mother is dead at the home that she shared with the gunman”).

³⁵ See Liz Robbins & N.R. Kleinfield, *4 Firefighters Shot, 2 Fatally*, in *New York: Gunman Dead*, *N.Y. Times* (Dec. 24, 2012), <http://www.nytimes.com/2012/12/25/nyregion/2-firefighters-killed-in-western-new-york.html> (on file with the *Columbia Law Review*). The police eventually discovered a third victim at the scene, believed to be the killer’s sister. Victoria Freile, *Body Found in Burned Home of Killer of 2 Firemen*, *USA Today* (Dec. 26, 2010, 10:52 AM), <http://www.usatoday.com/story/news/nation/2012/12/25/firefighters-shot-new-york-webster/1790293/> (on file with the *Columbia Law Review*).

³⁶ With respect to the Sandy Hook incident, in a *Washington Post* article aptly titled *A Frustrating Search for Motive in Newtown Shootings*, a Connecticut police department spokesperson admitted that “[the department didn’t] have any smoking gun to say this is why it occurred.” Marc Fisher, Robert O’Harrow & Peter Finn, *A Frustrating Search for Motive in Newtown Shootings*, *Wash. Post* (Dec. 22, 2012), http://www.washingtonpost.com/national/a-frustrating-search-for-motive-in-the-madness/2012/12/22/1cbe1cbc-4956-11e2-820e-17eefac2f939_story.html (on file with the *Columbia Law Review*) (describing search for motive as particularly complicated by the fact that shooter was “a young man who spent most of his waking hours at a computer” but who “appears to have left behind an astonishingly small online footprint”). With respect to the Webster shootings, “[a]uthorities said they were unaware of a motive.” Robbins & Kleinfield, *supra* note 35.

shooters appeared to have killed with premeditation,³⁷ particularly in the Webster case, as the shooter ambushed the firefighters by setting property ablaze to lure them to his home.³⁸ Again, both incidents arguably warrant legal designation as “terrorism” and the strong social disapproval that the label necessarily provokes. However, the absence of a discernible motive blocks these legal and social consequences in both cases, a result that heightens the call for a definition of terrorism that focuses on objective conduct, rather than subjective intent.³⁹

III. OAK CREEK AND THE MEDIA

In the case of Oak Creek, some commentators have, due to political and cultural sensitivities, effectively limited the range of reasons discussed by the media as to why Page killed the Sikh worshippers, specifically asking the media to remove from public consumption the possibility that Page targeted his victims because he thought they were Muslim. This artificial restriction is unwarranted. To support this point, analogy to a seemingly unrelated civil rights context can not only help cut through these sensitivities to demonstrate the propriety, and political and cultural innocuousness, of discussing the challenged reason, but also can and should be broadly utilized to assist in conceptualizing and grasping seemingly discrete catastrophes that at least facially involve race, religion, or difference.

³⁷. The Newtown shooter, Adam Lanza, shot his mother in the head four times at home, damaged his computer hard drive apparently to foil investigators and cover his tracks, and then proceeded to the elementary school where his mother volunteered, killing twenty-six people with a semiautomatic weapon. See Michael S. Schmidt, *Killer’s Mother Was Shot 4 Times*, *Official Says*, N.Y. Times (Dec. 18, 2012), <http://www.nytimes.com/2012/12/19/nyregion/lanzas-mother-shot-4-times-in-head-medical-examiner-says.html> (on file with the *Columbia Law Review*) (describing these facts and noting Lanza’s “path of devastation seemed coldly calculated”); see also Miriam Hernandez, *Psychologist Looks at Conn. Shooter’s Mindset*, KABC-TV L.A. (Dec. 14, 2012), http://abclocal.go.com/kabc/story?section=news/national_world&id=8921128 (on file with the *Columbia Law Review*) (quoting forensic psychologist as saying, “[i]t was a calculated, premeditated act of murder on this particular individual’s part to inflict harm, not only on his mother but to innocent children as well”).

³⁸. See Catherine E. Shoichet & Greg Botelho, ‘Chaos’: Gunman Ambushes, Kills Two Firefighters at New York Blaze, CNN (Dec. 24, 2012, 8:10 PM), <http://www.cnn.com/2012/12/24/us/new-york-firefighters-shooting/index.html> (on file with the *Columbia Law Review*). The shooter, William Spengler, also left a note describing his plans, providing strong evidence of premeditation. See Freile, *supra* note 35 (noting Spengler said he “[had] to go get ready to see how much of the neighborhood [he could] burn down and do what [he likes] doing best: killing people”).

³⁹. There is a sense that Lanza and Spengler both suffered from mental illness. See Gabriella Rosen Kellerman, *Diagnosing Adam Lanza*, *Atlantic* (Dec. 16, 2012, 9:34 AM), <http://www.theatlantic.com/health/archive/2012/12/diagnosing-adam-lanza/266322/#> (on file with the *Columbia Law Review*) (“In the aftermath of the Sandy Hook massacre, reports have surfaced that shooter Adam Lanza suffered from some sort of mental disability or disorder, the exact nature of which is thus far a matter of dispute.”); Robbins & Kleinfeld, *supra* note 35 (quoting Webster police chief as saying, “there were certainly mental health issues involved”). My response to this possibility is the same as my thoughts regarding Page’s purported mental illness, namely that speculation as to the shooters’ mental health problems is insufficient to overcome the evidence of premeditation that is necessary for the amended definition of terrorism to apply.

Following Oak Creek, prominent members of the media indicated that Wade may have selected his victims because he mistakenly believed that they were Muslim.⁴⁰ In articulating this possibility, some members of the media stated that, as Sikhs have been confused for Muslims after 9/11 because of superficial similarities in physical appearance, Wade may have “mistaken” his Sikh victims for Muslims.⁴¹ This explanation has been heavily criticized. In particular, some have urged a “retir[ing]” of the “mistaken identity”⁴² explanation on the grounds that, “to say that Page made a ‘mistake’ in targeting Sikhs . . . or that Sikhs are ‘unfairly’ targeted as Muslims. . . is to imply that it would be ‘correct’ to attack Muslims.”⁴³

This argument, grounded in undue sensitivities, impedes a full accounting for why the shooting occurred.⁴⁴ In the aftermath of 9/11, observant Sikh males—who wear turbans and beards, and typically have brown skin—have been the target of violence and discrimination due to their appearance and the perception that they may be Muslim.⁴⁵ This is fact. To separate the Oak Creek incident from that context would be to ignore the reality of post-9/11 discrimination and elevate niceties over the established post-9/11 circumstances in which Muslims and those perceived to be Muslim have been targeted.

In addition, a look at a seemingly unrelated civil rights law demonstrates how the criticism of the “mistaken identity” explanation is without merit. Federal law prohibits discrimination against an individual (1) because he or she

⁴⁰ I also share the belief that this may be the case. See *supra* note 16 and accompanying text.

⁴¹ See, e.g., Talk of the Nation: Oak Creek Tragedy Puts Sikh Community in Spotlight, NPR (Aug. 6, 2012), available at <http://www.npr.org/2012/08/06/158208043/oak-creek-tragedy-puts-sikh-community-in-spotlight> (on file with the *Columbia Law Review*) (noting callers suggested Sikhs “could very well have been targeted out of ignorance or mistaken identity”); see also Samuel G. Freedman, If the Sikh Temple Had Been a Mosque, N.Y. Times, Aug. 11, 2012, at A12, available at <http://www.nytimes.com/2012/08/11/us/if-the-sikh-temple-had-been-a-muslim-mosque-on-religion.html> (on file with the *Columbia Law Review*) (“The narrative that has emerged in both media coverage and public discourse since then has been one of religious mistaken identity. It presumes that the killer, identified as a white supremacist named Wade M. Page, may have shot the Sikhs because he ignorantly believed they were Muslim.”).

⁴² Valarie Kaur & Simran Jeet Singh, Two Sikh Americans: Let’s Retire ‘Mistaken Identity,’ Wash. Post (Aug. 10, 2012, 5:12 PM), http://www.washingtonpost.com/blogs/guest-voices/post/two-sikh-american-activists-lets-retire-mistaken-identity/2012/08/10/776ab9d8-e329-11e1-a25e-15067bb31849_blog.html (on file with the *Columbia Law Review*).

⁴³ Moustafa Bayoumi, Did Islamophobia Fuel the Oak Creek Massacre?, Nation (Aug. 10, 2012), <http://www.thenation.com/article/169322/did-islamophobia-fuel-oak-creek-massacre#> (on file with the *Columbia Law Review*).

⁴⁴ This argument does not apply to objections based on the specific phrasing (“mistaken identity”) used. However, to the extent that the objection is based on the phenomenon that Sikhs have been targeted due to the perception that they are Muslims, it must be rejected.

⁴⁵ For example, the president and executive director of a leading Muslim-American advocacy organization noted in Senate testimony that “Sikh Americans . . . are frequent targets of hate crimes because they are perceived to be Muslim.” Protecting the Civil Rights of American Muslims: Hearing Before Subcomm. on the Constitution, Civil Rights & Human Rights of the S. Comm. on the Judiciary, 112th Cong. (2011) (written testimony of Farhana Khera, President & Executive Director, Muslim Advocates), available at <http://www.judiciary.senate.gov/pdf/11-3-29%20Khera%20Testimony.pdf> (on file with the *Columbia Law Review*).

is disabled, (2) because he or she has a record of being disabled, or (3) because he or she is regarded as disabled.⁴⁶ It is the third category that is most relevant here: It “express[es] Congress’s understanding that unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities are often just as disabling as actual impairments,” and accordingly, Congress’s “desire to prohibit discrimination founded on such perceptions.”⁴⁷ And so it is with the mistreatment of Sikhs wrongfully perceived to be Muslim: The misperception may be based on fear, prejudice, and/or stereotypes premised on appearance, and the adverse consequences of the mistreatment are no less real even if the perpetrator intended to harm a Muslim. Accordingly, there are parallels between federal disability law and the mistreatment of Sikhs that warrant the former’s use to help understand the latter.

Restated in a deconstructed manner, it is impermissible to mistreat an individual because he or she *is* “x,” has a *record* of “x,” or is *regarded* as “x.” To point out that a person has been subject to mistreatment because he or she is perceived as “x” is to explain the factual basis for the mistreatment: Since this explanation exists within the confines of the third category, it does not indicate or imply by any means that the object of the first category—mistreatment because someone *actually* is “x”—denotes acceptable behavior. Indeed, in triggering the third category, the first remains wholly untouched and continues to signify a categorical wrong. Moreover, the Supreme Court itself has defined the third prong as occurring when an individual is “mistakenly” believed to be an individual with a disability,⁴⁸ and in doing so does not thereby suggest that mistreatment of an actual individual with a disability is somehow green-lit. In other words, there is nothing inherently untoward about either the “wrongfully perceived as” factual explanation, or about using “mistake” to describe that explanation.

An example may help illustrate how this disability paradigm is valuable in explaining, with specificity, legal wrongs committed against a particular group, and furthermore, why racial or religious communities might even find this paradigm preferable to current explanatory frameworks. Racial and religious profiling generally occurs when government officials, especially police, target with greater suspicion or interest individuals possessing certain physically identifiable traits.⁴⁹ This practice is symptomatic of guilt, or the presumption

⁴⁶ See Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(1) (Supp. II 2009) (amended 2008); see also *id.* § 12102(1)(3)(A) (defining impairment as when “individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity”).

⁴⁷ 29 C.F.R. pt. 1630 app. (2012) (Section 1630.2(*l*) Regarded as Substantially Limited in a Major Life Activity) (internal quotation marks omitted). The third prong further reflects Congress’s support for the view “that the negative reactions of others are just as disabling as the actual impact of an impairment.” *Id.* (quoting *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 282 (1987)).

⁴⁸ *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 522 (1999).

⁴⁹ See Yoram Margalioth & Tomer Blumkin, Targeting the Majority: Redesigning Racial Profiling, 24 *Yale L. & Pol’y Rev.* 317, 320 n.8 (2006) (describing profiling as “use [of] ‘sensitive’ traits such as ethnicity, national origin or race, namely, traits that relate to groups who may suffer from discrimination”).

of guilt, by proxy. In the context of immigration enforcement in Arizona, the disability discrimination categories indicate that there are independent harms in the profiling of an individual simply because he is Latino,⁵⁰ has a record of being Latino,⁵¹ or is perceived to be Latino.⁵² Similarly, to profile, in the post-9/11 climate, an individual solely because he is Muslim,⁵³ has a record of being a Muslim,⁵⁴ or is perceived to be Muslim,⁵⁵ is to identify separate wrongs. Accordingly, in invoking these categories, to state that Sikhs have been targeted after 9/11—and perhaps at Oak Creek—because they were perceived to be Muslim does not, on its own, include an implication that the first category is negated, and thus such a statement should be acknowledged as fact and not challenged as divisive, harmful, or worse. To be sure, activating the third category still preserves the ability for commentators, and the public at large, to immediately and roundly condemn any actual suggestion that it would be tolerable or understandable if Page had killed Muslims.

In short, the explanation of “mistaken identity,” while an admittedly clunky phrase, need not be removed from the post-Oak Creek lexicon. The explanation is useful and remains viable because it signals the truth of the matter: Sikhs have been targeted specifically due to the perception that they may be Muslim. The disability rights context further supports the notion that the phenomenon is not the product of animus or hostility toward a group, but instead exists as a more detailed, factual explanation for certain conduct. An apparently unrelated, antidiscrimination context thus holds the potential to dislodge sensitivities from preventing a full range of explanations from being discussed by the media or considered by the greater population. Oak Creek stands as proof that cross-civil rights conversations should occur in order to

⁵⁰. See Fernanda Santos & Charlie Savage, *Lawsuit Says Sheriff Discriminated Against Latinos*, N.Y. Times (May 10, 2012), http://www.nytimes.com/2012/05/11/us/justice-department-sues-arizona-sheriff-joe-arpai.html?_r=0 (on file with the *Columbia Law Review*) (describing alleged mistreatment of Latinos by Maricopa County Sheriff Joe Arpaio).

⁵¹. See David Biscobing, *Mexican Citizen Files \$75K Claim Against Gilbert Police*, E. Valley Tribune (Tempe, Ariz.) (July 19, 2008), http://www.eastvalleytribune.com/article_b988c00f-999d-574b-b35b-0077136a27a5.html (on file with the *Columbia Law Review*) (reporting case in which man was stopped by officer, in part because he “had a Mexican driver’s license” and “his vehicle had Sonora[, Mexico,] license plates”).

⁵². See Mary Romero & Marwah Serag, *Violation of Latino Civil Rights Resulting from INS and Local Police’s Use of Race, Culture and Class Profiling: The Case of the Chandler Roundup in Arizona*, 52 *Clev. St. L. Rev.* 75, 85 (2005) (“Persons were stopped and ask[ed] to prove citizenship solely on the basis of looking Mexican.”).

⁵³. See Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 *Calif. L. Rev.* 1259, 1265–77 (2004) (providing overview of various ways in which Muslims and others have been discriminated against after 9/11).

⁵⁴. See *id.* at 1274–76 (noting post-9/11 selective registration and detention processes for individuals from certain countries, almost all of which were Muslim countries).

⁵⁵. See Meghan Keneally, *The Armed Hate-Crime Victim Who Turned the Other Cheek*, Daily Mail (London) (Jan. 7, 2013), <http://www.dailymail.co.uk/news/article-2258510/Hate-crime-victim-gun-chose-NOT-shoot-attacked-man-thought-Muslim-Middle-East.html#ixzz2N4Lpny81> (on file with the *Columbia Law Review*) (“[The shooter Daniel] Quinnell believed that [the victim Cameron] Mohammed was Muslim or from the Middle East but he is neither: he was born and raised in Florida and his parents are from Trinidad, and he is Catholic.”).

avert tunnel vision and to ensure that our understanding of given issues and incidents is properly informed.

CONCLUSION

The tragic events in Oak Creek, Wisconsin, thrust upon an obscure religious community, and more broadly upon our laws and society, provide us with an opportunity to assess the efficacy of the law and conceptual explanations, not only as they apply to this incident, but also to those that may occur in the future. As discussed here, Oak Creek indicates why the definition of “terrorism” should be amended to not rely on the subjective motivation underlying the random killing of innocents, and how the disability-rights context may facilitate understanding and undermine criticisms of the media that are premised on notions of offensiveness or political value judgments. Oak Creek offers at least these lessons.

CODA

As this Essay was being finalized, on April 14, 2013, two bombs exploded near the finish line of the Boston Marathon, killing three spectators and injuring over 170 more.⁵⁶ In his remarks following the incident, President Obama called the twin bombings “an act of terrorism.”⁵⁷ Given the horrific nature of what occurred, the label seems appropriate. Indeed, whoever is responsible for the attack no doubt deserves the damning legal and social consequences of being deemed a “terrorist.”

But current federal law would disagree with President Obama’s assessment. As explained above, federal law generally requires that the act of violence be politically or ideologically motivated to constitute an act of terrorism. Here, as of this writing, we do not know who committed the atrocities in Boston, let alone why. And yet the “why” appears to be a necessary element to implicate federal terrorism law. Accordingly, the absence of an identifiable motive precludes the application of the federal definitions of terrorism.

The bombings in Boston only highlight the need for Congress to remedy this mismatch, and amend federal law to make objective action, not subjective motivation, the touchstone for the application of the terrorism designation.

Preferred Citation: Darwinder S. Sidhu, *Lessons on Terrorism and "Mistaken Identity" From Oak Creek, With a Coda on the Boston Marathon Bombings*, 113 COLUM. L. REV. SIDEBAR 76 (2013), http://www.columbia-lawreview.org/lessons-on-terrorism-and-mistaken-identity-from-oak-creek_SidhuS

⁵⁶ See The Boston Marathon Explosions, Boston Globe, <http://www.bostonglobe.com/metro/specials/boston-marathon-explosions> (last visited Apr. 18, 2013) (on file with the *Columbia Law Review*) (aggregating information on bombings).

⁵⁷ See Mark Landler, Obama Calls Blasts an ‘Act of Terrorism’, N.Y. Times (Apr. 16, 2013), <http://www.nytimes.com/2013/04/17/us/politics/obama-calls-marathon-bombings-an-act-of-terrorism.html> (on file with the *Columbia Law Review*).