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# Spatial Terrorism

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# *Fordham Urban Law Journal*

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THE NEW NORMAL: GRAPPLING WITH TERRORISM IN URBAN  
SPACES

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## Spatial Terrorism

Dawinder S. Sidhu\*

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# Spatial Terrorism

Dawinder S. Sidhu

## Abstract

Terrorism, under federal law, generally means an act of politically- or socially-motivated violence perpetrated against innocents. Terrorism within the meaning of federal law, in other words, exists only if a cognizable motive is uncovered. This definition also sees the United States as an undifferentiated landscape—by its own terms, it fails to take into account any geographic nuance in acts of mass violence. This Article suggests that spatial considerations are relevant in determining whether an act of mass violence constitutes an act of terrorism for purposes of federal law. It points to cities—which are characterized by a highly concentrated, fluid population, and which thus have more potential victims of indiscriminate violence—to demonstrate the propriety of considering space in an analysis of whether terrorism has occurred. It further argues that spatial dimensions lend support to shifting the definition of terrorism away from an exclusively instrumental, subjective intent model towards a more comprehensive descriptive, objective action paradigm. The existing terrorism scheme has generated confusion and unsatisfactory results. As incidents of mass violence continue to happen in the nation, the need for a coherent terrorism definition is particularly pressing and acute for prosecutors, judges, public officials, and a society attempting to conceptualize and categorize these incidents. Spatial considerations may provide greater consistency and clarity to the existing definitions of terrorism, further the underlying purposes of having terrorism as an independent legal harm, and catalyze a recalibrated, proper definition of terrorism.

**KEYWORDS:** Terrorism; Counterterrorism; Aurora; Oak Creek

# SPATIAL TERRORISM

*Dawinder S. Sidhu\**

## ABSTRACT

Terrorism, under federal law, generally means an act of politically or socially motivated violence perpetrated against innocents. Terrorism within the meaning of federal law, in other words, exists only if a cognizable and particular motive is uncovered. This definition also sees the United States as an undifferentiated landscape; by its own terms, it fails to take into account any geographic nuance in acts of mass violence.

This Article suggests that spatial considerations are relevant in determining whether an act of mass violence constitutes an act of terrorism for purposes of federal law. It points to cities—which are characterized by a highly concentrated, fluid population, and which thus have more potential victims of indiscriminate violence—to demonstrate the propriety of considering space in an analysis of whether terrorism has occurred. It further argues that spatial dimensions lend support to shifting the definition of terrorism away from an exclusively instrumental, subjective intent model and towards a more comprehensive descriptive, objective action paradigm.

The existing terrorism scheme has generated confusion and unsatisfactory results. As incidents of mass violence continue to occur, the need for a coherent terrorism definition is particularly pressing and acute for prosecutors, judges, public officials, and a society attempting to conceptualize and categorize these incidents. Spatial considerations may provide greater consistency and clarity to

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\*Assistant Professor of Law, University of New Mexico School of Law. My thanks to Nancy Hollander, Capt. David Iglesias (who provided comments in his personal capacity), Sudha Setty, and Matthew Waxman, for their feedback on this article; Martin Juarez for his diligent research assistance; the staff of the *Fordham Urban Law Journal*, especially Phillip Crain, Ellen Koenig, Frank Restagno, and Emily Seiderman, for their help in improving the quality and readability of this Article; and my parents for their love and support. Forgive me for any errors, which are unintentional and mine alone.

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### INTRODUCTION

In recent months, the people of the United States have witnessed and suffered several incidents of mass violence. The incidents—fresh in the hearts and minds of the people<sup>1</sup>—need no elaboration. Brief examples are therefore sufficient to provide the necessary factual background for this legal discussion.

On July 20, 2012, in Aurora, Colorado, James Holmes tossed gas canisters into a movie theater crowd that had assembled for the premiere of a widely anticipated feature film, and then proceeded to open fire, killing twelve individuals.<sup>2</sup> On August 5, 2012, Wade

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1. These incidents, to borrow a phrase from the Supreme Court, are “too recent to be called history.” *Slaughter-House Cases*, 83 U.S. 36, 71 (1872).

2. See Dan Frosch & Kirk Johnson, *Gunman Kills 12 in Colorado, Reviving Gun Debate*, N.Y. TIMES, July 20, 2012, <http://www.nytimes.com/2012/07/21/us/shooting-at-colorado-theater-showing-batman-movie.html>. “The total number of victims,” the Department of Justice assessed, “is more than 1,500.” Press Release, U.S. Dep’t of Justice, Office for Victims of Crime Announces \$2.9 Million Grant to Support Victims in Aurora, Colo. (Feb. 13, 2013), *available at* <http://www.ojp.usdoj.gov/newsroom/pressreleases/2013/ojppr021313.pdf> (“This includes the twelve killed, sixty-nine wounded and their families, other people in the theater complex at that time, people evacuated from an apartment complex where explosive devices were discovered, and first responders to the emergency.”).

Michael Page entered the grounds of a Sikh temple in Oak Creek, Wisconsin, killing six worshippers and ultimately killing himself during a firefight with responding law enforcement officers.<sup>3</sup> On December 14, 2012, Adam Lanza shot and killed twenty-seven individuals, including twenty children (none older than seven years old), at the Sandy Hook Elementary School in Newtown, Connecticut, meeting the same self-inflicted fate as Page.<sup>4</sup> On April 14, 2013, twin bombs exploded near the finish line of the Boston Marathon, killing three and injuring over 170 individuals.<sup>5</sup>

These incidents are unique in their respective factual circumstances. They are bound nonetheless by a common, self-evident truth: each was a horrific event in which numerous innocent lives (and only innocent lives) were targeted and violently eliminated. It is perhaps because of the heinous nature and scale of the incidents that public leaders at the highest levels and others have considered the incidents to be acts of terrorism. For example, speaking at a memorial service for the victims of the Oak Creek shooting, Attorney General Eric Holder stated, without equivocation, that “precisely what happened here [was] an act of terrorism.”<sup>6</sup> In remarks following the twin bombings in Boston, President Obama called the incident “an act of terrorism.”<sup>7</sup> President Obama also declared, “Any time bombs are used to target innocent civilians, it is an act of terror.”<sup>8</sup> Given the underlying and unifying qualities of these incidents, in which many innocents (and only innocents) were randomly targeted and killed, the Attorney General and the President’s particular assessments, as well as the President’s general rule, seem appropriate.

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3. See Rick Romell, *7 Killed, Including Shooter, at Sikh Temple in Oak Creek*, J. SENTINEL (Milwaukee), Aug. 6, 2012, <http://www.jsonline.com/news/crime/reports-of-people-shot-at-sikh-temple-in-oak-creek-qc6cgc0-165059506.html>; see also *Transcripts*, CNN (Aug. 6, 2012), <http://transcripts.cnn.com/TRANSCRIPTS/1208/06/cnr.03.html> (containing statement of Oak Creek Police Chief John Edwards).

4. 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/>.

5. See Chelsea Conaboy et al., *Investigation of Boston Marathon Bombings Continues*, BOSTON GLOBE, Apr. 16, 2013, <http://www.bostonglobe.com/metro/2013/04/16/some-areas-downtown-boston-reopen-today-boston-marathon-bombing-investigation-continues/qTROe6L0b98qR19W7dnWiJ/story.html>.

6. 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>.

7. Mark Landler, *Obama Calls Bombs 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>.

8. *Id.*

Federal law, however, seems to disagree. Federal law generally requires that an act of violence be politically or socially motivated to constitute an act of terrorism.<sup>9</sup> With respect to the Oak Creek shooting, for example, the perpetrator died at the scene, frustrating any attempt to identify his motive.<sup>10</sup> Other evidence obtained since the shooting has failed to reveal the motivation necessary to consider it an “act of terror” under federal law.<sup>11</sup> Thus, the Attorney General’s emphatic statement that the Oak Creek shooting constituted terrorism cannot be squared with federal terrorism law. With respect to the Boston bombings, to provide another example, President Obama called the incident an act of terrorism before there was any knowledge of who committed the atrocities, let alone why.<sup>12</sup> Yet the “why”—a political or social motive—needs to be present in order for federal terrorism law to follow. Accordingly, due to the absence of an identifiable motive, President Obama’s statement that the Boston Marathon bombings were an act of terrorism could not be supported under federal law.

As these examples reveal, there is an important disconnect between the leaders’ positions—which seem tied to the abhorrent nature of the incidents—and the existing federal definitions—which are tied, by contrast, to subjective motivation.<sup>13</sup> The Articles in this issue of the *Fordham Urban Law Journal* explore the relationship between cities and terrorism. This particular Article argues that the spatial characteristics of an incident may help inform the normative question as to when an incident should qualify as “terrorism” within

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9. See, e.g., 22 U.S.C. § 2656f(d)(2) (2012). See generally *infra* Part II.A.

10. See SCOTT MCALLISTER, OFFICE OF INTELLIGENCE & ANALYSIS, U.S. DEP’T OF HOMELAND SEC., TESTIMONY ON “HATE CRIMES AND DOMESTIC EXTREMISM” BEFORE THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND HUMAN RIGHTS (2012), available at <http://www.judiciary.senate.gov/pdf/9-19-12McAllisterTestimony.pdf>.

11. A report issued months after the shooting notes, at the outset, that “[n]o one knows what drove Wade Michael Page to walk into the Sikh Temple of Wisconsin on a Sunday morning last August and start shooting worshippers with a 9 mm handgun.” Marilyn Elias, *Sikh Temple Killer Wade Michael Page Radicalized in Army*, INTELLIGENCE REP., Winter 2012, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2012/winter/massacre-in-wisconsin>.

12. See *Boston Bombings: Obama Condemns ‘Act of Terrorism’*, BBC NEWS (Apr. 16, 2013), [www.bbc.co.uk/news/world-us-canada-22171684](http://www.bbc.co.uk/news/world-us-canada-22171684) (“President Barack Obama has condemned the twin bombing at the Boston Marathon as a ‘terrorist act’ . . . . [T]he motive and culprit were not yet known and no-one was in custody.”).

13. Compare *id.*, with 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> (defining terrorism as “criminal acts by individuals or groups . . . motivated by political or social agendas” (emphasis added)).

the meaning of federal law. It suggests specifically that the spatial dimensions of an incident not only matter, but indicate that the federal definition of terrorism should be triggered by “objective” conduct, not just by “subjective” motivation. That is, in resolving the apparent tension between the “what” (the objective paradigm) and the “why” (the subjective paradigm), the “where” (spatial considerations) of an incident is both relevant and points to the propriety of including the objective side of the spectrum in federal terrorism law.

This Article arrives at this conclusion by way of the following structure: Part I looks to the early conceptual foundations of terrorism—that which causes terror or fright (a descriptive understanding) and that which is calculated to cause terror or fright (an instrumental understanding). It also explores the first-order purposes of terrorism law: to socially marginalize the perpetrator of premeditated mass violence against innocents, and to apply an especially robust set of legal punishments to individuals that are deemed to be “terrorists.” Part II summarizes the current definition of terrorism under federal law. It also applies this definition to the four aforementioned incidents to demonstrate how the existing definition works in practice.

Drawing on other doctrinal areas that take physical settings into account, Part III suggests that the geographic qualities of an act of violence are salient in ascertaining whether “terrorism” has occurred. Cities, for example, are home to more innocents and thus more potential victims of indiscriminate violence. Part III also addresses whether, aside from cities, other spaces in our society, such as schools or places of worship, deserve special solicitude from federal terrorism laws. From this discussion, it proposes this definition: “terrorism” means premeditated violence perpetrated indiscriminately against innocents, where the factors that may support the terrorism designation are whether the violence was (1) perpetrated in an area with a high concentration of innocents, a public area of constitutional significance wherein individuals congregate or associate, or an area essential to the operation of the government wherein individuals work, engage in official government business, or are educated, or (2) calculated to further a political, religious, or social agenda. Next, Part III will apply this reformulated understanding of terrorism—one that acknowledges an objective or descriptive paradigm of terrorism—to the same four incidents to show how the proposed definition would play out. Part IV responds to potential counterarguments, including the concern that an “objective” definition of terrorism is too generous and will dilute its meaning, by offering limiting principles. This Part



also makes clear that while objective conduct is the preferred definition of terrorism according to this Article, motive-based terrorism still may fall within that definition.

“Terrorism” remains, perhaps inherently, an ambiguous and loaded term. At present, there are outstanding questions as to why one incident is designated an act of terrorism, while another not.<sup>14</sup> As with obscenity, a belief as to whether terrorism has occurred seems grounded more in an intuitive, visceral reaction than in the dispassionate application of established rules.<sup>15</sup> Whether an incident falls within the bounds of terrorism seems more personal than formal,<sup>16</sup> and these judgment calls are further complicated by the soft borders between terrorism and other categories of cognizable harm, such as simple premeditated murder.<sup>17</sup>

This Article does not pretend to solve the definitional problems with “terrorism,” but attempts to offer considerations that may tend to reduce not only the indeterminacy associated with the term, but the apparent mismatch between political or social views as to when terrorism occurs, on the one hand, and the law as to when terrorism has occurred, on the other. Therefore, in terms of the practical value of this Article, it suggests specifically that an appreciation for the geographic variations of an incident can clarify when the terrorism label is appropriate. Further, it shows how federal definitions of terrorism informed by spatial dimensions comport more fully with, and allow for the fuller expression of, the social disapproval of certain

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14. See, e.g., Glenn Greenwald, *Why Is Boston ‘Terrorism’ but not Aurora, Sandy Hook, Tucson and Columbine?*, GUARDIAN (London), Apr. 22, 2013, <http://www.guardian.co.uk/commentisfree/2013/apr/22/boston-marathon-terrorism-aurora-sandy-hook>; see also Scott Wong, *Claire McCaskill: If Boston Bombings are Terrorism, Why not Sandy Hook?*, POLITICO (Apr. 17, 2013), <http://www.politico.com/story/2013/04/claire-mccaskill-terrorism-boston-marathon-sandy-hook-90213.html?hp=l2>.

15. See Jacqueline S. Hodgson & Victor Tadros, *The Impossibility of Defining Terrorism*, 16 NEW CRIM. L. REV. 494, 495 (2013) (“We are often secure in our knowledge that a terrorist attack has been committed when we see it, yet a credible definition of terrorism eludes us.”).

16. See *id.*

17. See Lloyd J. Dumas, *Counterterrorism and Economic Policy*, 21 TRANSNAT’L L. & CONTEMP. PROBS. 83, 85 (2012) (“All acts of terrorism committed by non-governmental groups are crimes. They involve such acts as . . . murder . . .”); see also Christopher L. Blakesley, *Ruminations on Terrorism & Anti-Terrorism Law & Literature*, 57 U. MIAMI L. REV. 1041, 1097 (2003) (“If a common crime such as murder is committed in a manner that conforms to terrorism, it appears that the terror element functions as an aggravating factor, enhancing the punishment.”).

incidents.<sup>18</sup> More broadly, this Article supports an amendment to the federal definition of terrorism so that it includes objective conduct and considers spatial context.

In doctrinal terms, this Article seeks to build on the important work of legal scholars who are exploring the relationship between space and the law generally<sup>19</sup> and who, in the specific realm of terrorism, are calling attention to the “vertical” relationship between the federal government and state/local governments in the national security apparatus, where the dominant focus in the national security context has been on the “horizontal” dynamics between the three branches of the federal government.<sup>20</sup> This Article hopes to enrich the emerging conversation on space and to highlight the deeper complexities even within the sub-federal plane by showing that federal terrorism law should be mindful of variations in setting.

## I. PURPOSES OF THE “TERRORISM” CLASSIFICATION

### A. Basic Meanings of the Term

The term “terrorism,” as may be obvious, is derived from the root word “terror.”<sup>21</sup> Prior to the founding of the United States, the word “terror” was descriptive; it was used as a synonym for other words that each described a state of fright or horror. For example, in 1756, Edmund Burke, the prominent Irish political philosopher, observed that that politicians “cause terror and hatred.”<sup>22</sup> He also referenced the “mixed passion of terror and surprise” that a man may experience upon being extricated from a dangerous situation,<sup>23</sup> likened terror to “pain and danger”<sup>24</sup> and “panic,”<sup>25</sup> stated that “excessive loudness”

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18. At present, the leaders seem constrained in the use of “terrorism” in the immediate aftermath of incidents, and are instead inclined to wait until a motive can be unearthed. See Halimah Abdullah, *Obama Has Learned Tough Lessons on Using the Word ‘Terror’*, CNN (Apr. 16, 2013), <http://www.cnn.com/2013/04/16/politics/terror-word/index.html>.

19. See, e.g., Allan Erbsen, *Constitutional Spaces*, 95 MINN. L. REV. 1168 (2011).

20. See generally Matthew Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289 (2012).

21. *Terrorist*, VOCABULARY.COM, <http://www.vocabulary.com/dictionary/terrorist> (last visited Oct. 19, 2013).

22. 1 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 20 (James Prior ed., London, George Bell & Sons 1886).

23. *Id.* at 71; see also *id.* at 80 (calling “terror” a “passion”).

24. *Id.* at 74.

25. *Id.* at 200.

and “night” enhance our “terror,”<sup>26</sup> and claimed “love” is the opposite of “terror.”<sup>27</sup>

This country’s founding generation was aware of this descriptive understanding of terror.<sup>28</sup> In fact, the founding generation’s use of the word “terror” is consistent with this particular meaning of the word. For example, John Quincy Adams, writing to John Adams, observed that the people of the Netherlands “live[] in constant terror”—a condition or state of fear—as they were sandwiched between two imposing countries.<sup>29</sup>

The word “terror” took on a secondary meaning with the French Revolution’s “Reign of Terror,” where, in under a year, thousands were killed and tens of thousands were arrested.<sup>30</sup> The founding generation used the phrase “Reign of Terror” in their writings.<sup>31</sup> The “Reign of Terror” came to signify the use of terror, generally, as an instrument to agitate or excite another, and, specifically, as an instrument used in the context of civil conflict or political unrest.<sup>32</sup> “Terror,” combined with the French suffix “*isme*,” meaning “the practice of,” gives us “terrorism”: the practice of terror.<sup>33</sup>

In the early years of our nation, there were thus two overall viable meanings to “terror”—a descriptive meaning that has its origins prior

26. *Id.* at 109, 110.

27. *Id.* at 130.

28. *See, e.g.*, GEORGE MASON, AN APPENDIX TO AN ESSAY ON DESIGN IN GARDENING 6 (London, John White 1795) (discussing Burke’s essay on “terror”).

29. Letter from John Quincy Adams to John Adams (Sept. 12, 1795) (on file with the Massachusetts Historical Society).

30. *See* Hon. Louis G. Fields, Jr., *Contemporary Terrorism and the Rule of Law*, 113 MIL. L. REV. 1, 3 (1986) (noting that the “Reign of Terror” is the “period between September 1793 and July 1794 . . . during which an estimated 20,000 persons were killed and some 300,000 arrested.”).

31. *See, e.g.*, Letter from John Quincy Adams to John Adams 2 (May 20, 1797) (on file with the Massachusetts Historical Society) (noting the imprisonment of an individual “during the time which they call the reign of terror”); Letter from Abigail Adams to William Cranch 3–4 (Nov. 15, 1797) (draft on file with the Massachusetts Historical Society) (“[T]he Reign of Terror and absolute despotism has again commenced in France by the overthrow and banishment of every man disposed to the system of moderation justice & peace . . . [I]n the Chaos which France is plunged no order or harmony can arise, and we have nothing to look for, but Robbery and plunder so long as we expose our property unarmed to their grasp . . .”).

32. *See* David B. Kopel & Joseph Olson, *Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, 21 OKLA. CITY U. L. REV. 247, 251 (1996) (“[T]he term ‘terrorism’ originated in the French Revolution . . .”); *see also* JURGEN HABERMAS, PHILOSOPHY IN A TIME OF TERROR: DIALOGUES WITH JURGEN HABERMAS AND JACQUES DERRIDA 152 (2003) (“The current usage of the term ‘terrorism’ derives from the late phase of the French Revolution, when Robespierre’s Reign of Terror engaged in mass executions and purges of civilians.”).

33. *See* JONATHAN MATUSITZ, TERRORISM AND COMMUNICATION 1 (2013).

to the French Revolution, and an instrumental meaning that stems from the French Revolution. The authoritative 1828 *Webster's American Dictionary of the English Language*,<sup>34</sup> which took twenty years to complete,<sup>35</sup> reflects this dual meaning. The dictionary notes at the outset that “terror” is derived from the Latin *terreo*, or “to frighten.”<sup>36</sup> It then contains both strands of the meaning of “terror.” First, “terror” signals “[t]hat which may excite dread [or that is] the cause of extreme fear.”<sup>37</sup> In other words, “terror” can be a circumstance, a trigger or catalyst that causes the unpleasant emotions; it is “that” which generates or provokes “terror.” This meaning aligns with the early descriptive meaning.

The dictionary also defines “terror” as “[t]he threatenings of wicked men, or evil apprehended from them,” and “[a]wful majesty, calculated to impress fear.”<sup>38</sup> Under this meaning, “terror” is caused or planned by deplorable individuals to generate uncomfortable emotions in others.<sup>39</sup> This second definition of “terror” thus follows the instrumental meaning—similar to the “reign of terror.” In short, “terror” is that which may lead to fright and horror, and “terror” is also a tactic of fear used by others. Again, “terror” is what *causes* others to tremble, and what is *calculated to cause* others to tremble.

“Terrorism” tracks both definitions of “terror.” The word “terrorism” in the United States did not emerge as its own conceptual phrase until after the French Revolution of the late-eighteenth century. For example, it does not appear in the 1828 Webster’s dictionary as a separate entry. “Terrorism” first found its way into an American judicial opinion in 1862, when the Court of Appeals of New York, in *Eadie v. Slimmon*, found void an insurance policy that was obtained because of “force, terrorism and coercion which overcame

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34. The dictionary has been cited in thirty-two Supreme Court opinions, including lead opinions in major cases, such as *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008), *Crawford v. Washington*, 541 U.S. 36, 51 (2004), and one hundred forty-four federal court opinions (based on a Westlaw search last performed on July 19, 2013). See Steven G. Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 BYU L. REV. 1393, 1424 (referring to the dictionary as “authoritative”).

35. See *Eldred v. Ashcroft*, 537 U.S. 186, 207 n.15 (2003) (citations and internal quotation marks omitted).

36. The first entry of “terror” repeats this basic meaning: “Extreme fear; violent dread; fright; fear that agitates the body and mind.” 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828).

37. *Id.*

38. *Id.*

39. “Terror” has two other entries in Webster’s dictionary: “In Scripture, the sudden judgments of God are called terrors;” “Death is emphatically styled the *king of terrors.*” *Id.*

free agency.”<sup>40</sup> The word does not make its first appearance in a federal court opinion until 1879 in the ordinary context of lawyer disbarment. The attorney in question was suspected of inciting his clients to influence the outcome of a case by way of “exciting the fears of the judge by the terrorism of newspaper attacks and abusive circulars.”<sup>41</sup> The attorney appears to have used terrorism in the instrumental sense: to intimidate the court. *Eadie* suggests that the instrumental meaning of terror is not the sole province of revolutionaries or political actors. Around the same time, “terrorism” was mentioned by federal courts in similarly mundane contexts of the execution of an estate,<sup>42</sup> labor protests,<sup>43</sup> and jurisdiction to issue an injunction.<sup>44</sup> The Supreme Court first used the term in 1906.<sup>45</sup> In *Fisher v. Baker*, a writ of habeas corpus was suspended in the Philippine Islands (then controlled by the United States) because “there exists a state of insecurity and terrorism.”<sup>46</sup> The mention of a “state . . . of terrorism” reinforces the notion that terrorism contains two meanings, descriptive and instrumental.

Indeed, while the 1828 edition of Webster’s dictionary only has entries for “terror” and not “terrorism,” the 1913 edition has a separate entry for “terrorism.” According to that text, “terrorism” is defined both as “[t]he act of terrorizing, or state of being terrorized,” which follows the descriptive model, as well as “a mode of government by terror or intimidation,” which aligns with the instrumental model.<sup>47</sup> This gives credence to the suggestion that the early understandings of “terror” and “terrorism” have both descriptive and instrumental meanings.

In sum, although “terror” as an instrument of civil conflict or political unrest found its genesis in the French Revolution, it is clear that “terror” also had a descriptive meaning prior to and independent from that political event. Accordingly, “terrorism” arguably gained an additional, supplemental meaning, rather than its exclusive or original meaning, from the “reign of terror.” In modern times, as

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40. *Eadie v. Slimmon*, 26 N.Y. 9, 12 (1862).

41. *Ex parte Cole*, 6 F. Cas. 35, 37 (C.C.D. Iowa 1879) (No. 2973).

42. *See* *Lipse’s Ex’r v. Spears’ Ex’r*, 88 F. 952, 956 (C.C.W.D. Va. 1882).

43. *See* *Thomas v. Cincinnati, New Orleans & Tex. Pac. Ry. Co.*, 62 F. 803, 815 (C.C. Ohio 1894); *Lake Erie & W. Ry. Co. v. Bailey*, 61 F. 494, 496 (C.C. Ind. 1893).

44. *See* *United States v. Agler*, 62 F. 824, 825 (C.C.D. Ind. 1894).

45. *See* *Fisher v. Baker*, 203 U.S. 174 (1906).

46. *Id.* at 179–80.

47. NOAH WEBSTER, WEBSTER’S REVISED UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1489 (1913).

explained more fully below,<sup>48</sup> the instrumental definition has eclipsed the descriptive definition. This Article argues that the dormant, descriptive sphere of “terrorism” should be revived.

### B. Terrorism as a Separate Category of Legal Harm

The meanings of “terror” aside, it may not be self-evident why federal law should recognize a separate category of harm called “terrorism.” We may all agree that a simple state of fear does not, by itself, give rise to a cognizable legal harm. For someone to intentionally spook another and generate a discernible emotional condition in another similarly would not be seen as something worthy of regulation by law.<sup>49</sup> Every emotive artistic performance, bad break-up, or game of peak-a-boo would otherwise result in litigation. As a result, a state of fear alone, or a calculated attempt to cause fear, may not warrant the law’s involvement.

On the other hand, independent harms that cause fear may implicate the law. Battery, for example, constitutes a physical harm to the victim and the nature of assault and battery<sup>50</sup> is such that a state of fear, and intentional transmission of fear, is a necessary incident to the physical harm.<sup>51</sup> Rape represents a significant intrusion of bodily integrity<sup>52</sup> that not only ignores consent and violates the victim physically and emotionally, but induces fear and is designed to

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48. See *infra* Part II.A.

49. An exception is perhaps the tort of intentional infliction of emotional distress, though the bar to make such a claim is quite high. “To succeed on a claim for intentional infliction of emotional distress in Maryland,” for example, “a plaintiff must demonstrate that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress.” *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011); see also RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965) (“Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”).

50. See RESTATEMENT (SECOND) OF TORTS § 13 (1965) (“An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results.”); see also *id.* § 18(a) (“An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) an offensive contact with the person of the other directly or indirectly results.”).

51. See *State v. Hale*, 9 N.C. (2 Hawks) 582, 584 (1823) (“An assault and battery . . . is injurious to the citizens at large by its breach of the peace, by the terror and alarm it excites, by the disturbance of that social order which it is the primary object of the law to maintain . . .”).

52. See 10 U.S.C. § 920(a) (2012) (defining rape).

generate that fear.<sup>53</sup> Premeditated murder—because of its preconceived, planned character and deadly results<sup>54</sup>—may chill others in and around the community where the killing occurs.<sup>55</sup> Such a murder may send a negative message to others in that community or affiliated with the victim.<sup>56</sup> These crimes are what Robert Nozick would call “public wrongs” because they instill fear not only in victims, but in non-victims as well.<sup>57</sup>

Even though these crimes—battery, rape, and premeditated murder—cross the line into what is illegal, and even though they each may create fear and/or are calculated to cause fear, they do not fall within the ordinary meaning of “terrorism.” In other words, there is something qualitatively different from these “harm plus terror” crimes and what constitutes “terrorism.”

That additional, distinguishing characteristic of “terrorism” may be scale.<sup>58</sup> An individual battery, rape, or premeditated killing, may inflict significant harm, but may be seen nonetheless as a more discrete attack or incident whose affect on others is limited.<sup>59</sup> An act of terrorism, in contrast, has more immediate, direct targets, and has a wider impact both in physical and psychic terms.<sup>60</sup> The line between

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53. See, e.g., Samuel H. Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 LOY. L.A. L. REV. 845, 885 n.123 (2002) (noting the powerful testimony of a rape victim on the “sheer fear and terror” resulting from a sexual attack).

54. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 550 (4th ed. 2006) (providing that some courts distinguish premeditated murder as “a ‘cold-blooded’ killing, i.e., a homicide committed after calm and careful reflection by the wrongdoer”).

55. See Christopher J. Meade, *Reading Death Sentences: The Narrative Construction of Capital Punishment*, 71 N.Y.U. L. REV. 732, 742 (1996) (“Murders spawn a feeling of chaos which instills fear in a community.”).

56. See Jennifer M. Smith, Note, *An International Hit Job: Prosecuting Organized Crime Acts as Crimes Against Humanity*, 97 GEO. L.J. 1111, 1144 (2009) (“Hits and other violence committed by organized crime groups . . . send a message of intimidation to the broader community . . . .”)

57. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 67 (1974).

58. See Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579, 587 (2010) (“The context of terror has distinctive features, including [an almost unimaginable] scale of harm . . . .”); William F. Zieske, *Demystifying the USA PATRIOT Act*, 92 ILL. B.J. 82, 83 (2004) (“[I]t is inherently difficult to draw a definitive line between terrorism and all other crime, other than by the scale of impact.”).

59. This is not to dismiss or underestimate, by any means, the significant injuries that these harms may impose on an individual or others.

60. See Stephen P. Marks, *Branding the “War on Terrorism”: Is there a “New Paradigm” of International Law?*, 14 MICH. ST. J. INT’L L. 71, 73–74 (2006) (“[T]he nature of terrorism . . . is [that it is] successful to the extent that relatively small-scale

an individualized attack and one that constitutes terrorism may be difficult to draw, though it may be comfortably said that an assault in a bar falls short while a bombing of the same bar crosses that line.

The wider psychic impact of terrorism may be particularly heightened because terrorism is random; indeed, Cyrille Begorre-Bret describes terrorism as a “‘blind’ violence because it . . . strikes at random, innocent people.”<sup>61</sup> Terrorist incidents are systematic in a narrow sense—for example, the perpetrators may target individuals who are eating at a restaurant in a busy tourist district, working in a landmark building, or flying on a large airplane. But the targets are not individually selected, and are indistinguishable from each other as far as the offenders are concerned. An assault victim may have been selected due to some escalating disagreement in a bar. A terrorist event, by contrast, reflects indiscriminate targeting of victims.<sup>62</sup> Political philosopher Michael Walzer, for example, defines terrorism simply as “the random murder of innocent people.”<sup>63</sup> The fear that an act of terrorism generates is therefore larger, because the victim literally could be anyone—anyone who happened to be dining at a restaurant in that popular area, anyone working in a notable building, and anyone who happened to be flying.<sup>64</sup> As the particular victims are not specially targeted, the sense that “it could have been me” is shared more broadly and widens the circle of fear.<sup>65</sup>

harm can produce large scale fear and attract [greater attention] than all other causes of death . . .”).

61. Cyrille Begorre-Bret, *The Definition of Terrorism and the Challenge of Relativism*, 27 CARDOZO L. REV. 1987, 1996 (2006).

62. *See id.*; *see also* Kevin J. Greene, *Terrorism as Impermissible Political Violence: An International Law Framework*, 16 VT. L. REV. 461, 477 (1992) (“[A] feature that distinguishes terrorism from other types of political violence ‘is the willful and calculated choice of innocents as targets . . . [T]errorists choose to attack weak and defenseless civilians . . . anyone in fact except soldiers, if they can avoid it. Civilians, then are the key to the terrorists’ strategy.’” (quoting Benjamin Netanyahu, *Defining Terrorism*, in *TERRORISM: HOW THE WEST CAN WIN* 7, 9–10 (Benjamin Netanyahu ed., 1986))).

63. MICHAEL WALZER, *JUST AND UNJUST WARS* 198 (4th ed. 2000).

64. These examples already point to the relevance of space, a point clarified *infra* Part III.

65. Yehuda Amichai’s poem, *The Diameter of a Bomb*, speaks to the impact of mass violence:

The diameter of the bomb was thirty centimeters  
and the diameter of its effective range about seven meters,  
with four dead and eleven wounded.  
And around these in a larger circle  
of pain and time, two hospitals are scattered  
and one graveyard. But the young woman  
who was buried in the city she came from,



An interesting question is whether a serial perpetrator may be considered a “terrorist” due to the impact of his or her actions in the aggregate, where each individual act may not itself rise to the level of terrorism. A serial rapist or murderer may wreak more physical and psychic harm on a community than the perpetrator of a single incident with one-off targets. To use a different example, the Ku Klux Klan’s behavior—including organizing lynching, inciting violence, and intimidating African-Americans—has been said to constitute a protracted “reign of terror.”<sup>66</sup> A burning of a predominantly African-American church is a significant crime, one that causes fright and that is calculated to cause fright; the waves of fright extend beyond the four corners of the parish’s property to all African-Americans in the neighborhood or proximity, and reaches effectively all African-Americans.<sup>67</sup> But a single church burning is not considered terrorism; the collective campaign of intimidation and violence, however, may be.<sup>68</sup> In any case, federal hate crimes legislation, which makes it unlawful for anyone “to attempt to cause bodily injury to any person, because of the [person’s] actual or

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at a distance of more than a hundred kilometers,  
 enlarges the circle considerably,  
 and the solitary man mourning her death  
 at the distant shores of a country far across the sea  
 includes the entire world in the circle.  
 And I won’t even mention the crying of orphans  
 that reaches up to the throne of God and  
 beyond, making  
 a circle with no end and no God.

Yehuda Amichai, *The Diameter of a Bomb*, available at [http://allpoetry.com/poem/8513183-The-Diameter-Of-The-Bomb-by-Yehuda\\_Amichai](http://allpoetry.com/poem/8513183-The-Diameter-Of-The-Bomb-by-Yehuda_Amichai) (last visited Nov. 7, 2013).

66. See, e.g., *Virginia v. Black*, 538 U.S. 343, 353 (2003).

67. See generally Troy A. Scotting, *Hate Crimes and the Need for Stronger Federal Legislation*, 34 AKRON L. REV. 853, 864 (2001) (“[H]ate crimes are seen as ‘message crimes,’ in effect, sending ‘a message that members of a certain group . . . are not wanted in a particular neighborhood, community, workplace, or college campus.’” (quoting *Hate Crimes Prevention Act of 1998: Testimony on H.R. 3081 Before the H. Comm. on the Judiciary*, 105th Cong. (1998) (testimony of Jack McDevitt, Professor, Northeastern Univ.))); *id.* (“When the victim is attacked because of an immutable characteristic, members of the target community who share the characteristic perceive it ‘as an attack on themselves directly and individually.’” (quoting FREDERICK M. LAWRENCE, *PUNISHING HATE* 42 (1999))); *id.* (“This creates a feeling among target community members that any one of them could be a victim of similar violence.”).

68. This possibility appears to be consistent with the view, expressed by noted feminist legal scholar Catherine MacKinnon, that violence against women, a “daily war,” is terrorism. See Catherine MacKinnon, *Women’s September 11th: Rethinking International Law of Conflict*, 47 HARV. INT’L L.J. 1, 19 (2006).

perceived race [or] color,”<sup>69</sup> and federal civil rights laws, which make it unlawful for anyone to conspire to deprive another of constitutional rights on the basis of race,<sup>70</sup> not to mention arson and related state offenses, may nonetheless enable society and the government to punish strongly this systemic mistreatment of African-Americans. These other avenues of redress require us again to question why terrorism as a stand-alone offense is necessary.

To take a more recent example, John Muhammad and Lee Boyd Malvo, known as the “D.C. snipers,” killed thirteen people over a three-week period in the Washington, D.C. area.<sup>71</sup> They apparently, according to Malvo, sought to “terrorize” the nation.<sup>72</sup> They were formally charged in Virginia with “an act of terrorism,” among other things.<sup>73</sup> Given the number of victims, the number of potential victims, and the extended period over which the perpetrators randomly killed individuals, “terrorism” may seem appropriate under this “mosaic theory” of terrorism.<sup>74</sup> Nevertheless, the localized nature of the shootings (their limit to the D.C. region) cuts against the application of the term. In any case, premeditated murder would still cover these crimes.<sup>75</sup>

Drilling down on what constitutes “terrorism” still does not adequately respond to the question of why a separate legal harm of “terrorism” needs to exist. For example, to the extent that terrorism is a way to challenge political policies or programs,<sup>76</sup> such means are clearly unlawful under any doctrine. The eight German saboteurs who buried their uniforms in the sand upon arriving on the shores of

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69. 18 U.S.C. § 249(a)(1) (2012).

70. *See* 42 U.S.C. § 1985(3) (2006).

71. *See* Larry O’Dell, *D.C. Sniper Lee Boyd Malvo Wants Life Sentences Tossed*, WASH. TIMES, June 27, 2013, [www.washingtontimes.com/news/2013/jun/27/dc-sniper-malvo-wants-life-sentences-tossed/](http://www.washingtontimes.com/news/2013/jun/27/dc-sniper-malvo-wants-life-sentences-tossed/).

72. *See* C. Benjamin Ford, *Malvo Says Pair Planned Bombings*, GAZETTE.NET (May 24, 2006), [http://ww2.gazette.net/stories/052406/germnew193052\\_31939.shtml](http://ww2.gazette.net/stories/052406/germnew193052_31939.shtml) /.

73. *See* Muhammad v. Commonwealth, 619 S.E.2d 16, 30 (Va. 2005).

74. *See generally* Orin Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 313–14 (2012) (explaining that, under the Fourth Amendment, the mosaic theory holds that “searches can be analyzed as a collective sequence of steps rather than as individual steps”); *id.* at 314 (pursuant to the theory, courts are “aggregating conduct rather than looking to discrete steps”).

75. John Muhammad, the only adult of the two, was executed and would have been executed for the capital murder charge, irrespective of the terrorism charge. *See Muhammad*, 619 S.E.2d at 30 (noting that Muhammad was convicted of the two capital murder charges, only one of which was premised on terrorism).

76. *See* 22 U.S.C. § 2656f(d)(2) (2012) (“[T]he term ‘terrorism’ means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents . . .”).

Long Island and Florida, and who were on a mission to destroy American military capabilities and attack civilian stores, may have been engaged in instrumental terrorism.<sup>77</sup> Yet their actions already are violations of the laws of war.<sup>78</sup> Accordingly, why the need for terrorism? To take another recent example, the Tsarnaev brothers detonated two bombs near the finish line of the Boston Marathon, apparently in violent protest of American mistreatment of Muslims.<sup>79</sup> The surviving brother was charged with several offenses, perhaps the most serious of which were using of a weapon of mass destruction and the malicious destruction of property resulting in death,<sup>80</sup> which both potentially carry the death penalty.<sup>81</sup> If sufficient charges aside from terrorism exist, is not “terrorism” as a separate cognizable harm unnecessary or superfluous?

The scale, random nature, and extended sphere of fear are attributes of terrorism, but still are not wholly satisfactory ways to separate terrorism from other crimes. There are two reasons for including terrorism in federal law; the first is social and the second legal. First, “terrorism” and “terrorist” are powerful social terms that signify society’s alienation of the perpetrator, indicating that the perpetrator is worthy of no other identity than that of “terrorist.”<sup>82</sup> To label someone a “terrorist” is to socially exile that person. Perhaps no other word in the current American lexicon carries as much power to effectuate society’s interest in marginalizing the perpetrator; “murderer,” or “sex offender,” for example, also declare society’s revulsion as to the perpetrator, but perhaps not to the degree of “terrorist.” For Tsarnaev, being labeled a “user of a weapon of mass destruction” or “malicious destructor of property resulting in death” does not nearly have the same weight or social utility as “terrorist.”

This theory on the relationship between terrorism and identity is not altogether new. Prime Minister of India Dr. Manmohan Singh stated after the 2005 London subway bombings, for example, “I do

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77. See *Ex parte Quirin*, 317 U.S. 1, 7–8 (1942).

78. See *id.* at 12.

79. See Deborah Feyerick et al., *Boston Bomb Suspect Pleads Not Guilty*, CNN (July 11, 2013), <http://www.cnn.com/2013/07/10/us/boston-bombing-case>.

80. Indictment, *United States v. Tsarnaev*, No. 1:13CR10200, 2013 WL 3215742 (D. Mass. June 27, 2013).

81. See 18 U.S.C. § 2332a(a)(4) (2012); *id.* § 844(i).

82. See BRUCE HOFFMAN, *INSIDE TERRORISM* 23 (2006) (“[T]errorism’ is a pejorative term.”) Hodgson & Tadros, *supra* note 15, at 497 (noting that “terrorism” has a “condemnatory effect” in that it marks out an importantly distinctive wrong that has widespread public recognition).

believe that terrorism has no religion, terrorists have no religion and that they are a friend of no religion. No religion in the world preaches atrocities against innocent men, women and children . . . .”<sup>83</sup> Similarly, following failed terrorist plots in London and Glasgow, Dr. Singh said, “A terrorist is a terrorist and has no religion or community.”<sup>84</sup> Lieutenant Brian Murphy (retired), the first law enforcement officer to respond to the Oak Creek shooting, said of the perpetrator, “[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.”<sup>85</sup> To label an individual as a “terrorist” is to therefore strip the perpetrator of any other human identity and brand him as highly offensive of society’s most basic norms and rules. Further, as Attorney General Holder said in Oak Creek, “this community witnessed the very worst of human kind.”<sup>86</sup>

Social science on criminal defendants makes clear that informal social control—the practice of guiding individual behavior through interactions with society—helps reduce antisocial thoughts and actions, and in this respect helps an individual become a regular, non-offending part of mainstream society.<sup>87</sup> Social science further establishes that concepts of identity play a critical role in the post-offense development of a criminal defendant.<sup>88</sup> In branding an individual a “terrorist,” we may be indicating that the individual is no longer deserving of society’s informal support and that the starting point for any identity transformation of the individual must be the lowly and stigmatized identity of “terrorist.”

Second, to make this social punishment effective and available to prosecutors, terrorism must be codified in law.<sup>89</sup> “Terrorism” as a

83. *Joint Press Conference Between Tony Blair and Manmohan Singh*, NAT’L ARCHIVES (Sept. 8, 2005), <http://collections.europarchive.org/tna/20050908065251/number10.gov.uk/page8152>.

84. Emily Wax, *Indian Doctors Fear Bomb Plot Backlash*, WASH. POST, July 6, 2007, at A10.

85. Cal Fussman, *Lieutenant Brian Murphy: What I’ve Learned*, ESQUIRE (Dec. 27, 2012), <http://www.esquire.com/features/what-ive-learned/meaning-of-life-2013/brian-murphy-sikh-temple-shooting-0113>.

86. Holder, *supra* note 6, at 2.

87. See generally Robert J. Sampson et al., *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCI. 918 (1997).

88. See John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1, 12 (2001) (describing desistance as “a social transition that entails identity transformation . . . from an offender to a nonoffender”).

89. See Hodgson & Tadros, *supra* note 15, at 497 (noting that “terrorism” is designed to “trigger[] the use of terrorism law”).

legal concept reflects the great social disapproval of the underlying conduct and identifies violence that is in the highest level of harms to society and mankind. For example, William Blackstone noted that “it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness.”<sup>90</sup> Terrorism is in that tier. As one commentator writes, “States consider terrorism . . . a heinous crime on the order of a crime against humanity . . . .”<sup>91</sup>

Criminal laws are all supported, as they must be, by the purposes of criminal punishment. These are retribution (a form of social vengeance directed at the offender), just deserts (part of the bargain in the social contract wherein an individual who breaks the law consents to and is due punishment), deterrence (a social message that the offense will not be tolerated and thus should not be committed by others), incapacitation (a form of social control by removing the offender from society), and rehabilitation (a form of social investment in the improvement of the offender).<sup>92</sup> Because of its heinous nature, terrorism may be a crime that we concede to be supported primarily by retributive reasons.<sup>93</sup>

In short, “terror” historically has meant that which causes fright (the descriptive definition) *and* that which is calculated to cause fright (the instrumental definition).<sup>94</sup> Though “terrorism” shares these fear-based elements in common with other recognized crimes, terrorism may be distinguished in part by its scale, its indiscriminate nature, and the wider universe of individuals it potentially impacts,<sup>95</sup> in contrast with incidents that target particular people or are localized. As an

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90. *Wisconsin v. Mitchell*, 508 U.S. 476, 488 (1993) (citations and internal quotation marks omitted).

91. Kelly A. Gable, *Cyber-Apocalypse Now: Securing the Internet Against Cyberterrorism and Using Universal Jurisdiction as a Deterrent*, 43 VAND. J. TRANSNAT'L L. 57, 106 (2010); *see also* Christopher L. Blakesley, *Ruminations on Terrorism and Anti-Terrorism Law and Literature*, 57 U. MIAMI L. REV. 1041, 1110 (2003) (“Crimes against humanity and terrorism are crimes of the first order. They represent, along with genocide, the worst we mortals do to each other; that is to say . . . to ourselves.”).

92. *See* 18 U.S.C. § 3553(a)(2) (2012) (listing the purposes of criminal sentencing).

93. *See* Laura K. Donohue, *In the Name of National Security: U.S. Counterterrorist Measures, 1960–2000*, 13 TERRORISM AND POL. VIOLENCE 15 (2001) (“Let terrorists beware that when the rules of international behavior are violated, our policy will be one of swift and effective retribution.”); *cf.* Note, *Responding to Terrorism: Crime, Punishment, and War*, 115 HARV. L. REV. 1217 (2002) (suggesting that America’s response to terrorism after 9/11 may be supported by joint interests in retribution and incapacitation).

94. *See supra* notes 21–31 and accompanying text.

95. *See supra* notes 55–61 and accompanying text.

initial matter, terrorism, unique in its scale, randomness, and impact, should be a separate category of harm because it allows society to alienate, and the law to apply a particularly robust set of laws against, the perpetrators of such especially harmful actions.

## II. FEDERAL TERRORISM LAW

### A. Federal Definition of Terrorism

Part I was intended to provide some conceptual background on what should constitute terrorism. This Part is designed to address what counts as terrorism according to federal law. A single or static definition of terrorism is difficult to pin down,<sup>96</sup> a task complicated by the numerous definitions of and references to terrorism in federal law.<sup>97</sup> An overarching principle in federal terrorism statutes may be found nonetheless: as explained more fully below, federal law generally requires that the act of violence be politically or socially motivated to be an act of terrorism.

One federal statute, for example, provides that “the term ‘terrorism’ means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”<sup>98</sup> Another states 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,”<sup>99</sup> and still another federal statute states that “international terrorism” means violent or dangerous criminal activities that “appear to be intended . . . to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect

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96. 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, 6–7 n.12 (2011) (referring to scholars’ attempts to settle on a single definition of “terrorism” where a consensus, both internationally and domestically, on its meaning does not exist); Chris Good, *What It Means to Call It ‘Terrorism’*, ABC NEWS (Apr. 17, 2013), <http://abcnews.go.com/blogs/politics/2013/04/what-it-means-to-call-it-terrorism/> (quoting a former FBI counterterrorism official as saying, “There’s a number of different definitions for ‘terrorism.’ There’s the academic definition, and there are the legal definitions, and then there’s the one that’s used by the FBI, which kind of straddles both.”).

97. See Setty, *supra* note 96, 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)) (explaining that there are “twenty-two definitions of terrorism under U.S. federal law”).

98. 22 U.S.C. § 2656f(d)(2) (2012).

99. 18 U.S.C. § 2332b(g)(5) (2012).

the conduct of a government by mass destruction, assassination, or kidnapping.”<sup>100</sup>

Accordingly, the most basic definition of terrorism in federal law, as a federal agency pointed out in a post-9/11 memorandum, is that “terrorism” “means criminal acts by individuals or groups . . . motivated by political or social agendas.”<sup>101</sup> Many scholars and public figures seem to agree with this definition. Bruce Hoffman, for example, suggests that terrorism is “the deliberate creation and exploitation of fear through violence or the threat of violence in the pursuit of political change.”<sup>102</sup> Anne-Marie Slaughter and William Burke-White likewise contend that “[t]errorism . . . 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.”<sup>103</sup> Phillip Heymann writes that terrorism is “violence conducted as part of a political strategy by a subnational group or secret agents of a foreign state.”<sup>104</sup> For his part, Israeli Prime Minister Benjamin Netanyahu finds that “[t]errorism is the deliberate and systematic assault on civilians to inspire fear for political ends.”<sup>105</sup> Thus, the federal government, supported by scholars and others, sees terrorism as predicated upon a particular motive.

Federal conceptions 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, for example, notes that “[t]he goal of those who perpetrate terrorist attacks is in part to sow fear.”<sup>106</sup> Similarly, speaking on the sentencing of a man for terrorism violations, a federal prosecutor announced that an act that “creates panic, chaos, and fear . . . is the

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100. *Id.* § 2331(1).

101. CONG. BUDGET OFFICE, *supra* note 13, at 1.

102. HOFFMAN, *supra* note 82, at 40.

103. Anne Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT’L L.J. 1, 12 (2002).

104. PHILLIP B. HEYMAN, TERRORISM AND AMERICA: A COMMONSENSE STRATEGY FOR A DEMOCRATIC SOCIETY 6 (1998).

105. BENJAMIN NETANYAHU, FIGHTING TERRORISM: HOW DEMOCRACIES CAN DEFEAT DOMESTIC AND INTERNATIONAL TERRORISTS 8 (1997).

106. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 22 (2010), *available at* [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf); *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> (referring to the “fear and anxiety that terrorists seek to instill”).

definition of terrorism.”<sup>107</sup> This intimidation or coercion strand of terrorism is but part of a federal definition of terrorism that is exclusively instrumental.

This is not to suggest that the descriptive understanding of terrorism—in which “terror” means a state of fear or fright—has been wholly pushed out of the public consciousness. It is not uncommon for political leaders to walk the line between the descriptive and instrumental view, careful to use the former in order to benefit from its weight and import without wading into the latter, technical area.<sup>108</sup> In recent months, American leaders have chastised individuals for “terrorizing” a community or the American people without claiming to make, or being held to, a definitive legal statement that an incident is an “act of terrorism.”<sup>109</sup> For example, the morning after the Aurora, Colorado movie theater shooting, President Obama pondered why anyone would “terrorize their fellow human beings like this.”<sup>110</sup> Rhetorical maneuvers aside, it is clear that the formal, federal definition of terrorism requires a discernible political or social motive before it comes into play.

### B. Application of the Federal Definition to Recent Events

It may be helpful to see how the federal definition of terrorism applies to the four examples of recent mass violence briefly summarized at the outset of this Article. First, the shooting in Aurora, Colorado, was aimed at a large number of people (i.e., the theater was packed for the premiere of a popular movie),<sup>111</sup> indiscriminate (i.e., Holmes did not seem to have any specific targets

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107. 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/news/2011/Zajac%20sentenced%20for%20library%20bombing.pdf>.

108. *See* Abdullah, *supra* note 18.

109. President Obama is apparently aware of the need to be deliberate in one’s word choice. As he famously said during the 2008 campaign, “Don’t tell me words don’t matter.” *See* Michael Luo, *On Health Care, Affordability and Comprehensiveness*, N.Y. TIMES, Feb. 22, 2008, <http://www.nytimes.com/2008/02/22/us/politics/22check.html>.

110. Eyder Peralta, *President Obama: ‘Such Violence, Such Evil Is Senseless; It’s Beyond Reason’*, NAT’L PUB. RADIO (July 20, 2012, 11:14 AM), <http://www.npr.org/blogs/thetwo-way/2012/07/20/157101106/president-obama-such-violence-such-evil-is-senseless-its-beyond-reason>.

111. *See* Erica Goode et al., *Before Gunfire, Hints of ‘Bad News’*, N.Y. TIMES, Aug. 27, 2012, at A1 (noting that the movie theater was “sold out”).



in mind and was shooting individuals in the theater randomly),<sup>112</sup> and premeditated (i.e., Holmes was heavily armed and carefully planned his attack for months, first filling the theater with smoke before peppering the crowd with bullets).<sup>113</sup>

But the attack had no political or social agenda. Holmes did not express, nor is there any meaningful evidence Holmes intended to effectuate, political or social change through violence.<sup>114</sup> Instead, it seems that Holmes was a disaffected young man,<sup>115</sup> and the requisite motive was lacking. Thus, the terrorism designation would not apply—indeed, Holmes has not been charged with terrorism in federal court.<sup>116</sup>

Due to the reprehensible nature of the shooting, some were outraged at Holmes<sup>117</sup> and pondered whether the shooting should be

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112. See Dana Ford, *Colorado Theater Shooting Suspect Offers to Plead Guilty*, CNN (Mar. 28, 2013), <http://www.cnn.com/2013/03/27/us/colorado-theater-shooting> (“Witnesses who spoke to CNN said the gunman roamed the theater, shooting randomly as people tried to scramble away or cowered between seats.”).

113. See Andre Tartar, *Police: Colorado Shooter Planned Attack With ‘Calculation and Deliberation’*, N.Y. MAG. (July 22, 2012), <http://nymag.com/daily/intelligencer/2012/07/police-colorado-shooting-was-premeditated.html>.

Aurora Police Chief Dan Oates now says there is clear evidence that the rampage was planned with ‘calculation and deliberation.’ He points to the “high volume of deliveries” Holmes received over the past four months (including 6,000 rounds of ammunition and a bulletproof vest purchased online) and the fact that he spent two months amassing a small arsenal—consisting of a semi-automatic assault rifle, which jammed during the attack, two pistols, and a shotgun—from local stores.

*Id.*

114. At most, it seems, Holmes may have gone on his rampage in response to his academic shortcomings. See John Ingold et al., *DA: Holmes Made Threat at CU at Same Time He Failed, Bought Guns*, DENVER POST, Aug. 24, 2012, [http://www.denverpost.com/ci\\_21384695/prosecutor-alleged-theater-shooter-holmes-banned-from-cu-june-threats](http://www.denverpost.com/ci_21384695/prosecutor-alleged-theater-shooter-holmes-banned-from-cu-june-threats).

115. See Nancy Dillon & James McShane, *James Holmes, Aurora Shooting Suspect, Was Grad School Dropout and Loner, Say Neighbors*, N.Y. DAILY NEWS, July 21, 2012, <http://www.nydailynews.com/news/national/james-holmes-aurora-shooting-suspect-med-school-dropout-loner-neighbors-article-1.1118501#ixzz2ZbWAXi2q>.

116. See Madison Gray, *James Holmes Charged with 142 Counts, Including First-Degree Murder, in Colorado Theater Shooting*, TIME (July 30, 2012), <http://newsfeed.time.com/2012/07/30/james-holmes-charged-with-142-counts-including-first-degree-murder-in-colo-theater-shooting/#ixzz2ZbX1h9ce> (“Holmes . . . was formally charged with 24 counts of first-degree murder and 116 counts of attempted murder . . . as well as one charge of using a crime enhancer and one of possessing an explosive device.”).

117. See, e.g., Mark Brown, *Some See Accused Killer James Holmes as the Face of Evil*, CHI. SUN-TIMES, July 23, 2012, <http://www.suntimes.com/news/brown/13957656-452/some-see-accused-killer-james-holmes-as-the-face-of-evil.html>.

considered terrorism.<sup>118</sup> Calling the shooting an act of terrorism would allow the social alienation and legal consequences to flow from this designation. In truth, following the rampage, I argued that “the crime Mr. Holmes is accused of—the cold, calculated shooting of innocents in a movie theater—qualifies as terrorism and its perpetrator as a terrorist.”<sup>119</sup> These and similar social judgments aside, federal law would not hold that Holmes committed an act of terrorism because there was no evidence of a cognizable political or social motive.

Next, turning to the shooting of worshippers at a Sikh temple in Oak Creek, Wisconsin, the number of potential targets was high (i.e., the congregation has approximately 400 members).<sup>120</sup> Further, Page shot in cold blood six individuals in an indiscriminate fashion (i.e., not targeting anyone specifically, but gunning down anyone present in the temple or on temple grounds).<sup>121</sup> In addition, Page reportedly had visited the temple before,<sup>122</sup> suggesting premeditation.

But Page’s motive is still unknown,<sup>123</sup> preventing any firm conclusion that the incident was motivated by a political or social purpose, a necessary element of “terrorism” under existing federal law.<sup>124</sup> As the Oak Creek Chief of Police admitted, “I don’t know that we’ll ever know, because when he died [from a self-inflicted gunshot

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118. See Greenwald, *supra* note 14.

119. Dawinder S. Sidhu, *Colorado Shooter Was a Terrorist*, BALT. SUN, July 24, 2012, <http://www.baltimoresun.com/news/opinion/oped/bs-ed-colorado-shooting-terrorism-20120724,0,285198.story>.

120. See Eric Toner, *Sikhs Grieve After Deadly Temple Shooting*, NAT’L PUB. RADIO (Aug. 06, 2012, 3:00 PM), <http://www.npr.org/2012/08/06/158232623/sikhs-grieve-after-deadly-temple-shooting>.

121. See Mike Lillis, *Dem Lawmaker Wants the White House to Investigate Violence Against Sikhs*, HILL (Aug. 9, 2012), <http://thehill.com/homenews/house/243033-dem-wants-wh-to-investigate-violence-against-sikhs> (noting that Page “began firing, silently and indiscriminately.”)

122. See Henry Rosoff, *Southern Poverty Law Center Releases Report on Sikh Temple Gunman*, FOX6NOW.COM (Nov. 27, 2012), <http://fox6now.com/2012/11/27/southern-poverty-law-center-releases-report-on-sikh-temple-gunman> (“Page reportedly visited the Sikh Temple at least once before the shooting.”).

123. This paragraph and the remainder of this subpart are based, in part, on Dawinder 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, 79–80, 82–83, 88 (2013).

124. Indeed, speaking at a hearing on domestic terrorism and hate crimes convened by the Senate 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.” MCALLISTER, *supra* note 10, at 6.

wound], . . . what his motive was or what he was thinking [died with him].”<sup>125</sup> It is true that Page, the shooter, was an avowed white supremacist and had invited likeminded individuals to “get involved and become active.”<sup>126</sup> While Page’s involvement with the organized white supremacy movement may provide some measure of circumstantial evidence of the requisite motive,<sup>127</sup> this constitutionally protected speech and association does not automatically convert his behavior, however violent, into actionable bias or ideologically motivated conduct.<sup>128</sup> The Federal Bureau of Investigation itself reported, after its investigation, that “[n]o evidence was uncovered to conclude this attack was directed or facilitated by any white supremacist group.”<sup>129</sup> The mass shooting had a large number of potential targets, was indiscriminate, and was apparently premeditated, which all cut in favor of the terrorism label. But the absence of an identifiable motive prevents the terrorism designation from applying. Attorney General Holder’s comment, made at a memorial for the Oak Creek victims, that “what happened” was “an act of terrorism,”<sup>130</sup> is difficult to square with this straightforward analysis.<sup>131</sup>

Moving on to Newtown, the shooter, Adam Lanza, shot his mother in the head four times at home, damaged his computer hard drive in

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125. Elaine Quijano, *Question of Motive Remains in Sikh Temple Shooting*, CBS NEWS (Aug. 7, 2012), [http://www.cbsnews.com/8301-18563\\_162-57488654/question-of-motive-remains-in-sikh-temple-shooting/](http://www.cbsnews.com/8301-18563_162-57488654/question-of-motive-remains-in-sikh-temple-shooting/) (internal quotation marks omitted).

126. 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-was-white-supremacist>.

127. *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”).

128. *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.”).

129. *Oak Creek Sikh Temple Shooting Investigation Conclusion*, FED. BUREAU OF INVESTIGATION (Nov. 20, 2012), <http://www.fbi.gov/milwaukee/press-releases/2012/oak-creek-sikh-temple-shooting-investigation-conclusion>.

130. Holder, *supra* note 6, at 2.

131. *See* Sidhu, *supra* note 123, at 77–81.

an apparent effort to foil investigators and cover his tracks, and then proceeded to the elementary school where his mother volunteered, killing twenty-six people, including twenty children, with a semiautomatic weapon.<sup>132</sup> Lanza shot innocent individuals indiscriminately and did so with premeditation.<sup>133</sup> The shooting arguably warrants the “terrorism” designation under law and the strong social disapproval that the “terrorism” label necessary provokes, especially as Lanza shot each of the children multiple times, with some children shot as many as eleven times.<sup>134</sup>

The absence of motive, however, blocks the legal and social consequences from attending this case. In a *Washington Post* article aptly entitled “A Frustrating Search for Motive in Newtown Shootings,” a Connecticut police department spokesperson admitted that “we don’t have any smoking gun to say this is why it occurred.”<sup>135</sup> Accordingly, under prevailing federal law, Lanza’s actions would not be deemed “terrorism.”

Finally, and most recently, Boston. The bombings could have killed scores of individuals (i.e., there were hundreds of individuals crossing, or watching, the finish line).<sup>136</sup> The bombings were

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132. 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> (describing these facts, noting that Lanza’s “path of devastation seemed coldly calculated”).

133. See *id.*; see also Miriam Hernandez, *Psychologist Looks at Conn. Shooter’s Mindset*, ABC NEWS (Dec. 14, 2012) [http://abclocal.go.com/kabc/story?section=news/national\\_world&id=8921128](http://abclocal.go.com/kabc/story?section=news/national_world&id=8921128) (quoting a forensic psychologist as saying, “It 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.”).

134. See James Barron, *Pupils Were All Shot Multiple Times With a Semiautomatic, Officials Say*, N.Y. TIMES, Dec. 16, 2012, at A1.

135. Marc Fisher et al., *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](http://www.washingtonpost.com/national/a-frustrating-search-for-motive-in-the-madness/2012/12/22/1cbe1cbc-4956-11e2-820e-17eefac2f939_story.html) (noting that the search for motive in this case was particularly complicated because, “[f]or a young man who spent most of his waking hours at a computer, he appears to have left behind an astonishingly small online footprint”).

136. See *2013 Boston Marathon Statistics*, BOSTON ATHLETIC ASS’N, <http://raceday.baa.org/statistics.html> (last visited Oct. 18, 2013) (showing that 17,600 people completed the 2013 Boston Marathon). “[T]ens of thousands . . . line the race course to cheer on the runners and enjoy the race.” Indictment, *United States v. Tsarnaev*, No. 1:13CR10200, 2013 WL 3215742, ¶ 3 (D. Mass. June 27, 2013). Over 200 were injured in the bomb blasts. See *Reconstructing the Scene of the Boston Marathon Bombing*, N.Y. TIMES, Apr. 23, 2013, <http://www.nytimes.com/interactive/2013/04/17/us/caught-in-the-blast-at-the-boston-marathon.html>.

indiscriminate (i.e., no specific individuals were targeted).<sup>137</sup> There can be no doubt that the bombings were premeditated, as they necessarily required advance planning and deliberation.<sup>138</sup>

The day after the attack, before we even knew who was responsible for the bombings, let alone why the bombings were committed, President Obama declared the attack “an act of terrorism.”<sup>139</sup> As terrorism under federal law must be predicated upon the motive of the perpetrator, President Obama’s statement in the absence of any knowledge of perpetrators or the motive was, at the time, an improper statement of law.

Subsequently, of course, it was discovered that the bombings were the work of the Tsarnaev brothers.<sup>140</sup> Moreover, and importantly, news reports indicated that the bombings were the brothers’ response to alleged American mistreatment of Muslims. To erase any doubt as to the purpose of the bombings, the surviving brother, Dzhokhar, scribbled the following on the inside of the boat as he laid in the backyard of an area home:

The U.S. Government is killing our innocent civilians . . . . I can’t stand to see such evil unpunished . . . . We Muslims are one body, you hurt one you hurt us all . . . . Now I don’t like killing innocent people it is forbidden in Islam but due to said [unintelligible] it is allowed . . . . Stop killing our innocent people and we will stop.<sup>141</sup>

It would seem therefore that the requisite intent is present for federal terrorism charges to apply to Tsarnaev. Curiously, however, federal prosecutors have not charged Tsarnaev with committing an act of terrorism.<sup>142</sup>

The Boston bombings highlight the inconsistent and perhaps incoherent nature of terrorism’s definition in federal law and application to incidents of mass violence. The President, without knowledge of motive, makes a clear statement that the attack

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137. See Editorial, *In Boston, One Act of Evil, Thousands of Acts of Humanity*, BALT. SUN, Apr. 16, 2013, [http://articles.baltimoresun.com/2013-04-16/news/bs-ed-boston-marathon-bombing-20130416\\_1\\_boston-marathon-boston-globe-security-guard](http://articles.baltimoresun.com/2013-04-16/news/bs-ed-boston-marathon-bombing-20130416_1_boston-marathon-boston-globe-security-guard) (referring to the “indiscriminate pain and cruelty” of the Boston Bombings).

138. See Mark Memmott & Eyder Peralta, *Tsarnaev Charged: Suspected Boston Bomber Accused of Using WMD*, NAT’L PUB. RADIO (Apr. 22, 2013), <http://www.npr.org/blogs/thetwo-way/2013/04/22/178369466/boston-bombings-mondays-developments> (“FBI investigators said evidence shows [the incident] was a coldly calculated attack.”); see also Indictment, *Tsarnaev*, No. 1:13CR10200, 2013 WL 3215742, ¶¶ 15–40.

139. See Landler, *supra* note 7.

140. Indictment, *Tsarnaev*, No. 1:13CR10200, 2013 WL 3215742, ¶¶ 23–27.

141. *Id.* ¶ 10.

142. See *id.* ¶¶ 11–154 (listing the thirty counts against Tsarnaev).

constituted an act of terrorism, and when that motive is known, the federal authorities fail to lodge any terrorism charges.<sup>143</sup> At the same time that the federal position was changing or evolving, the people themselves were attempting to grapple with whether the terrorism designation was appropriate in this instance.<sup>144</sup> The need for clarity in understanding when terrorism has occurred is therefore critical and this need has been underscored by recent events and subsequent uncertainties. The remainder of the Article discusses whether an appreciation for space can bring us closer to a reliable and consistent concept of terrorism.

### III. A SPATIAL MODEL OF TERRORISM

#### A. The Relevance of Space

Context matters, as the Supreme Court has said many times and in various doctrinal areas.<sup>145</sup> This Part explains why the context of space should matter in determining whether terrorism has taken place.

The notion that space is relevant in legal analysis is not new. This notion is beyond the obvious realms of property (e.g., the legal right to exclusive use of certain lands or water),<sup>146</sup> privacy (e.g., shared understandings of personal or spatial integrity),<sup>147</sup> and extraterritorial

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143. Compare *Boston Bombings: Obama Condemns 'Act of Terrorism'*, *supra* note 12 (“President Barack Obama has condemned the twin bombing at the Boston Marathon as a ‘terrorist act.’”), with *Indictment, Tsarnaev*, No. 1:13CR10200, 2013 WL 3215742, ¶¶ 11–154 (charges against the surviving Tsarnaev brother do not include a charge of a terrorism offense).

144. See, e.g., Greenwald, *supra* note 14.

145. See, e.g., *Caraco Pharm. Lab., Ltd. v. Novo Nordisk A/S*, 132 S. Ct. 1670, 1681 (2012) (statutory interpretation); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 433 n.16 (2010) (same); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006) (employment discrimination); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006) (religious freedom and controlled substances); *Cutter v. Wilkinson*, 544 U.S. 709, 722–23 (2005) (religious freedom in the penal environment); *Grutter v. Bollinger*, 539 U.S. 306, 327 (2004) (race-conscious admissions in higher education).

146. See *Stop the Beach Renourishment, Inc. v. Fla. Dep’t. of Env’tl. Prot.*, 130 S. Ct. 2592 (2010) (holding that private landowners did not have an exclusive right to a new sand area created by the state on eroded beachfront).

147. See *United States v. Jones*, 132 S. Ct. 945, 949 (2012) (holding that the government’s placement of a global positioning device on a private vehicle constituted a “search” within the meaning of the Fourth Amendment); cf. *Katz v. United States*, 389 U.S. 347, 351 (1967) (“[T]he Fourth Amendment protects people, not places.”).

jurisdiction (e.g., the applicability of legal provisions beyond areas over which the United States has de jure sovereignty).<sup>148</sup>

In the First Amendment realm, for example, the extent to which an individual's speech is protected may depend on where he or she is speaking. The Court has instructed, "To ascertain what limits, if any, may be placed on protected speech, we have often focused on the 'place' of that speech, considering the nature of the forum the speaker seeks to employ . . . ."<sup>149</sup> "[T]he standards by which limitations on speech must be evaluated differ depending on the character of the property at issue," the Court continued.<sup>150</sup> Indeed, an individual speaking in a "traditional public forum" (i.e., public space that has been traditionally used for expressive conduct and that the government has intentionally dedicated for expressive conduct)<sup>151</sup> is generally entitled to greater constitutional protection than if the speech were to take place in a "non-public forum" (i.e., public space that the government has neither dedicated nor opened up for expressive conduct)<sup>152</sup>—even if the same individual engages in the same exact speech in both areas. Space is thus relevant in delineating the meaning of First Amendment protection, though the underlying speech or expressive conduct is otherwise equal in all other respects.

Similarly, the distinctive characteristics of prisons generally call for distinctive legal rules. The Supreme Court, for example, observed that a correctional facility is "a unique place fraught with serious security dangers."<sup>153</sup> Other social spaces have drawn the Court's attention for their unique attributes. The Court, in a memorable opinion by Justice Fortas, acknowledged the "special characteristics of the school environment," rejecting nonetheless any suggestion that

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148. *See Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (holding that the Suspension Clause reached detainees held in the Naval Base in Guantanamo because the United States exercises complete and exclusive control over the base).

149. *Frisby v. Schultz*, 487 U.S. 474, 479 (1988).

150. *Id.* (internal quotes and citation omitted).

151. *See Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995) ("If [the property in question is a public forum], a State's right to limit protected expressive activity is sharply circumscribed: It may impose reasonable, content-neutral time, place, and manner restrictions (a ban on all unattended displays, which did not exist here, might be one such), but it may regulate expressive *content* only if such a restriction is necessary, and narrowly drawn, to serve a compelling state interest." (emphasis added)).

152. *See Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 679 (1992) (providing that government regulation of speech "need only be reasonable" and the regulation cannot be "an effort to suppress the speaker's activity due to disagreement with the speaker's view").

153. *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

“students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>154</sup> Of course, there are other examples as well.<sup>155</sup>

The question becomes whether considerations of space also should play a role in a legal determination as to whether terrorism has taken place. To demonstrate the propriety of taking space into account for purposes of assessing whether terrorism has occurred, one need look no further than cities—the spaces that serve as centers for civic and political affairs, in which people are heavily concentrated relative to other areas, and that facilitate commercial and social exchange between otherwise non-connected individuals.<sup>156</sup>

In describing the special qualities of cities, Lyn Lofland, for example, refers to a city as “the locus of a peculiar social situation: the people to be found within its boundaries at any given moment know nothing personally about the vast majority of others with whom they share this space.”<sup>157</sup> Jerry Frug similarly notes that cities “put people in contact, whether they like it or not, with men and women who have values, opinions, or desires that they find unfamiliar, strange, even offensive.”<sup>158</sup> Further, Frug explains, cities are characterized by “[s]ocial differentiation without exclusion[,] mean[ing] the formation of a multiplicity of group affinities . . . in an atmosphere that

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154. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

155. *See, e.g.*, Erbsen, *supra* note 19, at 1176 (“[C]ourts have defined spaces to aid in applying constitutional provisions that lack a clear physical scope, including . . . ‘open fields’ under the Fourth Amendment.”). I argue that Congress may utilize its enforcement power under the Thirteenth Amendment to address entrenched urban poverty. *See generally* Dawinder S. Sidhu, *The Unconstitutionality of Urban Poverty*, 62 DEPAUL L. REV. 1 (2012). In conversation, a leading constitutional scholar construed this as a geographic model for the application of the Thirteenth Amendment.

156. This sense of a “city” is not dependent upon its more technical definitions, which focus on authority and power, rather than content and humanity. *See, e.g.*, 42 U.S.C. § 5302(a)(5) (2006). The statute defines “city” as:

(A) any unit of general local government which is classified as a municipality by the United States Bureau of the Census or (B) any other unit of general local government which is a town or township and which, in the determination of the Secretary [of the Department of Housing and Urban Development], (i) possesses powers and performs functions comparable to these associated with municipalities, (ii) is closely settled, and (iii) contains within its boundaries no incorporated places as defined by the United States Bureau of the Census.

*Id.*

157. Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1049 (1996) (quoting LYN H. LOFLAND, *A WORLD OF STRANGERS: ORDER AND ACTION IN URBAN PUBLIC SPACE* 3 (1973)).

158. *Id.* at 1050.



promotes their intermingling.”<sup>159</sup> Cities, he writes, are permeable because they are “open to anyone whatsoever,” and the sort of intellectual and cultural intercourse that a city fosters “provides exposure to opinions and cultures very different from one’s own.”<sup>160</sup> Arguably, then, cities offer the space where democracy—from informal debates to institutional policymaking—and the market—from a bustling bazaar to a sophisticated securities exchange—are most alive. All of this is made possible by a robust, hard infrastructure, including public transportation systems (e.g., subway), roads, sewers, water works, and digital soft infrastructures that facilitate commerce and everyday information-sharing in cafés, offices and other settings.<sup>161</sup>

The open, accessible nature of cities is highlighted by New York City’s response to 9/11. Very shortly after the 9/11 terrorist attacks that defied our imagination<sup>162</sup> and devastated the nation,<sup>163</sup> New York City, the city most affected by the attacks, expressly invited individuals to visit. The then-mayor of New York City, Rudolph Giuliani, instituted a campaign to encourage others to experience the city’s sights and sounds. “I urge everyone to come visit New York,” he said.<sup>164</sup> Another official made clear that the post-9/11 “message” from the city was that “we were open for business.”<sup>165</sup>

The aforementioned virtues of a city—its diverse and fluid population, political centrality, cultural and artistic offerings, economic energy, critical infrastructure, and openness—also make it

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159. *Id.* at 1051

160. *Id.* at 1051 (discussing IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 238–40 (1990)).

161. See generally Witold Rybczynski & Peter D. Linneman, *How to Save Our Shrinking Cities*, 135 PUB. INT. 30, 31 (1999) (describing the development of modern cities, which are characterized by “urban infrastructure technology, such as water supply, sewage treatment,” public transportation, and telecommunication capabilities).

162. See NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT* 336 (2004) (“The most important failure [with respect to the U.S. not deterring or delaying the attacks of 9/11 was one] of imagination.”).

163. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 568 (2006) (“Americans will never forget the devastation wrought by these acts. Nearly 3,000 civilians were killed.”).

164. See Press Release, N.Y.C. Mayor’s Office, Mayor Giuliani Launches Public Service Campaign that Encourages Tourism to the City, and Salutes the “Miracle of New York” (Nov. 8, 2001), available at <http://www.nyc.gov/html/om/html/2001b/pr351-01.html>.

165. Robin Pogrebin, *How Broadway Bounced Back After 9/11; But Downtown Theater Lacked the Right Ties*, N.Y. TIMES, May 22, 2002, <http://www.nytimes.com/2002/05/22/theater/how-broadway-bounced-back-after-9-11-but-downtown-theater-lacked-the-right-ties.html?pagewanted=all&src=pm>.

an attractive site for a terrorist attack. Indeed, a city may be targeted by terrorists precisely because of its accessibility (i.e., the ability to enter a city and blend in), the practical impact that an attack may have on its civic and social life, the vast amount of potential victims, and the symbolic value of attacking a prominent landmark or geographical area.<sup>166</sup> It therefore may not come as a surprise that major cities, including Boston,<sup>167</sup> New York,<sup>168</sup> London,<sup>169</sup> Madrid,<sup>170</sup> Mumbai,<sup>171</sup> Moscow,<sup>172</sup> and Tokyo,<sup>173</sup> have suffered and absorbed terrorist attacks.

The case of New York City particularly demonstrates terrorists' propensity to target cities. Aside from well-known incidents, such as the 1993<sup>174</sup> and 2001<sup>175</sup> attacks on the World Trade Center, and the

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166. See, e.g., *MacWade v. Kelly*, No. 05CIV6921RMBFM, 2005 WL 3338573, at \*4 (S.D.N.Y. Dec. 7, 2005) (recounting expert testimony on the attractiveness of cities' transportation systems to terrorists).

167. See *Indictment, United States v. Tsarnaev*, No. 1:13CR10200, 2013 WL 3215742, ¶¶ 3, 6–7 (D. Mass. June 27, 2013).

168. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 162, at 279–80 (describing the 1993 attack on the World Trade Center); *id.* at 285–89, 293, 305–06, 311 (describing the 2001 attack on the World Trade Center).

169. See *7 July London Attacks*, GUARDIAN (London), <http://www.guardian.co.uk/uk/july7> (last visited Oct. 18, 2013) (compiling information on the July 7, 2005 bombing in a London subway station and bus).

170. See *Scores Die in Madrid Bomb Carnage*, BBC NEWS (Mar. 11, 2004), <http://news.bbc.co.uk/2/hi/europe/3500452.stm> (reporting on the multiple blasts at three Madrid train stations, in which 173 people were killed).

171. See Vikas Bajaj & J. David Goodman, *3 Bombs Hit Crowded Sites in Mumbai*, N.Y. TIMES, July 13, 2011, <http://www.nytimes.com/2011/07/14/world/asia/14mumbai.html> (describing the 2011 Mumbai attacks on “central locations in the city, including the crowded Dadar neighborhood; Zaveri Bazaar, a popular jewelry market; and near the Opera House”); *Scores Dead in Mumbai Train Bombs*, BBC NEWS (July 11, 2006), [http://news.bbc.co.uk/2/hi/south\\_asia/5169332.stm](http://news.bbc.co.uk/2/hi/south_asia/5169332.stm) (covering the killing of over 160 people, by seven coordinated bombings, aboard Mumbai commuter trains); Somini Sengupta, *At Least 100 Dead in India Terror Attacks*, N.Y. TIMES, Nov. 26, 2008, <http://www.nytimes.com/2008/11/27/world/asia/27mumbai.html> (reporting on the 2008 Mumbai attacks on multiple locations, including two hotels, train station, and movie theater).

172. See *Moscow Bombing: Carnage at Russia's Domodedovo Airport*, BBC NEWS (Jan. 24, 2011), <http://www.bbc.co.uk/news/world-europe-12268662> (describing the suicide bombing at a Moscow airport).

173. See Nicholas D. Kristof, *Poison Gas Fills Tokyo Subway; Six Die and Hundreds are Hurt*, N.Y. TIMES, Mar. 20, 1995, <http://www.nytimes.com/1995/03/20/world/poison-gas-fills-tokyo-subway-six-die-and-hundreds-are-hurt.html> (noting Sarin gas attacks on three Tokyo train stations).

174. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 158, at 279–80.

175. See *id.* at 285–89, 293, 305–06, 311.

failed 2010 Times Square bombing,<sup>176</sup> New York City has been targeted a significant number of times in recent years: according to the deputy commissioner of the New York Police Department in roughly a three-month span in 2007, there were “22 bomb threats and 31 intelligence leads related to subway attack[s]” alone.<sup>177</sup> At least thirteen specific terror plots against New York City have been foiled,<sup>178</sup> the official disclosed, including a plot to bomb the New York Stock Exchange.<sup>179</sup>

A cost of the human, cultural, and financial flux that a city offers, and of the openness required to facilitate that ongoing flow of residents, consumers, businessmen, etc., is the possibility that an unsavory person or persons may use the same avenue for entry and enjoy the cover of relative anonymity to plot and implement a violent attack against innocents. The United States is an open society, particularly in cities; and that national virtue, which reflects our democratic and immigrant nature, creates both penetrability and opportunity for anti-social actors. The day after the 9/11 atrocities, Michael R. Gordon of the *New York Times* wrote that the terrorists “used the very accessibility of an open society to wound that society.”<sup>180</sup> Referring to the special circumstances of space, Gordon noted that “[i]t is relatively easy to defend a military base or fortified bunker,” but “virtually impossible to insulate all . . . government buildings and commercial centers against a suicide attacker.”<sup>181</sup> For abusing and exploiting the vulnerability of our open society, some

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176. See Press Release, Dep’t of Justice, Office of Pub. Affairs, Faisal Shahzad Pleads Guilty in Manhattan Federal Court to 10 Federal Crimes Arising from Attempted Car Bombing in Times Square (June 21, 2010), available at <http://www.justice.gov/opa/pr/2010/June/10-ag-721.html> (“On May 1, 2010, [Faisal] Shahzad drove [a Nissan] Pathfinder, loaded with the improvised explosive and incendiary devices, to Manhattan and parked the Pathfinder in Times Square . . . . After parking the Pathfinder, Shahzad attempted [but failed] to begin the detonation process of the improvised explosive and incendiary devices. Thereafter, Shahzad abandoned the Pathfinder . . .”).

177. Carol Eisenberg, *Waking Up to Terror*, NEWSDAY, Mar. 7, 2007, at 1, available at 2007 WLNR 4305365.

178. See Jessica Zuckerman, *Fifty-Third Terror Plot Foiled Since 9/11: Bombing Targets U.S. Financial Hub*, HERITAGE FOUND. (Oct. 17, 2012), <http://www.heritage.org/research/reports/2012/10/terror-plot-foiled-in-new-york-bombing-targets-us-financial-hub>.

179. See Kris Van Cleave, *NSA Director Says N.Y. Stock Exchange Terror Plot Foiled*, WJLA (June 18, 2013), <http://www.wjla.com/articles/2013/06/nsa-director-says-n-y-stock-exchange-terror-plot-foiled-90260.html>.

180. Michael R. Gordon, *When an Open Society Is Wielded as a Weapon Against Itself*, N.Y. TIMES, Sept. 12, 2001, <http://www.nytimes.com/2001/09/12/us/day-terror-assessment-when-open-society-wielded-weapon-against-itself.html>.

181. *Id.*

may agree with Gordon's assessment that the attacks of 9/11, when compared to others, were especially "sinister."<sup>182</sup> As New York City and the 9/11 attacks demonstrate, space, and cities are relevant in the terrorism context.

### B. Space and Terrorism

If space matters when it comes to determining whether terrorism has occurred, the question becomes how considerations of space merge with, or otherwise relate to, the two principal reasons for codifying terrorism as an independent cognizable harm: enabling society to express its strong disapproval of the underlying conduct by way of branding the perpetrator a "terrorist," and allowing the law to give effect to this social judgment by way of imposing severe punishments on the perpetrator. These purposes appear especially salient when an incident of mass violence occurs in a city environment.

First, an individual who targets an area huddled with innocents is more deserving of the social stigma and identity of a terrorist than one who commits the same underlying act in an area with a lower concentration of innocents. A bombing along a crowded city sidewalk or a busy subway station is qualitatively different than a bombing in space that is less crowded and open to individuals because of the significant number of innocents that may be implicated. The diversity and fluidity of the innocents in a city only, who may be from different nations, religions, and backgrounds, widens the universe of individuals who may be impacted. A target location that is more homogenous, sparsely populated, and less inviting to outsiders, by contrast, may have a smaller net of potential direct and indirect victims.

Second, a legal charge of terrorism allows these social benefits to flow and enables the government to join and echo the social judgment that the perpetrator has committed a particularly heinous crime worthy of the full weight of legal punishments.<sup>183</sup> It is true that a perpetrator of an attack on innocents in a city could be charged with other offenses, such as the use of a weapon of mass destruction, which

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182. *See id.*

183. *See* Hodgson & Tadros, *supra* note 15, at 497 ("[Terrorism] triggers the use of terrorism law. The body of terrorism law consists of an extended set of state powers that apply where terrorism is concerned. The definition of terrorism determines when these powers are triggered.").

was one of the charges against the surviving Tsarnaev brother.<sup>184</sup> One charged with that offense could face the death penalty.<sup>185</sup> Accordingly, one may argue that the legal punishment that Tsarnaev may receive pursuant to a terrorism charge would be no “better” than the punishment that would attach to other charges. While the technical sentence could be identical, in modern times the label of “terrorist,” when affixed by society and firmly secured by the law, carries with it a unique and special meaning that perhaps is unlike any label that other possible charges could convey or signify.<sup>186</sup> Accordingly, the purposes of having terrorism as an independent legal harm appear to be furthered by an appreciation for the spatial dimensions of a given act.

Naturally, the question may arise whether incidents in other areas, aside from cities, may similarly point towards the terrorism designation when premeditated mass violence indiscriminately directed at innocents takes place within them. Though an exhaustive exploration of every setting in a society is impracticable, it is possible to identify other areas that may call for the terrorism designation if a premeditated, indiscriminate act of mass violence happens in that physical context.

To be sure, incidents do not automatically become “terrorism” when they take place within the confines of a city. It is the attributes of a city, not the municipal borders or responsibilities, which matter. Instead, the high composition and fluid nature of the population are what lends space within a city to the terrorism designation. Accordingly, in examining other potential spaces that may draw heightened attention in a terrorism analysis, it is necessary to look to these practical attributes instead of technical formalisms.

Other physical settings exist that share the critical characteristics of cities. Certain places of public accommodation, such as restaurants, hotels, entertainment venues, and sporting arenas, generally contain many people and are open to a wide assortment of different people. Accordingly, an attack in one of these places would have more

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184. *See* Indictment, *United States v. Tsarnaev*, No. 1:13CR10200, 2013 WL 3215742, ¶¶ 11–40 (D. Mass. June 27, 2013).

185. *See* 18 U.S.C. § 2332a(a) (2012) (“[I]f death results [from the use of a weapon of mass destruction], [the defendant] shall be punished by death or imprisoned for any term of years or for life.”).

186. It is for this reason that, even if considerations of space or density are factored at the sentencing phase in a conviction for a non-terrorism charge, the specific “terrorism” label is appropriate and beneficial: it carries a unique meaning that is not captured in punishment. That is, “terrorism” should be affixed at the front-end in the charging document, rather than on the back-end only at the sentencing phase.

potential victims. Moreover, these areas may be open to heterogeneous populations and the chilling effect on future patronage may be high as well. These factors may help explain why terrorists have demonstrated an interest in targeting certain places of public accommodation, such as the Taj Mahal Place Hotel in Mumbai,<sup>187</sup> a pizzeria in Jerusalem,<sup>188</sup> a beachfront restaurant in Haifa, Israel,<sup>189</sup> and a café in Marrakeh.<sup>190</sup> Again, the key to such an analysis of whether an attack may deserve the terrorism label must hinge on the actual facts of the situation—e.g., whether the location generally has a large, fluid public presence—not whether it qualifies as a “place of public accommodation” under the law.<sup>191</sup> Indeed, a restaurant that is heavily frequented is qualitatively different than one that is not, even if they both fall within the meaning of a place of public accommodation more broadly.

Other spaces may warrant special attention to determine whether terrorism charges should apply, even if the essential spatial elements discussed thus far—significant, fluid population—are not present. These places are those accorded constitutional significance, such as places of worship<sup>192</sup> or civic associations,<sup>193</sup> and those that are essential to the operation of the democracy itself, such as government buildings, schools, or polling booths.

In short, under the aforementioned rubric:

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187. See Rohit Deshpandé & Anjali Raina, *The Ordinary Heroes of the Taj*, 89 HARV. BUS. REV. 119 (2011); Sengupta, *supra* note 171.

188. See Clyde Haberman, *At Least 14 Dead as Suicide Bomber Strikes Jerusalem*, N.Y. TIMES, Aug. 10, 2001, <http://www.nytimes.com/2001/08/10/world/at-least-14-dead-as-suicide-bomber-strikes-jerusalem.html>.

189. See Verity Murphy, *Mid-East Cycle of Vengeance*, BBC NEWS (Oct. 5, 2003), [http://news.bbc.co.uk/2/hi/middle\\_east/3165604.stm](http://news.bbc.co.uk/2/hi/middle_east/3165604.stm).

190. See Michael Slackman & Souad Mekhennet, *Bomb Strikes Moroccan Cafe, Killing Mostly Foreigners*, N.Y. TIMES, Apr. 28, 2011, <http://www.nytimes.com/2011/04/29/world/africa/29morocco.html>.

191. For example, the regulations implementing the Americans with Disabilities Act of 1990 define a “place of public accommodation” as “a facility, operated by a private entity, whose operations affect commerce and fall within at least one of the following categories,” such as a hotel, restaurant, movie theater, “place of public gathering,” a “sales or rental establishment,” “place of public display or collection,” “place of recreation,” “place of education,” “social service center establishment,” and “place of exercise.” 28 C.F.R. § 36.104 (2013).

192. See U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise [of religion.]”).

193. See *id.* (“Congress shall make no law . . . abridging the . . . right of the people peaceably to assemble . . .”).

“Terrorism” means premeditated violence perpetrated indiscriminately against innocents. Factors that may support the terrorism designation are whether the violence was—

(a) perpetrated in

- (1) an area with a high concentration of innocents (e.g., a city or place of public accommodation),
- (2) a public area of constitutional significance wherein individuals congregate or associate, or
- (3) an area essential to the operation of the government wherein individuals work, engage in official government business, or are educated, or

(b) calculated to further a political, religious, or social agenda.

Note that subsection (a) comports with the overlooked descriptive meaning of terrorism, and (b) with the dominant instrumental view of terrorism. This paradigm allows for both conceptions of terrorism to be activated.

There is some precedence in federal law for this special consideration of space in the context of mass violence. For example, 18 U.S.C. § 2332f makes it unlawful for anyone to “deliver[], place[], discharge[], or detonate[] an explosive or other lethal device in, into, or against a place of public use, a state or government facility, a public transportation system, or an infrastructure facility . . . with the intent to cause death or serious bodily injury.”<sup>194</sup> But a violation of this statute is not, within the text of the statute, “terrorism.”<sup>195</sup> Accordingly, it is not a vehicle for the powerful social term for terrorism. Section 2332f would better reflect the proposal in this Article if it expressly defined violations as acts of “terrorism. That said, this statute does demonstrate that, in federal law, special consideration of space in the context of mass violence already exists.<sup>196</sup>

The spatial formulation of terrorism in this Article includes motive, an otherwise fundamental component of terrorism definitions in current federal law, only as a supplement to the core definition.<sup>197</sup> While a definition of terrorism that requires evidence of motive comports with an instrumental understanding of terrorism, the purposes of the terrorism designation—to signal society’s significant disapproval of a given incident of mass violence because of the

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194. 18 U.S.C. § 2332f(a) (2012).

195. *See id.*

196. *See generally* § 2332f(a).

197. *See supra* Part II.A.

intentional targeting of innocents on a large scale, and to enable the government to formally sanction the perpetrator by way of law—are satisfied irrespective of why the perpetrator committed the underlying act. Indeed, an act of mass violence kills, maims, injures, chills, and psychologically scars those immediately present, those in and around the targeted area, and those connected to the victims regardless of whether the perpetrator’s motive was political, social, or religious, or whether there was any motive at all. There are also evidentiary problems with resting the application of terrorism on motive. In some instances, such as with the Oak Creek and Newtown incidents, motive cannot be ascertained because the perpetrators died (more specifically, killed themselves) at the scene.<sup>198</sup> To allow the perpetrators the ability to escape the powerful social and legal term of “terrorist” because they killed innocents without revealing their motive would be to withdraw from the people and the government a meaningful means by which to sanction the perpetrator of a horrific crime.

At the end of the day, the impact is not predicated or dependent upon the reasoning of the perpetrator, whether it is available or not. And it is the impact on targeted innocents that lies at the foundation of the strong social distaste for terrorism and the attendant legal punishment.<sup>199</sup> In this sense, the terrorism definition proposed here incorporates an appreciation for what happened, not necessarily why it happened.

To be sure, this does not mean that there is no room for motive in a terrorism analysis. Rather, this Article suggests that terrorism as a social and legal construct does not require motive in order to be activated. In other words, under this proposed scheme, motive would add nuance to, but not be the touchstone for, the definition of terrorism.

For two reasons, under this proposal, motive-based terrorism constitutes a statutory subsection instead of the whole provision. First, practically speaking, completely omitting motive-based terrorism may be too drastic. Second, there is value in allowing society and the law to condemn harms premised on motive. A person

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198. See Quijano, *supra* note 125; Simpson et al., *supra* note 4.

199. See Dru Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125, 139 (2008) (“[T]he stakes are plainly higher for deterring or incapacitating perpetrators of terrorism, as opposed to the traditional ‘victimless’ crimes,” precisely because “[t]errorists . . . kill and maim innocent civilians, destroy private property, and disrupt daily life and commerce.”); *id.* at 140 (“This point is nothing new; it is obvious from events of the last decade that terrorism is a special category of crime, something particularly horrific [compared to other crimes.]”).



who commits an act of mass violence against innocents for political purposes not only injures individuals by way of his or her actions (an objective harm), but undermines the political process that exists to resolve such political disputes (an instrumental harm).<sup>200</sup> By the same token, killing innocents in a violent premeditated attack is not only a wrong in itself (an objective harm), but, when done in the context of a political conflict, may be especially worthy of condemnation because it undermines how violence is to be conducted within the bounds of the laws of war.<sup>201</sup> Accordingly, this formulation does not sever motive from terrorism, but includes it as a subsidiary arm of a broader terrorism definition.

The importance of coercion or intimidation found in traditional notions of terrorism is not lost in the proposed definition either.<sup>202</sup> Rather, coercion and intimidation may be assumed to be inherent aspects and consequences of an act of mass violence directed at innocents instead of elements of the offense to be supported by evidence. One need not have proof of intent to impose undue pressures on the victims; those external forces are there by virtue of the deed itself. It may be argued that motive to coerce or intimidate still must be known because the targets must be aware of exactly what they are being compelled to do, or not do, by way of the violent influence. Yet an identifiable motive is not necessary to cause terror, coerce, intimidate, or otherwise trigger emotion-based changes in behavior. For example, in the aftermath of the Oak Creek shooting at a Sikh temple, members of the Sikh community nationwide were put on edge, even though the motive behind the Oak Creek attack was a mystery (and remains so today).<sup>203</sup> That the immediate and wider Sikh community was placed in a state of terror speaks to the accomplishment of an emotional response irrespective of an identifiable motive.<sup>204</sup> Accordingly, a model of terrorism that focuses

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200. See Hodgson & Tadros, *supra* note 15, at 502 (“[P]ursuing political aims violently might be wrong in part because it subverts a legitimate political process . . . . Terrorism undermines the assurance each citizen has that all political conflicts will be resolved through the democratic process.”).

201. See *Ex parte Quirin*, 317 U.S. 1 (1942).

202. See 18 U.S.C. § 2332b(g)(5) (2012).

203. Indeed, though hundreds of miles away from Oak Creek, and though Page himself had perished in the Oak Creek shooting, the Sikh temples to which I belong—the Guru Gobind Singh Foundation in Travilah, Maryland, and the Guru Nanak Foundation of America in Silver Spring, Maryland—both had armed, uniformed police officers guard the temples during services immediately following the tragedy. This speaks to the element of “intimidation” or “fear” that arguably existed, even though Page’s motive remains unknown. *See id.*

204. *See id.*

on conditions and facts, rather than intent, may still contemplate and encompass the emotion-based reactions that may be seen by some to be critical to the appropriateness of the terrorism label.

In applying this suggested rubric, each of the four recent incidents described at the start of this Article would be considered an act of terrorism. First, the shooting at a movie theater in Aurora, Colorado, satisfies the proposed definition because it was premeditated and an indiscriminate targeting of innocents.<sup>205</sup> For good measure, it was at a place of public accommodation at which many innocents were present.<sup>206</sup> As these factors, by themselves, would tip the balance in favor of the terrorism designation, the fact that James Holmes's motive is unknown<sup>207</sup> would not have, as it does today, preclusive effect over the potential application of federal terrorism laws.<sup>208</sup> Second, the shooting at a Sikh temple in Oak Creek, Wisconsin, was an act of terrorism under this proposed framework because it was premeditated and an indiscriminate targeting of innocents.<sup>209</sup> Should there be any doubt about whether the incident qualifies as terrorism, it may be pointed out that the incident took place at a setting—a place of worship where individuals gather to exercise their religion—afforded special protection in the Constitution.<sup>210</sup> The failure to know why Wade Michael Page went on the shooting rampage does not prevent the terrorism label from applying here, as the other factors get us over the hump.<sup>211</sup> Third, the shooting at the elementary school in Newtown, Connecticut, is terrorism within the meaning of this proposed framework because it was a premeditated and indiscriminate killing of innocents, including children.<sup>212</sup> Further, the shooting took place at a school, one of the spaces in American society that, because of the importance of education, holds special value in our constitutional scheme.<sup>213</sup> Fourth, the Boston Marathon bombing is terrorism because it was a premeditated and indiscriminate targeting of innocents.<sup>214</sup> In addition, the bombing took place in a

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205. *See supra* notes 111–13 and accompanying text.

206. *See supra* note 111 and accompanying text.

207. *See supra* note 114 and accompanying text.

208. *See* CONG. BUDGET OFFICE, *supra* note 13, at 1.

209. *See supra* notes 120–122 and accompanying text.

210. *See supra* note 148–52 and accompanying text.

211. *See supra* notes 120–22 and accompanying text.

212. *See supra* notes 133–34 and accompanying text.

213. *See* *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“Today, education is perhaps the most important function of state and local governments . . . . It is the very foundation of good citizenship.”).

214. *See supra* notes 137–38 and accompanying text.

major city at a major event, when the number of potential victims would be particularly high and the fluidity of the people particularly pronounced.<sup>215</sup>

With respect to the benefits of such a construction, the primary advantages are its clarity and consistency, which are currently lacking in the federal definition of terrorism.<sup>216</sup> The present state of confusion in the terrorism laws is perhaps best demonstrated by the response to the Boston bombings, where the President first claimed the bombings were a terrorist attack without knowing who committed the attack, or why, in contravention of the terrorism laws' requirement of motive. Once it came to light that the motive was political and religious in nature, which would seem to satisfy terrorism laws, the surviving brother was not charged with a terrorism offense.

Moreover, the definition, because of its descriptive component, truly captures the nature of terrorist activity today. Philip Bobbitt, for example, observes that al-Qaeda "does not simply want to seize the governing apparatus of a particular national state," but also "attempts to achieve a constant state of terror."<sup>217</sup> That is, modern terrorism is not only a "technique" to provoke political change, Bobbitt notes, but "an end in itself."<sup>218</sup> It is, in other words, instrumental and descriptive. The dual definition of terrorism aligns with this reality.

Further, it promotes the purposes of having independent terrorism laws in the first place. Indeed, this formulation, which looks to descriptive action, not just instrumental intent, allows the social and legal consequences to flow even if the perpetrator's reasoning is kept within the confines of his or her twisted brain. In this sense, a descriptive focus places the facts in charge of whether those social and legal consequences will be activated. By contrast, a perpetrator currently can enjoin those consequences by dying and joining the bloodshed at the scene. Page and Lanza, for example, both killed themselves in the course of their mass shootings.<sup>219</sup> Their suicides should not entitle these perpetrators to the windfall of avoiding the label of "terrorists," or from enabling society thereafter from properly conceptualizing what happened. A formulation driven by facts and objective action is thus preferable to one dependent solely upon subjective intent.

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215. *See supra* note 136 and accompanying text.

216. *See supra* note 13 and accompanying text.

217. PHILIP BOBBITT, TERROR AND CONSENT 62 (2008).

218. *Id.*

219. *See* Quijano, *supra* note 125; Simpson et al., *supra* note 4.

In addition, this proposed definition reduces the possibility that the terrorism designation will be premised upon the racial or religious identity of the perpetrator. At present, there is a sense that individuals from certain countries or religious traditions, primarily Muslims, will be more likely to be found to be terrorists than individuals from other communities.<sup>220</sup> If terrorism is grounded in action, there is a diminished opportunity for intent to be reflexively inferred from identity and for any one group to be presumptively deemed terrorists. With an overview of the contents of the proposed definition and its potential benefits, it is now appropriate to refine the contours of the definition.

#### IV. CLARIFYING THOUGHTS

This proposed shift in definitions of terrorism—precipitated by an understanding that space is relevant and supportive of an objective or descriptive terrorism paradigm—will invariably provoke questions and concerns. The final Part of this Article responds to six anticipated counterarguments.

First, there is the “dilution” counterargument. Four out of four incidents—Aurora, Oak Creek, Newtown, and Boston—would qualify as terrorism under the Article’s proposed framework, where the outcome would be different under the existing paradigm. Accordingly, some may claim that the suggested definition of terrorism is too generous, and that the significance of terrorism will be lost or minimized as to incidents to which it *should be* applied.<sup>221</sup> In response to that argument, I note that, under the current regime, the social and legal reasons for having independent terrorism laws are

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220. See Muneer I. Ahmad, *A Race Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1311 (2004) (“[B]ecause the logic of post-September 11 hate violence depends upon a substitution of anyone ‘Muslim-looking’ for the terrorists, the claims of loyalty are more troubling; once this substitution is made, it is all ‘Muslim-looking’ people, and not merely the nineteen terrorists, who are presumptively disloyal.”); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576 (2002) (“September 11 facilitated the consolidation of a new identity category that groups together persons who appear ‘Middle Eastern, Arab, or Muslim.’ This consolidation reflects a racialization wherein members of this group are identified as terrorists, and are disidentified as citizens.”).

221. See generally Geoffrey Sant, *So Banks Are Terrorists Now? The Misuse of the Civil Suit Provision of the Anti-Terrorism Act*, 45 ARIZ. ST. L.J. 533 (2013) (expressing concern with the overbreadth of a federal terrorism law); Chantal Tortoroli, Note, *Gangs of New York Are Terrorists? The Misapplication of the New York Antiterrorism Statute Due to the Lack of Comprehensive Gang Legislation*, 84 ST. JOHN’S L. REV. 391 (2010) (same with respect to a state terrorism law).

left unfulfilled. The definition of terrorism under federal law—anchored in subjective motivation and without any textual allowance for geographic variation—is underutilized and fosters inconsistent results. Indeed, individuals already believe that the four examples provided in this Article should be considered terrorism—President Obama has said as much with respect to Boston, Attorney General Holder with respect to Oak Creek, and commentators have said as much with respect to Aurora and Newtown. Concerns about an increase in terrorism designations in raw terms should give way to an appreciation for the remedied mismatch between terrorism laws’ unsatisfactory and confusing outcomes, on one hand, and the underlying purposes for those laws in the first place and prevailing social judgments, on the other. At this point, anxiety that the terrorism designation will be overinclusive and that the terrorism label will lose its effect are speculative.<sup>222</sup> In any case, it seems unlikely that a term that remains so powerful in modern society will somehow have little force when applied to random mass violence in which innocents are targeted and/or killed.

Second, there is the “limiting principles” counterargument. If terrorism is not restrained by the existence of subjective motive, what, some may ask, prevents terrorism from extending to effectively all senseless violence? There are several factors, however, that refine and focus terrorism to an act which is 1) premeditated, 2) indiscriminate, 3) violent, that is 4a) in a public location i) with a high concentration of individuals, ii) with constitutional significance, or iii) that is essential to the operation of the government, or 4b) calculated to further a political, religious, or social agenda. These factors can help distinguish terrorism from other acts of violence.

Third, the “indeterminacy” counterargument is based on the concern that, while these aforementioned factors may, in theory, regulate when a particular incident is terrorism, the factors themselves are insufficiently defined and lead to arbitrary and inconsistent application. The factors have workable definitions that may guide their reliable and even-handed application.

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222. A broader definition of terrorism may trigger real concerns over expanded executive power in times of war. *See* Hodgson & Tadros, *supra* note 15, at 497 (“The body of terrorism law consists of an extended set of state powers that apply where terrorism is concerned. The definition of terrorism determines when these powers are triggered.”). We should be mindful of such executive abuse, though it is curious that the executive has failed to take advantage of that additional power when the opportunity has presented itself. In the *Tsarnaev* case, for example, federal prosecutors, under the direction of the Attorney General, could have charged the surviving Tsarnaev brother with terrorism, but did not.

“Premeditated,” for example, is an established term in criminal law.<sup>223</sup> A killing made in the heat of the moment or without the proper consideration would thus fall below the threshold culpability required for terrorism.<sup>224</sup> This is not to suggest that there are no problems with “premeditation” as a technical term,<sup>225</sup> but at the end of the day, “premeditation” signals a state of mind that is particularly culpable,<sup>226</sup> where the underlying action is supported by some measure of reflection.<sup>227</sup> “Indiscriminate” simply denotes that the violence is against random, indistinguishable individuals.<sup>228</sup> Article 51 of the Geneva Conventions, for example, prohibits “indiscriminate attacks” and notes that they strike individuals “without distinction.”<sup>229</sup> Accordingly, an indiscriminate killing has no specific targets, and fails to consider potential victims as separate individuals. A mass shooting in which the perpetrator sprays an area with bullets to kill one or two specific individuals is a targeted killing and, by definition, is not indiscriminate, even if the carnage extends beyond the specific targets. A workplace shooting by a disgruntled ex-employee<sup>230</sup> or a

223. See, e.g., CAL. JURY INSTR. CRIM. 8.20 (Deliberate and Premeditated Murder) (Thomson Reuters, Westlaw updated Sept. 2013) (providing that “premeditation . . . means considered beforehand”); see *id.* (“[The] intent on the part of the defendant to kill . . . must have been formed upon pre-existing reflection . . . . The true test is not the duration of time, but rather the extent of the reflection.”).

224. See, e.g., *id.* (providing that premeditated murder does not include murder which is committed “under a sudden heat of passion” or which is the product of “a mere unconsidered and rash impulse”).

225. See BENJAMIN CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 100 (1931) (expressing concern about the “mystifying cloud of words” such as “deliberation” and “premeditation,” adding that the difference between the two is “so obscure that no jury hearing it for the first time can fairly be expected to assimilate and understand it”).

226. See *id.* at 100 (indicating that a “lesser degree” offense is an “exercise of mercy” by the jury).

227. See, e.g., DRESSLER, *supra* note 54, at 551 (providing that “to ‘premeditate’ means ‘to think about beforehand’”). Requiring “premeditation” is to serve as a limiting principle on the application of the terrorist label. That said, to the extent that “premeditation” may be sufficiently problematic, alternative regimes serving the same purpose may be considered. One alternative is to reserve the terrorist designation for murder committed “by certain means, such as by bombing, or poison, or lying in wait, or torture.” Matthew A. Pauley, *Murder by Premeditation*, 36 AM. CRIM. L. REV. 145, 166 (1999). Another is to “leav[e] to courts and juries some discretion to decide which murders are the most grievous and deserving of society’s worst condemnation.” *Id.* at 166–67.

228. See Begorre-Bret, *supra* note 61, at 1996.

229. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51.4, June 8, 1977 (Protection of the Civilian Population).

230. See, e.g., *Multiple People Shot Near Empire State Building*, CBS NEWS (Aug. 24, 2012), [http://www.cbsnews.com/8301-201\\_162-57499732/multiple-people-shot-](http://www.cbsnews.com/8301-201_162-57499732/multiple-people-shot-)

gang-related shooting<sup>231</sup> could not be deemed terrorism for this reason. “Violence” would be limited to the use of firearms, explosives, or other devices that have the capacity to maim or kill many people.<sup>232</sup> Accordingly, violence by way of fistfights or small capacity instruments of violence, such as a knife, would not qualify as terrorism because the potential to harm many people quickly is not present. The rubric also would leave “duds” outside of the terrorism designation, such as a homemade device intended to maim or kill many people that lacks that actual capacity. It also would eliminate cyber-attacks from the ambit of terrorism. “A location with a high concentration of individuals” refers to physical spaces where there is a large and fluid population, such as cities or certain places of public accommodation.<sup>233</sup> Temporary population density—a sporting event at a football stadium, for example—may be a suitable metric to determine when a physical location has such characteristics. “A public location with constitutional significance” means a physical setting open to the general public that is essential to the exercise of rights expressly mentioned in the text of the Constitution, such as places of worship and places where individuals associate to engage in speech (e.g., a speakers’ corner in a public park, or a civic hall).<sup>234</sup> This would eliminate from contention any public space that cannot find a link to the express text of the Constitution, or any space closed to others. “A location that is essential to the operation of the government” refers to a space critical to the success of our democratic society, such as schools, government buildings, and polling booths.<sup>235</sup> Even if these three spaces were given a narrow construction, they would still serve to hone terrorism on locations that have many

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near-empire-state-building (“A man laid off about a year ago went to his former workplace . . . and shot a co-worker in the face, killing him . . .”).

231. See, e.g., Dean Reynolds, *Even Tiniest Chicagoans Caught in Gang Crossfire*, CBS NEWS (July 2, 2012), [http://www.cbsnews.com/8301-18563\\_162-57465408/event-tiniest-chicagoans-caught-in-gang-crossfire/](http://www.cbsnews.com/8301-18563_162-57465408/event-tiniest-chicagoans-caught-in-gang-crossfire/) (reporting on the death of seven-year-old Heaven Sutton, where “Heaven was standing near the intended target . . . when the gunman walked up and fired ten times,” striking and killing Heaven).

232. Such definitions can be taken from existing federal statutes. See, e.g., 18 U.S.C. § 2332f (2012) (prohibiting the use of “an explosive or other lethal device” in certain places); *id.* 18 U.S.C. § 249(a) (2012) (prohibiting the use of “fire, a firearm, a dangerous weapon, or an explosive or incendiary device” for certain purposes).

233. See, e.g., 42 U.S.C. § 5302(5) (2006) (including “closely settled” as a defining characteristic of a city).

234. See *supra* note 190 and accompanying text.

235. See *supra* notes 192–93 and accompanying text.

potential victims and whose impact would be quite problematic for our society and public institutions.<sup>236</sup>

Fourth, there is the “media” counterargument. If a location with constitutional significance may have a greater claim to terrorism, the media should be able to invoke this principle because of the freedom of the press that is expressly guaranteed and found in the First Amendment.<sup>237</sup> While the “freedom of press” clause in the First Amendment provides a constitutional hook for the media to be included in this paradigm, and while the media serve an important role in society, the proposed definition would require that the protected area of constitutional significance be open to the public. Accordingly, to the extent that the media are places of business, an incident of mass violence in such a place would not be within the bounds of the terrorism definition advanced here.

Fifth, the “mental health” counterargument stresses that the perpetrators of mass violence that have mental disabilities may not be sufficiently morally or legally culpable to warrant the “terrorist” label. There is a sense that some of the perpetrators of the incidents described herein may suffer, or may have suffered, from mental illness. This mental health concern has been raised particularly with respect to James Holmes<sup>238</sup> and Adam Lanza.<sup>239</sup> This concern raises

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236. A commentator on a draft of this Article suggests that, under the proposed formulation, if gang member #1 shoots and kills an “innocent” on the side street near his house as part of an initiation ritual (therefore, premeditated), then he is charged with murder, yet if gang member #2 does the same act on the Washington Mall at night he would be a terrorist, calling such different outcomes highly problematic and arbitrary. I respectfully respond that this is not necessarily the outcome under my proposed formulation. The same underlying act may be more harmful in the second case if it is takes place in a dense area, has more potential victims, and can chill far more people. Moreover, the gravamen of the analysis would be such facts, including the population, rather than dictated by whether the shooting took place on a “street” as opposed to a “city.” As this Article suggests, the general characteristics of a city help explain why such spatial considerations are relevant in a fact-specific assessment as to whether an act of terrorism has occurred.

237. See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”).

238. See Jack Healy, *Suspect in Colorado Killings Enters Insanity Plea*, N.Y. TIMES, June 4, 2013, [http://www.nytimes.com/2013/06/05/us/suspect-in-colorado-movie-killings-enters-insanity-plea.html?\\_r=0](http://www.nytimes.com/2013/06/05/us/suspect-in-colorado-movie-killings-enters-insanity-plea.html?_r=0) (noting that Holmes has pleaded not guilty by reason of insanity).

239. See Gabriella Rosen Kellerman, *Diagnosing Adam Lanza*, ATLANTIC (Dec. 16, 2012), <http://www.theatlantic.com/health/archive/2012/12/diagnosing-adam-lanza/266322/#> (“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.”).



the question as to the relationship between my proposed formulation and the prospect that the perpetrator may be mentally ill.

In response to my Essay suggesting that Mr. Holmes should be deemed a terrorist, Cord Jefferson, writing in *The Nation*, suggested that Mr. Holmes might be mentally disturbed.<sup>240</sup> As my proposed definition of terrorism requires premeditation as a necessary element, and as diminished mental capacity may preclude a finding of premeditation,<sup>241</sup> my definition would encompass or accommodate the mental illness possibility noted by Mr. Jefferson.

Sixth, the “morality” counterargument suggests that this Article’s attempt to root terrorism laws in a more descriptive or objective area, and thereby sever current laws’ reliance on subjective intent, is itself fraught with subjectivity.<sup>242</sup> Indeed, some may seize on the stated purposes of terrorism that has been described here—for society to marginalize individuals for particularly reprehensible actions, and for the law to memorialize that judgment and impose especially harsh punishments on those who commit these sorts of deplorable attacks—and expose the value-judgments underlying the purposes.<sup>243</sup> What counts as sufficiently reprehensible to warrant the public determination to socially banish and brand an individual is inherently subjective, some may say. The line between what is and what is not damning is drawn by collective judgments that themselves may be informed by the people’s religious, political, or social views, experiences, biases, and backgrounds, skeptics may continue.

I concede this point. The law is a human institution; personal or external considerations on legal decisions cannot be completely eliminated, and thus find their way into our thinking on subjects, our

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240. 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>.

241. See MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962).

242. See *supra* notes 15–16 and accompanying text; see also Frederick V. Perry, *Multinationals at Risk: Terrorism and the Rule of Law*, 7 FLA. INT’L U. L. REV. 43, 84 (2011) (“At the end of the day, there is a prevailing view . . . that terrorism is a subjective matter, and that ‘one person’s terrorist is another person’s freedom fighter.’”) (citation omitted); Setty, *supra* note 96, at 6–7 (“The quest to establish a universal definition of terrorism is entangled in questions of law, history, philosophy, morality, and religion. Many scholars believe that the definitional question is, by nature, a subjective one that eludes large-scale consensus.”).

243. See Begorre-Bret, *supra* note 61, at 1991 (“One cannot define terrorism independently of the point of view one adopts. In that sense, the notion of terrorism is intrinsically relativistic.”); see also Carol A. Bahan, *International Terrorism: The Legitimization of Safe Harbor States in International Law*, 54 N.Y.L. SCH. L. REV. 333, 347 (2009/2010) (noting that definitions of terrorism depend on the definer’s decision “to qualify and make exceptions to the general normative value that terrorism is wrong”).

decisionmaking processes, and into our final determinations.<sup>244</sup> One may still endeavor, nonetheless, to minimize undue influence on important matters, and to focus decisionmakers on aspects or issues that may guide proper analyses and ultimate conclusions.<sup>245</sup> This is not to ignore value-judgments, but to channel their attention to factors that objectively matter, and to make a case for why those factors matter more than an exclusive fixation on intent.

Defining terrorism in the wake of attacks on innocents and on our feelings of safety generates insecurities and sensitivities that may cloud otherwise dispassionate and principled decisionmaking. Accordingly, the ability to filter through emotional and personal considerations in this particular context is even more complicated. Defining terrorism is an especially difficult human endeavor when humanity itself is challenged. But, in the end, the enduring hope is that considerations of space and what has occurred can bring us closer to some semblance of clarity and shared consistency on the meaning of terrorism. I am unconvinced that these potential criticisms, either alone or in any combination, are sufficient to take this proposed definition off the table.

### CONCLUSION

An inquiry into ways to improve the definition of terrorism in federal law is necessary, given the inconsistency in messages from our primary federal leaders and the disappointing application of federal terrorism law to recent domestic incidents of mass violence; the need for this inquiry is further supported by the mismatch between what federal law says about whether an incident constitutes terrorism, on one hand, and political and social views as to what constitutes terrorism, on the other. Current federal terrorism law is both unclear and unsatisfactory.

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244. See also OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Dover Publications, Inc. 1991) (1881) (“The life of the law has not been logic: it has been experience.”); RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* 26 (2006) (constitutional decisionmaking is informed by “life experience and other personal factors”).

245. See generally John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 *MCGEORGE L. REV.* 1, 10 (2010) (“If knowledge is power, simply recognizing the prevalence of implicit bias and being open to the possibility that it is influencing our decision-making should be the first step toward empowerment. Once acknowledged and thoughtfully considered, the impacts of implicit biases can hopefully be reduced through a variety of actions.”).

This Article suggests that considerations of space are relevant in ascertaining the difficult and complicated question of whether an incident qualifies as terrorism. It is an examination of cities in particular, I believe, that best showcases the relevance of space in determining whether terrorism has occurred. Indeed, cities contain a high concentration of individuals and those populations are not only significant, but fluid. This means that the impact of an act of domestic mass violence is wider and more deserving of the terrorist label than incidents in other physical settings. This is not to suggest that only highly packed places should receive special consideration in a terrorism analysis; other areas within our society, because they have been singled out in the Constitution and because of their significance to our democracy, also warrant heightened attention. Spatial considerations are valuable in their own right, and, in a broader sense, point towards a definition of terrorism that is descriptive or objective in nature, to be contrasted with the current model that is wholly instrumental and essentially subjective.

This Article does not presume to solve the fundamental social and legal problem in this nation of what terrorism means, but instead sets a modest aim: to contribute to and enrich the conversation on the meaning of terrorism. This Article, it is hoped, will facilitate the development of a more coherent and well-received definition when and if the contents of this powerful term are revisited by Congress.