

WERE TIMOTHY MCVEIGH AND THE UNABOMBER THE ONLY WHITE TERRORISTS?: RACE, RELIGION, AND THE PERCEPTION OF TERRORISM

*Tung Yin**

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INTRODUCTION

Since 1990, it has seemed as if scarcely any significant length of time passes without another announcement of an attempted terrorist plot against the United States—with increasing frequency in more recent years. Almost invariably, the perpetrators or suspects have been Muslim—mostly Middle Eastern or of Middle Eastern descent—with the notable exceptions of the Unabomber and Timothy McVeigh.

“Who is a terrorist?” is a predicate question that must be answered in connection with counterterrorism efforts. It can be a difficult question, plagued with claims of moral equivalence,¹ as demonstrated by the apho-

* Professor of Law, Lewis & Clark Law School. J.D., 1995, University of California, Berkeley. Thanks to attendees at the “Race and Terrorism in a Post-9/11 World” panel session at the *Race and Criminal Justice in the West* conference at Gonzaga University School of Law, participants at a faculty workshop at the University of Iowa College of Law, Shahid Buttar, and John Parry for thoughts and feedback, and to Ricky Nelson (‘13) for research assistance.

1. See, e.g., Interview with Noam Chomsky by David Barmasian, *The United States Is a Leading Terrorist State*, MONTHLY REV. (Nov. 2001), <http://monthlyreview.org/2001/11/01/the->

rism that “one [person’s] terrorist is another[’s]... freedom fighter.”² One tempting answer is that a “terrorist” is anyone who engages in “terrorism,” but that answer simply redirects the definitional challenge toward defining terrorism, which can present its own challenge.³

Consider the following four fact patterns, and determine which, if any, describes an act of terrorism:

Case 1. Defendant wants to blow up people and plots with co-conspirators to set off a car bomb in a city’s crowded downtown. His co-conspirators are actually undercover FBI agents carrying out an elaborate “sting” operation, so no one is hurt.

Case 2. Defendant leaves a live bomb near a bank. The bomb goes off and kills two police officers and maims another officer.

Case 3. Defendant brings handguns to a place where nearly everyone else is unarmed. He shoots dozens of people, killing thirteen and wounding thirty-two, before he is himself disabled by return fire.

Case 4. Defendant brings handguns to a public place full of unarmed people. He opens fire, killing six (including a federal judge) and wounding thirteen, before he is disabled by others at the scene.

Who are the terrorists in these case studies? All four of them? Only the first pair, or maybe only the second pair? Or none of them? One could plausibly argue for any of those permutations. Maybe all four are terrorists because they deliberately and nihilistically attacked their victims for no apparent reason other than mass murder. Or perhaps only the bombers are terrorists, given the ubiquity of guns—and hence, gun-related violence—in

united-states-is-a-leading-terrorist-state; NOAM CHOMSKY, 9-11: WAS THERE AN ALTERNATIVE? (2011); FREDERICK GAREAU, STATE TERRORISM AND THE UNITED STATES (2004); NOAM CHOMSKY & EDWARD S. HERMAN, THE POLITICAL ECONOMY OF HUMAN RIGHTS, VOLUME I: THE WASHINGTON CONNECTION AND THIRD WORLD FASCISM (1979); cf. Brian Michael Jenkins, *The Study of Terrorism: Definition Problems*, 1 (Dec. 1980), <http://www.rand.org/content/dam/rand/pubs/papers/2006/P6563.pdf> (“What is called terrorism thus seems to depend on one’s point of view.”).

2. *United States v. Afshari*, 426 F.3d 1150, 1155 (9th Cir. 2005) (internal quotation marks omitted).

3. See, e.g., BEN SAUL, *DEFINING TERRORISM IN INTERNATIONAL LAW* 1 (2006) (“Few words are plagued by so much indeterminacy, subjectivity, and political disagreement as ‘terror’ . . . ‘terrorism’, and ‘terrorist.’”); Martha Crenshaw, *Thoughts on Relating Terrorism to Historical Contexts*, in *TERRORISM IN CONTEXT* 3, 9 (Martha Crenshaw ed., 1995) (noting that “terrorism” is a political label).

American society.⁴ Or perhaps only the shooters are terrorists, given the higher death toll in those incidents.

Judging from media accounts and government press releases, however, the correct answer appears to be that the suspects in Cases 1 and 3 are “terrorists,” but those in Cases 2 and 4 are not. This is a result that is challenging to explain without reference to the fact that the suspects in Cases 1 and 3 are Muslim Americans (one of African descent, the other of Middle Eastern descent), while those in Cases 2 and 4 are white non-Muslims. To be clear, I am not arguing that being Muslim *justifies* their being labeled as terrorists, only that it appears to *explain* the differential perceptions.

In this Article, I use that question as a lens through which to examine the way that race and religion influence, if not dictate, the perception of certain criminal suspects—but not others—as terrorists. Terrorism-like crimes committed by Arab- or Muslim-Americans get treated as terrorism, but similar crimes by non-Arabs/non-Muslims, while punished harshly, are generally not viewed as terrorism. It would be easy to jump to the conclusion that racism or bigotry is the underlying cause, but at least in these case studies, reality is quite a bit more complicated.

First, I provide a brief review of terrorism against the United States as a political tactic up to and beyond 9/11. Next, I examine the case studies provided earlier in more detail. I then provide a micro-level analysis that explores plausible reasons that each case, on its own, might have been appropriately characterized. Finally, I close with a macro-level analysis of all of the cases, in which one can notice the disturbing implication that race and religion play a dominant role in understanding those characterizations. I conclude with thoughts about beginning steps that can be taken to address the problem.

I. TERRORISM: BEFORE 9/11 AND AFTER, AND CASE STUDIES

Public locations frequented by many citizens have made attractive targets for terrorists aiming for spectacular attacks with mass casualties, particularly if those locations are relatively unprotected and hence “soft,” as compared to fortified areas such as military bases or some government buildings. Intentional targeting of public locations through the use of or attempted use of bombs against soft targets could well be understood as acts of terrorism.

4. *But see* Adam Lankford, Editorial, *What Drives Suicidal Mass Killers*, N.Y. Times, Dec. 18, 2012, at A35 (arguing that “suicide rampage shooters” should be considered “nonideological suicide terrorists”).

Terrorism need not involve a weapon of mass destruction;⁵ as the Department of Homeland Security and the FBI warned shortly after a spree killing in Norway killed sixty-nine people, “transnational terrorist groups and homegrown violent extremists (HVEs) could employ small-unit assault tactics in the United States.”⁶ Indeed, Beltway snipers John Allen Muhammad and Lee Boyd Malvo did *terrorize* Washington, D.C., in 2002 when they shot thirteen people from a hidden firing platform in their vehicle; ten of the victims died.⁷

When thinking about terrorism and terrorists today, we Americans perhaps can be forgiven for fixating on the massive casualty attacks preferred by al Qaeda and its ideological cousins. The 9/11 attacks were the culmination of a decade-plus long string of terrorism plots by radical Islamic terrorists against the United States, including the late 2000 suicide bombing in Yemen against the *U.S.S. Cole*, the 1998 simultaneous truck bombings of our embassies in Kenya and Tanzania, and the 1993 truck bombing of the World Trade Center.⁸ These attacks shared a number of characteristics: (1) they were intended to kill a shocking number of people; (2) the intended victims were not selected because of their status as politicians, law enforcement personnel, or other high-profile positions, but rather were fungible with any other victims; and (3) there were no advance warnings given, no demands made to avert any further attacks, and no responsibility claimed.

A. *Terrorism, Historically*

Yet, terrorism has not always been about sneak attacks aimed at killing as many innocent people as possible, and it has hardly been a tactic employed only by Arab Muslims. In fact, in its long history, terrorism has encompassed left-wing, right-wing, and religious terrorists under its wide tent,⁹ with different tactics and goals. Even the terrorism tactic of suicide bombing—often associated with Arab Muslim groups such as Hamas,¹⁰ as well as the 9/11 hijackers—has been practiced by a variety of terrorists,

5. 18 U.S.C. 921 (2006) (defining “destructive device” as including conventional bombs and even grenades).

6. See U.S. DEP’T HOMELAND SECURITY & FEDERAL BUREAU OF INVESTIGATION, JOINT INTELLIGENCE BULLETIN, USE OF SMALL ARMS: EXAMINING LONE SHOOTERS AND SMALL-UNIT TACTICS at 3 (2011), available at http://www.cbsnews.com/htdocs/pdf/JIB_Use_of_Small_Arms_Examining_Lone_Shooters.pdf.

7. Marcia Slacum Greene & Carol Morello, *Muhammad’s Inexorable Descent; On Eve of Trial, Acquaintances Describe a Stinging Succession of Hopes Followed by Failures*, WASH. POST, Oct. 12, 2003, at A01. Muhammad was eligible for the death penalty in Virginia in part because the shooting spree was treated as terrorism under state law. Josh White, *Jury Sentences Muhammad to Death; Defendant Stoical, Panel Emotional as Sniper Trial Ends*, WASH. POST, Nov. 25, 2003, at A01.

8. For a longer list of terrorist incidents, see Appendix 4.

9. BRUCE HOFFMAN, *INSIDE TERRORISM* 229-30 (rev. ed. 2006).

10. See MIA BLOOM, *DYING TO KILL: THE ALLURE OF SUICIDE TERROR* 2, 19 (2005).

including secular groups.¹¹ If anything, the terrorism of the 1980s and earlier appear to fit federal definitions of terrorism better than that of the 1990s and later. For example, the definition of “international terrorism” in Chapter 113B of Title 18 is activity:

[I]nvolv[ing] violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State . . . [and 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 the conduct of a government by mass destruction, assassination, or kidnapping.¹²

A different section generally relating to immigration focuses more on specific acts, defining “[t]errorist activity” as including “[t]he highjacking or sabotage of any conveyance,” hostage taking “in order to compel a third person (including a governmental organization) to do or abstain from doing any act,” assassination, and the use of biological, chemical, or nuclear weapon.¹³ A third section defines terrorism as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”¹⁴

These definitions presume that there will be some statement from the alleged perpetrator of an act or demand—or at the minimum, an indication of responsibility—from which we can determine whether the violent act was “intended to intimidate or coerce” the public, to “influence the policy of a government by intimidation or coercion,” or to “compel [the government] to do or abstain from doing any act”;¹⁵ or if it was otherwise politically motivated.

Terrorists used to take public credit for their actions.¹⁶ In today’s world, however, terrorist groups like al Qaeda have not stepped forward to claim credit for their deeds.¹⁷ While some experts have argued that

11. *Id.* at 3, 102.

12. 18 U.S.C. § 2331(1)(A)-(B) (2006) (emphasis added).

13. 8 U.S.C. § 1182(a)(3)(B)(iii) (2006).

14. 22 U.S.C. § 2656f(d)(2) (2006).

15. 8 U.S.C. § 2331(1)(A)-(B).

16. *See, e.g.*, Gary LaFree & Laura Dugan, *Research on Terrorism and Countering Terrorism*, 38 CRIME & JUST. 413, 443-52 (2009). These two characteristics are in fact related, as the terrorism of that era was meant to draw attention to a particular cause, rather than to inflict maximum death and destruction. *Id.*

17. *See, e.g.*, HOFFMAN, *supra* note 8, at 272 (noting that “only about 30 percent of all terrorist attacks in 2004 were claimed”). No group stepped forward to take official claim for the 9/11 attacks. Finally, ten years later, when Iranian President Mahmoud Ahmadinejad asserted before the United Nations that Israel and the United States were responsible for the 9/11 attacks, al Qaeda angrily denounced him for denying the obvious. Saeed K. Dehghan, *Al-Qaida Calls on Ahmadinejad to End 9/11 Conspiracy Theories*, GUARDIAN (Sept. 28, 2011), <http://www.guardian.co.uk/world/2011/sep/28/al-qaida-ahmadinejad-911-conspiracy>.

now-deceased al Qaeda leader Osama bin Laden made clear his reasons for attacking the United States,¹⁸ others, like Pulitzer Prize-winning author Lawrence Wright have described al Qaeda as a “death cult,”¹⁹ suggesting that its members were less interested in achieving concrete goals than in killing mass numbers of people. In any event, much of the terrorist attacks since 9/11 have been followed with silence.

Regarding casualties, many terrorists before the 1980s generally tried to avoid killing those they considered “innocent,”²⁰ though of course their conception of innocence was more narrow than that under, say, the laws of war. Thus, left-wing European terrorists’ overall “use of violence historically has been heavily constrained,”²¹ though they were not above kidnapping or even assassinating politicians.²² Right-wing terrorists in Europe have been less restrained, but at the same time, they engaged in violence “based not on some pathological obsession to kill or beat up as many people as possible but rather on a deliberate policy of intimidating the general public into acceding to specific demands or pressures.”²³ Religiously motivated terrorists have tended to carry out the most violent attacks with the widest scope of targets—sometimes as broad as “encompassing not merely their declared enemies but anyone who does not share their religious faith.”²⁴

This is not to say that there were no terrorism-related deaths in the 1970s and earlier. Indeed, one of the earliest terrorist incidents, an assassination attempt in 1858, failed to harm the target, Emperor Napoleon III, but did kill eight and wound 148 others.²⁵ The intent there, however, was to kill Napoleon; the actual victims were incidental.²⁶ Still, as terrorism expert Jessica Stern notes, from 1970 to 1995, “there [was] a clearly increasing trend” of both the annual number of worldwide terrorism incidents *and* casualties, as well as the casualty rate per incident.²⁷ Perhaps a major turning point was the stunning attack during the 1972 Olympic Games in Munich, when the Black September Organization of the Pales-

18. See, e.g., MICHAEL SCHEUER, OSAMA BIN LADEN 110-22 (2011); LAWRENCE WRIGHT, THE LOOMING TOWER: AL QAEDA AND THE ROAD TO 9/11 264 (2006) (discussing ABC News interview in which bin Laden declared his *fatwa* against the United States).

19. WRIGHT, *supra* note 17, at 107.

20. HOFFMAN, *supra* note 8, at 5-6; see also *id.* at 269 (“[U]ntil 9/11, the conventional wisdom held that terrorists were interested not in killing but in publicity.”).

21. See, e.g., *id.* at 230-31.

22. *Id.* at 230, 234 (“[H]ighly placed government officials and security force commanders will, when the opportunity presents itself and the political conditions are propitious, be attacked.”).

23. *Id.* at 238.

24. *Id.* at 230.

25. See Martin A. Miller, *The Intellectual Origins of Modern Terrorism in Europe*, in TERRORISM IN CONTEXT, *supra* note 3, at 27, 38.

26. In other words, if one accepts the terrorism principle that politicians are legitimate targets because they voluntarily sought their government positions, the problem with this attack was its disproportionality.

27. JESSICA STERN, THE ULTIMATE TERRORISTS 6 (1999).

tinian Liberation Organization (PLO) stormed the dormitory where Israeli athletes were staying, killing two immediately and capturing nine.²⁸ When West German police attempted a rescue mission, the captors killed the remaining hostages; the crippling blow was a hand grenade that a terrorist tossed into a helicopter cabin where the hostages were held.²⁹ Although Black September failed to secure its demands (and all but one of the direct perpetrators were killed), the sheer brutality of its violent actions ended up being “a spectacular publicity coup,” because “many across the world [were convinced] that the Palestinians were now a force to be reckoned with and possessed a cause that could no longer justifiably be denied.”³⁰ As terrorism analyst Hoffman explains, a year and a half later, “the PLO’s leader, Yasir Arafat, was invited to address the UN General Assembly and shortly afterward the PLO was granted special observer status in that international body.”³¹ Other terrorist groups apparently took note of the connection between the riveting images of violence and the successful publicity: between 1968 and 1978, the number of international terrorist groups exploded from eleven to fifty five.³²

Terrorism attacks against the United States, either domestically or overseas, certainly followed the pattern observed by Stern. Perhaps the most notorious terrorist group in the early to mid-1970s was the left-wing organization, the Weathermen (also known as Weather Underground Organization). This was a classic terrorist group in the sense of using violent means against specific targets in an effort to broadcast a political message (if not to effectuate political change): “opposition to the Vietnam War and . . . [a] desire to help militant blacks like the Black Panthers.”³³ More extravagantly, the group sought to bring about a revolution that would result in “a classless world.”³⁴ At one point, the key members of the Weathermen were subject to “one of the most intensive manhunts in [the FBI’s] history.”³⁵

In its earlier days, the Weathermen was not averse to planning violent bombings that would likely kill large numbers of people, but its means (though not its goals) changed after a bomb-making accident destroyed one of their townhouses and killed the bomb-maker and two other Weathermen

28. See SIMON REEVE, ONE DAY IN SEPTEMBER: THE FULL STORY OF THE 1972 MUNICH OLYMPICS MASSACRE AND THE ISRAELI REVENGE OPERATION “WRATH OF GOD” (2000); HOFFMAN, *supra* note 8, at 67.

29. HOFFMAN, *supra* note 8, at 67-68.

30. *Id.* at 69.

31. *Id.* at 70.

32. *Id.*

33. JEREMY VARON, BRINGING THE WAR HOME: THE WEATHER UNDERGROUND, THE RED ARMY FACTION, AND REVOLUTIONARY VIOLENCE IN THE SIXTIES AND SEVENTIES 11 (2004).

34. *Id.* at 50 (quoting another source) (internal quotation marks omitted).

35. *Id.* at 176 (quoting another source) (internal quotation marks omitted).

members; nine months later, one of the key members issued a public statement known as “New Morning” that read in part:

The FBI can't catch us; we've pierced their bullet proof shield.
But the townhouse forever destroyed our belief that armed struggle
is the only real revolutionary struggle.³⁶

From that point on, the Weathermen avoided attacking police, and while it continued to engage in bombing attacks, it “issued a warning to prevent injury—a practice they continued throughout their existence.”³⁷

Terrorism against the United States evolved towards less discriminating violence. In 1978, the Unabomber began his 17-year campaign of terror.³⁸ So code-named by the FBI because of his propensity to target university and airline targets,³⁹ Ted Kaczynski—a former mathematics professor at the University of California—mailed 12 letter bombs between 1978 and 1987, killing one and injuring twenty one, before taking a six-year hiatus.⁴⁰ From 1993 to 1995, he mailed four more letter bombs, with significantly more lethal results: two deaths and two severely injured and maimed victims.⁴¹ The Unabomber's terror campaign was dangerous enough that the Justice Department offered—and eventually paid—a \$1 million reward for information leading to his arrest.⁴² After the last attack, Kaczynski did finally issue a public justification for his actions, culminating in the *New York Times's* and *Washington Post's* publication of his 35,000 word manifesto *Industrial Society and Its Future*,⁴³ which lambasted the Industrial Revolution and technology. Publication led directly to

36. *Id.* at 173-74, 182 (quoting another source) (internal quotation marks omitted).

37. *Id.* at 184. With the Weathermen fading into the background, the other notable left-wing terrorist group in the United States in the 1970s was the Symbionese Liberation Army, which gained prominence with the murder of the Oakland school superintendent, followed by the kidnapping of 19-year-old heiress Patty Hearst. See VIN MCLELLAN & PAUL AVERY, *THE VOICES OF GUNS* 32-33 (1977). The SLA declared itself to be attacking “the vitals of the fascist power structure.” *Id.* at 32. Hearst subsequently took part, seemingly willingly, in an SLA bank robbery that left two victims dead from gunshot wounds. *Id.* at 35. A few months later, most of the SLA members were killed in a firefight with police, and the rest were captured two years later. *Id.* at 37-39.

38. See William Glaberson, *In Book, Unabomber Pleads His Case*, N.Y. TIMES, Mar. 1, 1999, at A12.

39. *Id.*

40. See B. Drummond Ayres, Jr., *Man Held as Unabomber Is Indicted in 2 Slayings*, N.Y. TIMES, June 19, 1996, at 12; David Johnston, *17-Year Search, an Emotional Discovery and Terror Ends*, N.Y. TIMES, May 5, 1998, at A24.

41. Johnston, *supra* note 39.

42. See James Brooke, *Unabomber's Kin Collect Reward of \$1 Million for Turning Him In*, N.Y. TIMES, Aug. 21, 1998, at A1.

43. See Howard Kurtz, *Unabomber Manuscript Is Published: Public Safety Reasons Cited in Joint Decision by Post*, N.Y. TIMES, WASH. POST, Sept. 19, 1995, at A01. The original essay, Theodore Kaczynski, *Industrial Society and Its Future* (undated), can be found at <http://editions-hache.com/essais/pdf/kaczynski2.pdf>.

Kaczynski's capture, as his brother recognized very similar themes in the essay to letters received from Kaczynski.⁴⁴

The lethality of attacks against American interests stepped up from there. In 1993, terrorists led by Ramzi Yousef (cousin to 9/11 mastermind Khalid Sheikh Mohammed) and "Blind Sheikh" Omar Abdel-Rahman set off a truck bomb in an effort to bring down the World Trade Center.⁴⁵ The attempt failed, but it still killed six victims and injured over a thousand others.⁴⁶ The terrorists had hoped for as many as 250,000 deaths if one of the towers would have collapsed into the other one.⁴⁷

No discussion of American terrorism is complete without mention of the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City.⁴⁸ On April 19, 1995, a Ryder truck packed with homemade explosives derived from fertilizer and diesel fuel exploded and blasted away the northern half of the building.⁴⁹ Almost 170 people—including nineteen children at a daycare center—died as a result, and more than 800 others were injured.⁵⁰

Like al Qaeda, McVeigh did not give any advance warning, nor did he issue any public statement taking credit for the bombing, though the post-bombing silence may have been due to his quick capture. However, the trial testimony of a co-conspirator as well as post-sentencing interviews that McVeigh gave to the television show *60 Minutes* and to a pair of authors have established that McVeigh wanted to strike back against the federal government for what he perceived to be its wanton slaughter of government resisters at Ruby Ridge and Waco.⁵¹

Al Qaeda's large-scale attacks against American interests also increased in intensity in the late 1990s. The twin bombings of our embassies in Kenya and Tanzania in 1998 killed over 200 people.⁵² Ahmed Ressay, a terrorist loosely affiliated with al Qaeda, plotted to set off a car bomb at the Los Angeles International Airport on New Year's Eve 1999, but he was caught at the U.S.–Canada border by a sharp-witted customs agent.⁵³

44. Johnston, *supra* note 39.

45. See ANDREW C. MCCARTHY, *WILLFUL BLINDNESS: A MEMOIR OF THE JIHAD* (2008).

46. See generally *id.*; SIMON REEVE, *THE NEW JACKALS: RAMZI YOUSEF, OSAMA BIN LADEN, AND THE FUTURE OF TERRORISM* 15 (1999) [hereinafter REEVE, *NEW JACKALS*].

47. REEVE, *NEW JACKALS*, *supra* note 45, at 108.

48. In the interest of full disclosure, I should note that from 1996-97, I was a law clerk in the federal courthouse in Oklahoma City. I was not there at the time of the explosion, but my office window looked out at the remains of the Murrah Federal Building, and the entrance to the underground federal parking lot was at the ground level of that structure. The judge, his secretary, and my co-clerk all suffered through that terrible day, fortunately without harm.

49. LOU MICHEL & DAN HERBECK, *AMERICAN TERRORIST: TIMOTHY MCVEIGH AND THE OKLAHOMA CITY BOMBING* 231-34 (2001).

50. *Id.*

51. See *id.* at 332, 378-80, 382-83.

52. REEVE, *NEW JACKALS*, *supra* note 45, at 1.

53. See David Johnston, *Few Answers About Man Being Held in Bomb Case*, N.Y. TIMES, Dec.

A suicide boat attack in 2000 against the destroyer *U.S.S. Cole* while it was docked in Yemen killed 17 sailors.⁵⁴ None of these attacks was claimed publicly by al Qaeda, nor were any demands issued to abate further attacks.

Actually, bin Laden did issue a public demand of sorts in 1996, when he declared *jihad* against the United States and called for all Muslims to drive American forces out of Saudi Arabia.⁵⁵ Two years later, he called more explicitly for a declaration of war against the United States: "Good Muslims must fight and kill American civilians and soldiers whenever they can."⁵⁶ American intelligence forces were aware of and alarmed by these declarations, and, during the Clinton Administration, the CIA tried working out a plan with local Afghan fighters to capture bin Laden.⁵⁷ In addition, on at least two occasions, the United States attempted to or considered attempting to kill bin Laden through a missile strike on his compound in Afghanistan.⁵⁸

Like the preceding attacks, al Qaeda did not claim credit for 9/11. In December 2001, the United States released a videotape that it had found after overrunning al Qaeda's training camps in Afghanistan; the videotape captured an Arabic conversation among bin Laden and others, in which the terrorist leader declared:

We calculated in advance the number of casualties from the enemy, who would be killed based on the position of the tower. We calculated that the floors that would be hit would be three or four floors. I was the most optimistic of them all. [inaudible] Due to my experience in this field, I was thinking that the fire from the gas in the plane would melt the iron structure of the building and collapse the area where the plane hit and all the floors above it only. This is all that we had hoped for.⁵⁹

This videotape convincingly established bin Laden's knowledge of and culpability for conspiring to carry out the 9/11 attacks (though there were

21, 1999, at A24. Interestingly, in August 2001, Jose Melendez-Perez, a customs agent in Miami, refused entry to Mohamed al-Kahtani, a Guantanamo detainee who has been suspected of being the intended 20th 9/11 hijacker. See David Johnston & Thom Shanker, *The Reach of War: Detainees; Pentagon Approved Intense Interrogation Techniques for Sept. 11 Suspect at Guantánamo*, N.Y. TIMES, May 21, 2004, at A10.

54. RICHARD A. CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR* 222 (2004).

55. REEVE, *NEW JACKALS*, *supra* note 45, at 192.

56. *Id.* at 194.

57. See CLARKE, *supra* note 53, at 149.

58. See, e.g., STEVE COLL, *GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001*, at 410-11, 446-48 (2004).

59. *A Nation Challenged; Scenes of Rejoicing and Words of Strategy from bin Laden and His Allies*, N.Y. TIMES, Dec. 14, 2001, at B4.

many in the Arab world who thought it had been faked),⁶⁰ but it did not appear to have been intended as a public claim of responsibility. Parts of it were hard to hear clearly, and it was more of a recording of a conversation for internal archiving.

Finally, it should be noted that since 9/11, there have been hundreds of Americans convicted of providing material support or resources to designated terrorist organizations or similar crimes.⁶¹ Under the primary statute, 18 U.S.C. § 2339B, material support or resources means:

any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.⁶²

Nearly all of those convicted since 9/11 under this statute have run afoul of the law well short of plotting terrorist attacks, but rather, were found to have attempted to join al Qaeda,⁶³ to sell classified information or weapons to al Qaeda,⁶⁴ to provide money to al Qaeda, the Taliban, or other terrorist groups,⁶⁵ or to otherwise assist al Qaeda in ways other than direct attacks themselves. Although these convictions are typically counted in the Justice Department's announcements of the tally of terrorism-related offenses, they are not part of my historical context for comparing the perception of Arab/Muslims versus non-Arab/Muslims as terrorists. This is because the material support cases generally do not involve plots of violence involving the defendants. They are certainly terrorism-related crimes, but there are generally no direct state analogues with which to compare prosecutions of similar conduct but without the specter of terrorism.

B. Case Studies

Having traced the evolution of terrorism against the United States from being largely attention-grabbing and political at first to increasingly nihilistic and lethal of late, it is time to analyze the case studies set forth in

60. *Id.*

61. See, e.g., Robert M. Chesney, *Federal Prosecution of Terrorism-Related Offenses: Conviction and Sentencing Data in Light of the "Soft-Sentence" and "Data-Reliability" Critiques*, 11 LEWIS & CLARK L. REV. 851 (2007).

62. See 18 U.S.C. § 2339B(g)(4) (2006); 18 U.S.C. § 2339A(b)(1) (2006).

63. See, e.g., *United States v. Goba*, 220 F. Supp. 2d 182 (W.D.N.Y. 2002); *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002).

64. See, e.g., *United States v. Taleb-Jedi*, 566 F. Supp. 2d 157 (E.D.N.Y. 2008).

65. See, e.g., *United States v. Afshari*, 635 F. Supp. 2d 1110 (C.D. Cal. 2009).

the introduction. All four case studies fit suitably within the more recent terrorism, aimed at mass casualties, without advance warnings or political justifications/demands.

1. *The Bombers (Cases 1 and 2)*—Case 1 is based on the conviction of former Oregon State University student Mohamed Mohamud, who was 19 years old at the time of his arrest. According to the government, in summer 2010, Mohamud tried to get in touch with a suspected radical Islamic militant in the lawless region of Pakistan.⁶⁶ Mohamud apparently made a mistake regarding the email address he was supposed to write to, so he never managed to get hold of his contact in Pakistan.⁶⁷ When Mohamud's father tipped off the FBI as to his son's apparent radicalization, federal agents obtained a Foreign Intelligence Surveillance Act warrant to be able to access Mohamud's email account.⁶⁸ Upon seeing Mohamud's unsuccessful email attempts, FBI agents decided to carry out a sting operation against him. An undercover agent made contact with Mohamud, pretending to be an associate of the person in Pakistan that Mohamud had tried to reach by email.⁶⁹ According to the government, in a critical face-to-face meeting between Mohamud and two undercover agents, Mohamud was the one who proposed the idea of building a car bomb.⁷⁰ However, Mohamud allegedly admitted that he needed help building an explosive device.⁷¹

The agents provided Mohamud with cash to buy bomb components and to secure a safehouse, and when Mohamud obtained the bomb parts, the agents constructed bombs for him.⁷² Unknown to him, the "bomb" was inert, but he believed it was live because the undercover agents took him to a remote location to "test" another prototype.⁷³ Then, the evening after Thanksgiving, Mohamud, accompanied by one of the undercover agents,

66. Arrest Warrant, Affidavit of FBI Special Agent Ryan Dwyer at ¶ 18, *United States v. Mohamud*, 2012 WL 5208173 (D. Or. 2012), available at http://media.oregonlive.com/portland_impact/other/USAFFIDAVIT.pdf [hereinafter Dwyer Affidavit].

67. *Id.* at ¶ 23.

68. See Bryan Denson, *Mohamed Mohamud Time Line: Key Events in Portland Bomb Plot Case*, OREGON LIVE (Jan. 31, 2013, 2:45 PM), http://www.oregonlive.com/portland/index.ssf/2013/01/mohamed_mohamud_time_line_key.html.

69. *Id.*

70. Dwyer Affidavit, *supra* note 66, at ¶¶ 35-36. Although the FBI agents recorded all other meetings with Mohamud, this one was not recorded due to some kind of equipment malfunction, later explained by the government as "dead batteries." See Bryan Denson, *Portland Bomb Plot: FBI Recording of Mohamed Mohamud Lost Because of Dead Batteries, Prosecutors Say*, OREGON LIVE (Apr. 8, 2011, 9:33 PM), http://www.oregonlive.com/portland/index.ssf/2011/04/dead_batteries_scuttled_record.html. Without knowing more details, it is hard to evaluate the validity of critics' suspicions that the FBI agents deliberately failed to record the first meeting. Note, however, that the FBI is generally aware of the importance of testing its recording equipment in advance of crucial meetings. See generally KURT EICHENWALD, *THE INFORMANT* 210-11 (2000) (detailing the careful attention that the FBI paid to testing not just the recording equipment, but also the coverage of the room in question, necessitating the delivery of a new camera).

71. Dwyer Affidavit, *supra* note 66, at ¶ 35.

72. *Id.* at ¶¶ 61, 65.

73. *Id.* at ¶ 77.

stepped out of a car and dialed a number from a cell phone that he allegedly believed would set off a car bomb parked near a downtown transit line.⁷⁴ As this night was the city's annual Christmas tree lighting ceremony, a real bomb could have killed thousands. However, nothing blew up because the car bomb was inert.⁷⁵ The agents arrested Mohamud, and he was soon indicted for attempted use of a weapon of mass destruction in violation of 18 U.S.C. § 2332a.⁷⁶ Mohamud raised entrapment as a defense but was convicted.⁷⁷

The local and national news media collectively labeled Mohamud as a terrorist. For example, the Portland CBS affiliate's news broadcast referred to Mohamud's having "plotted a 'spectacular show' of terrorism for months."⁷⁸ Other sources described the alleged plot as demonstrating that the threat of terrorism against the United States came from not just al Qaeda but also Americans.⁷⁹ Yet another news account said that Mohamud was "too young to drink but apparently old enough to pursue jihad – the version preached by al Qaeda."⁸⁰ *Jihad* in this context is, of course, a synonym for terrorism.⁸¹ A more detailed sampling of sources can be found in Appendix 1.

Case 2 is based on a bank bombing incident in Woodburn, which is a town about 30 miles south of Portland. On December 12, 2008, an unknown person called in bomb threats to the Wells Fargo and West Coast Bank branches; although the police searched and failed to find anything, a bank employee discovered a suspicious-looking device outside the latter bank.⁸² Later that day, when police officers moved it inside to examine it, the device exploded, killing a bomb technician and a police captain, and maiming the Woodburn police chief.⁸³ At least one bomb expert uncon-

74. *Id.* at ¶ 91.

75. Laura McVicker, *Mohamed Mohamud Guilty of Trying to Bomb Tree Ceremony*, KATU.COM (Jan. 31, 2013, 4:08 PM), <http://www.katu.com/news/local/mohamed-Mohamud-guilty-bomb-plot-189277531.html>.

76. *Id.*

77. Bryan Denson, *Mohamed Mohamud found guilty in Portland terrorism trial*, Oregon Live, Jan. 31, 2013, http://www.oregonlive.com/portland/index.ssf/2013/01/mohamed_mohamud_found_guilty_i.html.

78. Jennifer Meacham, *Who Is Mohamed O. Mohamud?*, KATU.COM (Nov. 27, 2010, 7:57 PM), <http://www.katu.com/news/local/110917854.html>.

79. *Feds Arrest Somali Teen in Oregon Bomb Plot*, CBSNEWS (Nov. 29, 2010, 9:14 PM), <http://www.cbsnews.com/stories/2010/11/27/national/main7093701.shtml>.

80. Caryn Brooks, *Portland's Bomb Plot: Who Is Mohamed Mohamud?*, TIME (Nov. 28, 2010), <http://www.time.com/time/nation/article/0,8599,2033372,00.html>.

81. On the different meanings of "jihad," see WRIGHT, *supra* note 17, at 108. *But see* J.M. BERGER, *JIHAD JOE: AMERICANS WHO GO TO WAR IN THE NAME OF ISLAM* viii (2011) (acknowledging different meanings but contending that violent jihad is the primary meaning for many).

82. *See* Aimee Green, *Two Officers Confirmed Dead in Woodburn Bank Bombing*, OREGON LIVE (Dec. 13, 2008, 8:31 PM), http://www.oregonlive.com/news/index.ssf/2008/12/police_identify_colleagues_kil.html.

83. *Id.*

nected to the case opined that the bomb victims made a serious mistake in handling the device themselves instead of using a robot to test it safely.⁸⁴

A few days later, police officers arrested thirty-two-year-old Joshua Turnidge on multiple charges, including aggravated murder and manufacture and possession of a destructive device.⁸⁵ Shortly thereafter, Bruce Turnidge—Joshua’s father—was arrested on the same set of charges.⁸⁶ According to the government, the Turnidges planted the bomb as an expression of anti-government sentiment or possibly as part of a plan to rob the bank.⁸⁷

Unlike Mohamad, the Turnidges were generally *not* described by the mass media as terrorists. Portland’s main newspaper, the *Oregonian*, covered the Woodburn bombing investigation and the ensuing Turnidge trial extensively. On the day of Joshua Turnidge’s arrest, the headline in the *Oregonian* read simply, “Salem man arrested on aggravated murder counts in Woodburn bank bombing.”⁸⁸ The article noted that the bombing “staggered Oregon law enforcement officials and frightened the public”; however, the article never raised the possibility of terrorism.⁸⁹ The closest that the mainstream media came to labeling the Turnidges as terrorists was in reporting the prosecutor’s closing argument that the bank bombing was Bruce Turnidge’s “Timothy McVeigh moment.”⁹⁰

To be sure, there were media outlets that raised the question of whether the Turnidges were terrorists, but these were in mostly alternative newspapers, such as the online blog of the weekly *Portland Mercury*,⁹¹ or the editorial pages of daily papers.⁹²

84. See, e.g., Doug Bates, *A Barbaric Crime in Woodburn*, OREGONIAN, Dec. 16, 2008, at B4.

85. See Marion County Probable Cause Statement & Data Sheet, OREGON LIVE (Dec. 15, 2008), http://blog.oregonlive.com/news_impact/2008/12/turnidgeprobcause2.pdf.

86. Helen Jung, *Money Troubles Follow Bomb Suspect*, OREGON LIVE, Dec. 18, 2008, available at 2008 WLNR 24375221.

87. Helen Jung, *Prosecution Outlines Strategy in Upcoming Trial for Accused Woodburn Bank Bombers Bruce and Joshua Turnidge*, OREGON LIVE (Aug. 18, 2010, 8:20 PM), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2010/08/prosecution_strategy_revealed_in_upcoming_trial_for_accused_bank_bombers_bruce_and_josh_turnidge.html.

88. Stuart Tomlinson, *Salem Man Arrested on Aggravated Murder Counts in Woodburn Bank Bombings*, OREGON LIVE (Dec. 15, 2008, 1:04 PM), http://www.oregonlive.com/news/index.ssf/2008/12/police_release_photos_of_suspe.html.

89. See *id.*

90. See Helen Jung, *Woodburn Bank Bombing Jury Now Deliberating Possible Death Sentence for Bruce Turnidge*, OREGON LIVE (Dec. 13, 2010, 8:31 PM), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2010/12/woodburn_bank_bombing_jury_now_deliberating_possible_death_sentence_for_bruce_turnidge.html.

91. Sarah Mirk, *Don't Call Them Terrorists: Oregon's Other Politically Motivated Bomb Plot*, PORTLAND MERCURY BLOG (Dec. 9, 2010), <http://www.portlandmercury.com/portland/dont-call-them-terrorists/Content?oid=3137017>.

92. See Bob Welch, *Hate Knows No Color or Background*, REGISTER-GUARD (Eugene, Or.), Nov. 30, 2010, at B1, available at <http://projects.registerguard.com/csp/cms/sites/web/news/cityregion/25606908-57/turnidge-bad-welch-card-oregon.csp> (“Whether that terrorist is a Somali-born Muslim or a descendant from Oregon Trail survivors, the common denominator is simply, and pathetically, this: a total disregard for the lives of others.”); Editorial, *Justice at Last in Woodburn*

Another way of quantifying the vast difference in perception of the Mohamud and Turnidge cases is to consider the percentage of news stories about each that mention terrorism in connection with the suspects. To demonstrate this, I searched the ALLNEWS database in Westlaw for the total number of hits on the defendants, and the number of hits on the defendants also mentioning terrorism. The results were that 1.7% of stories about the Turnidges also mentioned terrorism,⁹³ whereas 29.8% of stories about Mohamud also mentioned terrorism.⁹⁴ In other words, news stories have been almost fifteen times more likely to connect Mohamud with terrorism than the Turnidges.⁹⁵

Moreover, the perception of Mohamud as a terrorist perhaps fueled national media interest in his story, compared to the lesser interest in the Turnidges; the difference is reflected in the aggregate number of new stories about each of them—25% more about Mohamud, even though his incident was more recent, and had yet to go to trial when I performed the searches, whereas the Turnidges had already been sentenced.⁹⁶ Another indication of the greater national interest in the Mohamud story is reflected in the number of stories in the national newspapers about him. The *New York Times* and *Los Angeles Times* had each run ten stories about Mohamud, even though he had yet to go to trial, compared to only five about the Turnidges.⁹⁷ The *Washington Post* has also run ten stories about

Bombing, OREGON LIVE (Dec. 23, 2010, 9:11 PM), http://www.oregonlive.com/opinion/index.ssf/2010/12/justice_at_last_in_woodburn_bo.html (characterizing the Turnidge bombing as “a crude act of homegrown terrorism”). *But see* Susan Nielsen, *Crime and Fear: Two Oregon Bombs, Set a Universe Apart*, OREGON LIVE (Dec. 6, 2010, 8:30 AM), http://www.oregonlive.com/news/oregonian/susan_nielsen/index.ssf/2010/12/crime_and_fear_two_oregon_bomb.html (conceding the unfairness of the differential treatment, but justifying it as a matter of newsworthiness); Dick Hughes, *Turnidges, Despite Actions, Didn't Fit 'Terrorist' Label*, STATESMAN JOURNAL (Salem, Or.), Feb. 24, 2011, at C4.

93. The search term “turnidge /p terror!” generated nine hits, of which one was irrelevant; two others were newspaper editorials arguing against labeling the Turnidges as terrorists. The search term “(joshua bruce) +2 turnidge” generated 470 hits, of which two pre-dated the bombing attacks and were therefore irrelevant. I conducted these searches on Mar. 4, 2012.

94. The search term “mohamed +1 (o osman) +1 mohamud /p terror!” generated 175 hits, all but a handful of which used the terms “terrorist” or “terrorism” in connection with Mohamud. The search term “mohamed +1 (o osman) +1 mohamud” generated 587 hits, all of which were relevant. I conducted these searches on Mar. 4, 2012.

95. Not every story that mentions “terrorism” will in fact characterize the subject of the story as a terrorist. In some instances, the story might state that terrorism had been ruled out. This was the case with some stories about Major Hasan. *See infra* note 125. No doubt, there is some margin of error with regard to the tabulation of stories mentioning terrorism, such that we should avoid drawing definitive conclusions based on small discrepancies between news coverage of different defendants. Here, however, the difference is tremendous. Moreover, for similar conduct, we might well expect similar investigative consideration of terrorism, with the resulting “ruling out” of terrorism in all instances.

96. For the total number of stories on Mohamud versus those on the Turnidges, see *supra* notes 93 and 94.

97. I used the search term “mohamed +2 mohamud” and “(bruce joshua) +2 turnidge” in the NYT and LATIMES databases in Westlaw on Mar. 12, 2012.

Mohamud, but zero about the Turnidges.⁹⁸ The *Wall Street Journal* comes the closest to parity, with three stories about Mohamud and two on the Turnidges,⁹⁹ though this was still skewed, since there was the possibility of additional stories about the former, depending on how newsworthy his case remained as it proceeds to its ultimate resolution.

The striking contrast between the Mohamud and Turnidge cases is especially relevant, given their geographic and temporal proximity. The same trends are present, however, with other recent examples of attempted bombings. Antonio Benjamin Martinez, a Muslim convert also known as Muhammad Hussain, pleaded guilty to attempting to blow up a military recruiting center in Maryland in late 2010.¹⁰⁰ Kevin Harpham, who has ties to a white supremacist group, pleaded guilty to planting a radio-controlled bomb along the route of a Dr. Martin Luther King, Jr. parade in Spokane, Washington in early 2011.¹⁰¹ Over 75 percent of the stories about Martinez mentioned terrorism,¹⁰² whereas only 11 percent of the stories about Harpham did.¹⁰³ Like Mohamud, Martinez was caught in an undercover sting operation; the bomb that he thought he was activating was inoperative.¹⁰⁴ Harpham's bomb was real and happened to be discovered before it was detonated.¹⁰⁵ Thus, the plot that posed actual danger of harming large numbers of people was Harpham's. Yet, in terms of percentage of stories even mentioning the possibility of terrorism, media coverage of Harpham's case was closer to that of the Turnidges (non-terrorists) than those of Mohamud and Martinez.¹⁰⁶

98. I used the search term "mohamed +2 mohamud" and "(bruce joshua) +2 turnidge" in the WASHINGTONPT database in Westlaw on Mar. 12, 2012.

99. I used the search terms "mohamed +2 mohamud" and "(bruce joshua) +2 turnidge" in the WSJ-ABS database in Westlaw on Mar. 12, 2012.

100. See, e.g., Tricia Bishop, *Maryland Man Pleads Guilty in Terrorist Bomb Plot*, BALTIMORE SUN (Jan. 26, 2012), http://articles.baltimoresun.com/2012-01-26/news/bs-md-co-martinez-plea-20120126_1_muhammad-hussain-terrorist-bomb-plot-federal-agents/.

101. William Yardley, *Suspect Held in Spokane Bomb Attempt*, N.Y. TIMES, Mar. 10, 2011, at A20.

102. The search term "antonio +2 martinez and baltimore and da(aft 2009)" yielded 153 hits, while adding the term "and terror!" resulted in 116 hits. I conducted these searches on Mar. 10, 2012.

103. The search term "kevin +2 harpham" yielded 394 hits, while adding the term "and terror!" resulted in 44 hits. I conducted these searches on Mar. 9, 2012.

104. Bishop, *supra* note 100. Ironically, Martinez read about Mohamud's arrest and told the undercover agent dealing with him that "I'm not falling for no b.s." Kevin Johnson, *Man Arrested in Md. Terror Plot; Police Say Suspect Tried to Detonate Fake Weapon of Mass Destruction*, USA TODAY, Dec. 9, 2010, at 2A.

105. Yardley, *supra* note 101.

106. Perhaps the tide is turning somewhat. In May 2012, a group of five self-described anarchists were arrested as a result of an undercover sting operation, on charges of attempting to bomb a bridge in the Cuyahoga Valley (near Cleveland, Ohio). All five defendants are white, with reported ties to the Occupy Cleveland movement, but many news articles did refer to the alleged plot as an attempted act of terrorism, and federal agents labeled it as "domestic terrorism." See, e.g., Michael Scott, *5 Men Accused of Bridge Bomb Plot Talked of Attacks on Other Cleveland Targets, Including Justice Center*, CLEVELAND.COM (May 1, 2012, 11:57 AM), http://www.cleveland.com/metro/index.ssf/2012/05/5_men_accused_of_bridge_explos.html; FBI: CLEVELAND DIVISION, FIVE MEN ARRESTED IN

2. *The Shooters (Cases 3 and 4)* – Case 3 is based on Major Nidal Malik Hasan, an Army psychologist stationed at Fort Hood, Texas. On November 5, 2009, Hasan walked into the Soldier Readiness Processing Center, took out the semi-automatic firearm that he had purchased earlier that year, said or yelled, “Allahu Akbar,” and began opening fire at uniformed soldiers.¹⁰⁷ In less than ten minutes, he fired more than 100 shots, killing thirteen and wounding thirty one.¹⁰⁸ He was stopped when two armed base police officers returned fire;¹⁰⁹ as a result of the wounds he suffered, Hasan was left paralyzed below the middle of the chest.¹¹⁰

Multiple media outlets described Hasan as a terrorist,¹¹¹ often emphasizing the fact that he might have said shouted “Allahu Akbar!” (*God is great!* in Arabic) as he fired.¹¹² A key Senate Committee report prepared after the attack presumed that the Fort Hood shooting was an act of terrorism, as the report was titled “Counterterrorism Lessons From The U.S. Government’s Failure to Prevent the Fort Hood Attack.”¹¹³ On the other hand, President Obama did call for restraint, urging that there be no “jump[ing] to conclusions,”¹¹⁴ and military investigators concluded that Hasan acted alone, not as part of a “terrorist plot.”¹¹⁵

PLOT TO BOMB OHIO BRIDGE, <http://www.fbi.gov/cleveland/press-releases/2012/five-men-arrested-in-plot-to-bomb-ohio-bridge>. On the other hand, the Cleveland plotters had discussed bombing multiple targets in and around Cleveland, including the Federal Reserve Bank, the Justice Center, a homeland security operation, and an interstate highway bridge—a scope of potential attacks that goes beyond the single incidents of Mohamud and the Turnidges. See Scott, *supra*.

107. See Robert D. McFadden, *12 Killed, 31 Wounded in Rampage at Army Post; Officer is Suspect*, N.Y. TIMES, Nov. 6, 2009, at A1; James C. McKinley, Jr. & James Dao, *After Years of Growing Tensions, 7 Minutes of Bloodshed*, N.Y. TIMES, Nov. 9, 2009, at A1.

108. McKinley & Dao, *supra* note 107.

109. James C. McKinley, Jr., *She Ran to Gunfire, and Ended It*, N.Y. TIMES, Nov. 7, 2009, at A1.

110. Clifford Krauss, *Witnesses at Hearing Recount Horror of Fort Hood Shootings*, N.Y. TIMES, Oct. 14, 2010, at A28.

111. See, e.g., Patrik Jonsson & Tracey D. Samuelson, *Fort Hood Suspect: Portrait of a Terrorist?*, CHRISTIAN SCI. MONITOR (Nov. 10, 2009), <http://www.csmonitor.com/USA/2009/1110/p02s15-usgn.html>; Nancy Gibbs, *The Fort Hood Killer: Terrified . . . or Terrorist?*, TIME MAG. (Nov. 11, 2009), <http://www.time.com/time/magazine/article/0,9171,1938698,00.html>. But see Dee Dee Myers, *Is Nidal Hasan a Terrorist or Not?*, Vanity Fair (Nov. 11, 2009), <http://www.vanityfair.com/online/daily/2009/11/is-nidal-hasan-a-terrorist-or-not> (“As the investigation and the eventual trial proceed, we’ll learn more about Hasan’s motivations. Then we can fairly decide what to call him. In the meantime, we need to proceed carefully.”).

112. See, e.g., “Allahu Akbar”: *Hasan’s Words as He Fired?*, CBS NEWS (Nov. 6, 2009), <http://www.cbsnews.com/stories/2009/11/06/earlyshow/main5549394.shtml>; Ann Gerhart, *During Painful Testimony, Hasan Shows No Emotion*, WASH. POST, Oct. 16, 2010, at A03 [hereinafter Gerhart, *Hasan Shows No Emotion*]; Ann E. Gerhart, *Witnesses Recall Terror, Carnage at Fort Hood*, WASH. POST, Oct. 14, 2010, at A03 [hereinafter Gerhart, *Witnesses Recall Terror*].

113. COMM. ON HOMELAND SECURITY & GOV’T AFF., 112TH CONGRESS, A TICKING TIME BOMB: COUNTERTERRORISM LESSONS FROM THE U.S. GOVERNMENT’S FAILURE TO PREVENT THE FORT HOOD ATTACK (2011) (Special Report by Joseph I. Lieberman & Susan M. Collins), *available at* <http://s3.documentcloud.org/documents/31713/senate-committee-on-homeland-security-report-on-fort-hood-shooting.pdf>. [hereinafter Homeland Security Committee Report].

114. Sheryl Gay Stolberg, *Obama Offers Sympathy and Urges No ‘Jump to Conclusion,’* N.Y. TIMES (Nov. 8, 2009), <http://www.nytimes.com/2009/11/08/us/politics/08address.html> (internal

Case 4 is based on Jared Lee Loughner, a former community college student, who walked into a Safeway supermarket in Tucson, Arizona, on January 8, 2011, and opened fire at people gathered during a public event for U.S. Congresswoman Gabrielle Giffords and her constituents.¹¹⁶ He killed six people, including the Chief U.S. District Judge for the District of Arizona, and wounded thirteen others before others at the scene subdued him.¹¹⁷ Giffords survived a direct gunshot wound to the head, but subsequently resigned her congressional seat in order to concentrate on her recovery.¹¹⁸ On August 7, 2012, Loughner pleaded guilty to all nineteen charges against him and is expected to receive a life sentence.¹¹⁹

Loughner was generally not described as a terrorist, but rather as a “gunman” who battled substance abuse and was a “seriously disturbed student.”¹²⁰ CBS News eschewed the terrorist label as well, and noted instead his mental instability.¹²¹ *Time Magazine* called the shooting a “tragedy,” not an act of terrorism.¹²²

Quantitative analysis of the frequency with which media accounts have connected the Hasan and Loughner shootings to terrorism shows the same pattern as the Mohamud/Turnidge comparison—though to a lesser extent—as the Mohamud/Turnidge comparison. 2.2% of stories about Loughner also mentioned terrorism,¹²³ whereas 15.5% of stories about Hasan also mentioned terrorism.¹²⁴ In other words, news accounts were more than seven times more likely to connect Hasan to terrorism than Loughner.

quotation marks omitted).

115. David Johnston & Eric Schmitt, *Little Evidence of Terror Plot In Base Killings*, N.Y. TIMES, Nov. 8, 2009, at A1.

116. John Cloud, *The Troubled Life of Jared Loughner*, TIME (Jan. 15, 2011), <http://www.time.com/time/magazine/article/0,9171,2042358,00.html>; Jennifer Stienhauer, *For Giffords, House Comeback Is One Too Many*, N.Y. TIMES, Jan. 23, 2012, at A1.

117. Stienhauer, *supra* note 116.

118. *Id.*

119. See Fernanda Santos, *Tucson Case Comes to End With Plea by Gunman*, N.Y. TIMES, Aug. 8, 2012, at A9.

120. David Fahrenthold et al., *Accounts Depict Suspect as a Man on the Path to Unraveling: U.S. Charges Plot to Assassinate Giffords*, WASH. POST, Jan. 10, 2011, at A01.

121. *Who is Jared Loughner? Friends Reveal Alienation*, CBS NEWS (Jan. 10, 2011), <http://www.cbsnews.com/stories/2011/01/10/national/main7229463.shtml>. According to this news account, a student in Loughner’s Algebra classes wrote to the news saying: “We have a mentally unstable person in the class that scares the living crap out of me. He is one of those whose picture you see on the news, after he has come into class with an automatic weapon. Everyone interviewed would say, Yeah, he was in my math class and he was really weird. I sit by the door with my purse handy. If you see it on the news one night, know that I got out fast.”

122. Cloud, *supra* note 116.

123. The search term “jared +2 loughner /p terror!” generated 204 hits, while the search term “jared + loughner” generated 9335 hits. I conducted these searches on Mar. 4, 2012.

124. The search term “nidal +2 hasan /p terror!” generated 1376 hits, while the search term “nidal +2 hasan” generated 8889 hits. I conducted these searches on Mar. 4, 2012.

Unfortunately, Hasan and Loughner are far from the only mass shooters. Just since 9/11, there have been at least eight other such incidents, and they confirm the pattern demonstrated above:

-*John Allen Muhammad and Lee Boyd Malvo*: two Muslim-Americans who killed ten people in 2002; Muhammad received the death penalty in part because Virginia treated the shootings as an act of terrorism;¹²⁵

-*Doug Williams*: a Lockheed Martin employee who made openly racist comments and ultimately killed five co-workers (four African-Americans and one white); some survivors called him a racist, but no one called him a terrorist;¹²⁶

-*Seung-Hui Cho*: Korean-American student who killed thirty-two students, staff, and faculty on the Virginia Tech campus in 2007; incident was frequently called a “murderous rampage” and Cho was described as mentally unstable, but no major references to terrorism;¹²⁷

-*Charles Lee “Cookie” Thornton*: Killed six people at a city council meeting in a St. Louis suburb in 2008; not described as a terrorist;¹²⁸

-*Steven Kazmierczak*: Killed five people at Northern Illinois University in 2008; described as mentally ill but not as a terrorist.¹²⁹

-*James Eagan Holmes*: Killed twelve people in a movie theater in Aurora, Colorado in 2012; described as mentally ill but not as a terrorist.¹³⁰

125. See Adam Liptak, *Virginia Justices Set Death Sentence in Washington Sniper Case*, N.Y. TIMES, Apr. 23, 2005, at A9.

126. See *6 Dead in Shooting at Mississippi Defense Plant*, USA TODAY (July 8, 2003, 3:24 PM), http://usatoday30.usatoday.com/news/nation/2003-07-08-lockheed-shooting_x.htm.

127. Christine Hauser, *No Motive Yet For Rampage*, N.Y. TIMES, Apr. 26, 2007, at A18; Michael Luo, *U.S. Rules Made Killer Ineligible to Purchase Gun*, N.Y. TIMES, Apr. 21, 2007, at A1.

128. Greg Jonsson, *6 Dead in Shooting Rampage at Kirkwood City Council*, ST. LOUIS POST-DISPATCH, Feb. 8, 2008, at A1.

129. Jonathan Fast, *Steve Kazmierczak: The Secret Life*, HUFFINGTON POST (Feb. 16, 2008, 5:59 PM), http://www.huffingtonpost.com/jonathan-fast/steve-kazmierczak-the-secret-life_87031.html.

130. See *James Eagan Holmes Charged With Murder, Attempted Murder from Colo. Rampage*, CBS NEWS (July 30, 2012, 12:26 PM), http://www.cbsnews.com/8301-201_162-57482151/james-eagan-holmes-charged-with-murder-attempted-murder-from-colo-rampage/.

-*Wade Michael Page*: Killed seven people at a Sikh temple in Wisconsin in 2012; event was quickly described as possible domestic terrorism involving a white supremacist.¹³¹

-*Adam Lanza*: Killed twenty-six children and adults at an elementary school in Connecticut in late 2012; generally described as mentally ill but not a terrorist.¹³²

Only two of the mass shootings were described as terrorism. The first happened to be the one involving the two African-American Muslim men. The other was the second most recent one, involving a white supremacist who attacked a Sikh temple, raising the inference of a religiously- or race-motivated killing spree.¹³³

Of course, there are some important differences between the Beltway Snipers and the other five “non-terrorist” shooters. The others were all technically mass murders, with the killings taking place in one location at one time. Muhammad and Malvo, on the other hand, shot their victims over the course of about three weeks in eleven different cities, making them serial killers. From the perspective of the victims, the difference is academic, but from the point of view of the local communities, serial killers may be far more terrorizing, because the killings continue over a period of time, during which the members of the public have time and opportunity to fear being the next victim. Notable serial killers of the past, such as David Berkowitz (aka “Son of Sam”) and Angelo Bueno and Kenneth Bianchi (aka “the Hillside Strangler”), in fact were described as having terrorized the cities in which they committed their awful crimes.¹³⁴ Thus, Muhammad and Malvo were not characterized any differently than others who engaged in similar conduct; rather, it is among the mass murderers where we see the differential treatment, with Hasan alone described as a terrorist until the deceased Wade Michael Page.

131. Colleen Curry et al., *7 Dead at Sikh Temple in Oak Creek, Wis.; Officials Believe ‘White Supremacist’ Behind ‘Domestic Terrorism,’* ABC NEWS (Aug. 5, 2012), <http://abcnews.go.com/US/sikh-temple-shooting-oak-creek-wisconsin-domestic-terrorism/story?id=16933779#.UDHgJN2miuJ>.

132. See, e.g., Gina Kolata, *Seeking Answers in Genome of Gunman*, N.Y. TIMES, Dec. 25, 2012, at D5;

Joe Nocera, Editorial, *Guns and Mental Illness*, N.Y. TIMES, Dec. 29, 2012, at A19.

133. On how Indian Sikhs have been mistaken for Arab Muslims, see Ethan Bronner, *Mourning Victims, Sikhs Lament Being Mistaken for Radicals or Militants*, N.Y. TIMES, Aug. 7, 2012, at A14.

134. See, e.g., Lawrence Van Gelder, *‘Out of Darkness,’ On Son of Sam Case*, N.Y. TIMES, Oct. 11, 1985, at C34 (reviewing made-for-TV true crime movie about police efforts to “track down a killer [Berkowitz] who terrorized New York”); Robert Lindsay, *Judge Refuses to Drop Case Against Suspect in Stranglings on Coast*, N.Y. TIMES, July 22, 1981, at A12 (noting the “the string of killings that terrorized much of Los Angeles from November 1977 to February 1978”).

II. A MICRO-LEVEL VIEW OF THE CASES

What accounts for the difference in characterization of these cases? Based on the fact of his conviction, it appears that Mohamud definitely had the intent to commit mass murder.¹³⁵ However, the entire operation was under control of the FBI, and the device that he believed to be a bomb was actually inert.¹³⁶ Accordingly, the attendees of the tree lighting ceremony were in no real danger that night from Mohamud.¹³⁷ The Turnidges, on the other hand, not only did pose an actual danger to the public, but in fact caused two Oregon law enforcement officers to die in a bomb explosion. To be sure, the Turnidges' bomb was smaller than the one that Mohamud believed he would be detonating. One could argue therefore that intentions are what matter, and Mohamud's intentions were far worse in scope. The point is that it is not immediately clear why Mohamud should have been perceived as a terrorist, while the Turnidges were not. The same is true when one compares Hasan to Loughner. In both cases, someone blasted away at unarmed victims, killing multiple people and wounding even more.

At first glance, it might be tempting to ascribe the labeling of Mohamud and Hasan as terrorists due to bigotry or racism. After all, "terrorists" Mohamud and Hasan are both Muslims of African (Somalia) or Arab (Palestine) descent, whereas "non-terrorists" Turnidges and Loughner are Caucasians.¹³⁸

Nevertheless, it is important to keep in mind that the questions raised herein about the perceptions of the Turnidges compared to those of Mohamud do not appear to reflect *intentional* racism or bigotry—certainly not in terms of the actual or potential consequences suffered by or facing the perpetrators. This is not a situation like that in the Jim Crow era, where white defendants frequently escaped conviction for assaulting or killing African-American victims due to nullification by all-white juries, while African-American defendants ran the risk of being falsely convicted in similar circumstances.¹³⁹ Though they might not have been perceived as terrorists, the Turnidges were prosecuted for aggravated murder, which is a capital crime in Oregon.¹⁴⁰ Both father and son in fact received death

135. For example, according to the government, Mohamud said, "Do you remember when 9-11 happened when those people were jumping from skyscrapers . . . I thought that was awesome." With regard to his own plot, he allegedly said, "I want whoever is attending that event to leave, to leave either dead or injured." Dwyer Affidavit, *supra* note 66, at ¶ 79.

136. See McVicker, *supra* note 75.

137. See Colin Miner et al., *Bomb Plot Foiled at Holiday Event in Portland, Ore.*, N.Y. TIMES, Nov. 28, 2010, at A1.

138. See Mirk, *supra* note 91.

139. Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1192-96 (1997).

140. OR. REV. STAT. §163.105(1)(a) (2003) (providing for possible sentences of "death, life im-

sentences.¹⁴¹ In short, the Turnidges received the harshest possible punishment under Oregon law.¹⁴²

Similarly, we might wonder whether Hasan has been labeled a terrorist due to his Palestinian background. When it comes to the actual administration of justice, however, it is difficult to argue that Loughner is getting some sort of preferential or lenient treatment. He has been indicted on forty-nine counts of murder or attempted murder of federal employees acting within the scope of their official duties and other related charges,¹⁴³ and he has been forcibly administered anti-psychotic medication in order to make him competent to stand trial.¹⁴⁴ If convicted, he could face the death penalty,¹⁴⁵ as could Hasan.¹⁴⁶

Moreover, there is a plausible basis for distinguishing the nature of the charges against the Turnidges versus those against Mohamud. As noted above, the Turnidges were tried and convicted of aggravated murder. Oregon law does not prohibit terrorism as such, though of course terrorism consists of tactics that almost certainly constitute assault, battery, mayhem, or murder. Thus, because the Turnidges were tried in state court, aggravated murder was the only realistic charging option.

On the other hand, with regard to Mohamud, the federal government sat in somewhat of a converse situation; in a vacuum, attempted mass

prisonment without the possibility of release or parole[,] or life imprisonment”).

141. Helen Jung, *Bruce and Joshua Turnidge Get Death Penalty in Woodburn Bank Bombing*, OREGON LIVE (Dec. 23, 2010), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2010/12/post_7.html.

142. Whether the sentences will actually be carried out is a different issue, given Oregon's reluctance to execute death row inmates. As of fall 2011, the only two persons who were executed since 1976, when the U.S. Supreme Court lifted its moratorium on capital punishment, were those who essentially volunteered by waiving their appeals. See OR. DEPT. OF CORR., LIST OF EXECUTIONS, 1904 - 1997, available at http://www.oregon.gov/DOC/PUBAFF/cap_punishment/cap_punishment.shtml#Capital_Punishment_in_Oregon. In 2011, death row inmate Gary Haugen sought to waive his remaining appeals, even firing his court-appointed lawyers, but the Oregon Supreme Court nevertheless blocked his execution date and ordered further hearings to evaluate his competency. Helen Jung, *Oregon Supreme Court Orders Judge to Vacate Death Warrant for Gary Haugen for Further Mental Evaluation*, OREGON LIVE (June 30, 2011, 8:54 PM), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/06/oregon_supreme_court_orders_judge_to_vacate_death_warrant_for_gary_haugen_for_further_mental_evaluat.html.

143. A good summary of the charges is found in the government's press release regarding the superseding indictment. See Press Release, U.S. DEP'T OF JUST., Office of Public Affairs, Jared Lee Loughner Charged for Multiple Murders, Attempted Assassination, (Mar. 4, 2011), available at <http://www.justice.gov/opa/pr/2011/March/11-opa-280.html>. He may also face criminal charges under Arizona law for the other victims of the shooting. Michael Kiefer, *Feds' new indictment charges Loughner with 49 counts*, AZCENTRAL.COM, (Mar. 5, 2011, 12:00 AM), <http://www.azcentral.com/news/articles/2011/03/04/20110304giffords-shooting-loughner-49-count-indictment.html>.

144. David Nakamura, *Loughner case hinges on response to treatment*, WASH. POST, May 28, 2011, at A01.

145. Marc Lacey, *Evidence Points to Methodical Planning*, N.Y. TIMES, (Jan. 9, 2011), <http://www.nytimes.com/2011/01/10/us/10giffords.html?pagewanted=all>.

146. Angela K. Brown, *Fort Hood Shooting Suspect Will Face Death Penalty*, ABC11.COM (July 6, 2011), http://abclocal.go.com/wtvd/story?section=news/national_world&id=8227483.

murder might seem like the most appropriate type of charge to describe the nature of the conduct. However, while there is a federal homicide statute, it applies in limited situations, such as murder of federal officers acting within the scope of their duties,¹⁴⁷ of foreign officials,¹⁴⁸ of persons aiding federal investigations,¹⁴⁹ or murder by incarcerated or escaped federal prisoners.¹⁵⁰ None of those situations would appear to apply to the Pioneer Square plot. Thus, Mohamud was indicted for violating 18 U.S.C. § 2332a—“Use of weapons of mass destruction”; while this crime does not specifically mention terrorism, it is located within Chapter 113B of Title 18, which is titled “Terrorism.”¹⁵¹

The availability of charges, state or federal, might well explain the ensuing description of alleged criminal conduct on the part of the Turnidges and Mohamud. But a predicate question arises: why were the Turnidges prosecuted in state court, and why was Mohamud prosecuted in federal court? In other contexts, the choice of prosecution venue has resulted in significant differential treatment of defendants; for example, the federal mandatory minimum sentences for drug possession combined with the fact that the federal system treated the possession of one gram of crack cocaine the same as 100 grams of powder cocaine meant that defendants prosecuted in federal court would typically receive a much harsher sentence than one prosecuted for the same conduct in state court.¹⁵²

A micro-level of analysis explains why the Mohamud and Turnidge cases played out the way they did. The first law enforcement responders to the Wells Fargo bank were local Woodburn police officers, followed by bomb technicians from the Oregon State Police (OSP) and the FBI.¹⁵³ They were joined by another FBI Special Agent, the Woodburn police chief, and a Woodburn police captain.¹⁵⁴ The bomb defusing attempt was in some sense a joint federal-state operation, but ultimately, it was the OSP bomb technician and the two senior Woodburn police officers who moved the bomb and were thus killed or maimed when it exploded.¹⁵⁵ Be-

147. 18 U.S.C. § 1114 (2006).

148. 18 U.S.C. § 1116 (2006).

149. 18 U.S.C. § 1121 (2006).

150. 18 U.S.C. §§ 1118, 1120 (2006).

151. In fact, most of the crimes in Chapter 113B do not include “terrorism” in their titles. *See* 18 U.S.C. §§ 2332d-2332e (2006).

152. Robert Heller, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1336 (1997); *see also* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 116 (rev. ed. 2012) (noting suspicions of federal public defenders in Los Angeles that “whites were being diverted by federal prosecutors to the state system, where the penalties for crack offenses were far less severe”).

153. *See, e.g.*, Marion Cnty. Probable Cause Statement & Data Sheet for Joshua Abraham Turnidge, Dec. 15, 2008, at 2, *available at*: http://blog.oregonlive.com/news_impact/2008/12/brucetcause.pdf.

154. *Id.*

155. *Id.* at 3.

cause the bomb blast victims were local and state officers, it is understandable that local Oregon prosecutors took charge of the case. Most of the ensuing investigation was conducted by a local police officer, with the FBI's main assistance being to serve a cell phone carrier with a request for information about two cell phones involved in the bombing.¹⁵⁶

The sting operation against Mohamud, on the other hand, was entirely a federal operation. Due to the city of Portland's withdrawal from the Joint Terrorism Task Force (JTTF) in 2005,¹⁵⁷ the FBI did not involve Portland police (except to notify the police chief as a courtesy).¹⁵⁸ This, too, was hardly surprising. The initial tip about Mohamud went to the FBI, prompting agents to get a Foreign Intelligence Surveillance Act (FISA) warrant to be able to access Mohamud's emails.¹⁵⁹ What the investigators found alarmed them and set the sting operation into motion.¹⁶⁰

It follows that having the State prosecute Mohamud would have been grossly inefficient. All of the evidence against him had been gathered by federal agents, who therefore would be the primary witnesses in any trial. Of course, under different circumstances, state and local law enforcement officers could have been involved in the investigation and sting operation, but even so, the key tip and the FISA surveillance had to originate with the federal government; state law enforcement officers lack anything comparable to FISA authority. Here we see the consequence of Portland's withdrawal from the JTTF. Absent that task force, there were no Portland police officers in a position to see the FISA surveillance evidence, and hence no meaningful ability to participate in the investigation.

With Nidal Hasan, there is yet to be any clear motivation for his murderous spree. While there are some indications that Hasan was upset about his impending deployment to Afghanistan,¹⁶¹ it would be hard to argue that he made any effort to intimidate or coerce the public or the government into canceling his assignment.¹⁶²

156. See *id.*

157. See, e.g., Tung Yin, *Joint Terrorism Task Forces as a Window into the Security vs. Civil Liberties Debate*, 13 FLA. COASTAL L. REV. 1, 5 (2011) [hereinafter Yin, *Joint Terrorism Task Forces*].

158. Dan Tilkin, *Mayor Wants to Join Terrorism Task Force, But With Conditions*, KATU.COM (Apr. 20, 2011, 6:04 PM), <http://www.katu.com/news/local/120327334.html>.

159. See Tung Yin, *Mohamed Mohamud's Not So Speedy Trial*, THE YIN BLOG (Jan. 5, 2011, 2:32 PM), http://yin.typepad.com/the_yin_blog/2011/01/mohamed-mohamuds-not-so-speedy-trial.html; see generally 50 U.S.C. § 1805.

160. See Tung Yin, *Portland Merc on the Two Bombing Cases*, THE YIN BLOG (Dec. 9, 2010, 1:25 AM), http://yin.typepad.com/the_yin_blog/2010/12/portland-merc-on-the-two-bombing-cases.html.

161. James Dao, *Suspect Was 'Mortified' About Deployment*, N.Y. TIMES, Nov. 5, 2009, at A1.

162. Cf. 18 U.S.C. § 2331(1)(A)-(B) (2006) (defining international terrorism as "involv[ing] violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State . . . [and 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 the conduct of a government by mass destruction, assassination, or kidnapping"); 8 U.S.C. § 1182(a)(3)(B)(iii) (2006)

Observers quickly latched on to his apparent cry of “Allahu Akbar[!]” (“God is great!”) prior to blasting away at his targets as a demonstration of his political or religious motivation.¹⁶³ Perhaps this cry would suffice to brand Hasan a terrorist under 22 U.S.C. § 2656f’s definition of terrorism as “premeditated, politically motivated violence perpetrated against non-combatant targets by subnational groups or clandestine agents.”¹⁶⁴ Unlike other provisions defining terrorism, section 2656f does not require demonstration of intent to coerce the civilian population or the government. Still, the conclusion that Hasan was a terrorist seems inextricably linked to his being Muslim more than to any classic understanding of terrorism as a form of violent coercion. Some also pointed to after-the-shooting praise of Hasan by Anwar al-Awlaki,¹⁶⁵ the agitator of al Qaeda in the Arabian Peninsula, as further evidence of the shootings as terrorism.

Jared Loughner did not have as clear of an ideology for observers to look to when trying to characterize him. The Tucson shooting incident quickly became a *cause célèbre* to score partisan political points. Some argued that former Republican Vice Presidential candidate Sarah Palin had incited the shooting through a political message that she sponsored,¹⁶⁶ and numerous politicians and public commentators quickly called for a return to civility in political discourse.¹⁶⁷ Others responded that Loughner was not, as those critics implied, a right-wing lunatic, but rather, more of a paranoid anarchist.¹⁶⁸ Instead of considering whether Loughner was as much of a terrorist as Hasan was, the public debate instead descended into a pointless series of political “gotchas.”

(defining “terrorist activity” as including “[t]he hijacking or sabotage of any conveyance,” hostage taking “in order to compel a third person (including a governmental organization) to do or abstain from doing any act,” and assassination, use of biological, chemical, or nuclear weapons).

163. Gerhart, *Witnesses Recall Terror*, *supra* note 112.

164. 22 U.S.C. § 2656f(d)(2) (2006).

165. On al-Awlaki’s praise of Hasan as a “hero,” see, e.g., Brooks Egerton, *Imam’s E-mails to Fort Hood Suspect Hasan Tame Compared to Online Rhetoric*, THE DALLAS MORNING NEWS (Nov. 29, 2009, 2:30 AM), <http://www.dallasnews.com/news/state/headlines/20091129-Imam-s-e-mails-to-Fort-7150.ece>. On treating Hasan’s attack as terrorism in part because of the connection to al-Awlaki, see Homeland Security Committee Report, *supra* note 113, at 21 (describing al-Awlaki as “virtual spiritual sanctioner [of] U.S. terrorism cases . . . since the Fort Hood attack”).

166. The message targeted a number of Democratic representatives for defeat in the 2010 elections; one of those targeted was Gabrielle Giffords. The message included a map, with targeting crosshairs over the identified Democrats. Brian Montropoli & Robert Hendin, *Sarah Palin Criticized Over Gabrielle Giffords Presence on “Target List”*, CBS NEWS (Jan 8, 2011, 7:16 PM), http://www.cbsnews.com/8301-503544_162-20027918-503544.html.

167. See Paul Krugman, *Civility is the Last Refuge of Scoundrels*, N.Y. TIMES (April 16, 2011, 9:08 AM), <http://krugman.blogs.nytimes.com/2011/04/16/civility-is-the-last-refuge-of-scoundrels/>; see also Jordan Zakarin, *Blood Libel: Sarah Palin’s Claim Recalls Anti-Semitic Legacy*, HUFFINGTON POST (Jan. 12, 2011, 2:52 PM), http://www.huffingtonpost.com/2011/01/12/blood-libel-sarah-palin_n_808104.html.

168. See Jo Becker et al., *Police Say They Visited Tucson Suspect’s Home Even Before Rampage*, N.Y. TIMES, Jan. 12, 2011, at A1.

Still, in neither Hasan's case nor Loughner's has there been a clear motive established yet for their shooting rampages. Perhaps both are classic mass murderers, not terrorists. In the end, the nature of the criminal charges brought against the two men are essentially the same, whether under military law or federal law: murder and attempted murder.

III. A MACRO-LEVEL VIEW OF THE PROBLEM

The previous part suggested that the different characterization of each individual pairing of cases could plausibly be attributed to non-racial/non-religious factors. Even if one accepts the micro-level view of these cases, however, a macro-level examination identifies a number of reasons to be concerned about the developing pattern where suspects who are Muslims and racial minorities are labeled "terrorists" while other suspects are not.

A. *Bad Assumptions and Racial Profiling*

When publicly labeled instances of terrorism are disproportionately linked to Arab-Americans and/or Muslim-Americans, there may be an undue temptation to assume that the perpetrators of any new apparent act of terrorism are probably members of those groups.¹⁶⁹ It is an undeniable fact that a large number of the high profile, high casualty instances of terrorism against U.S. interests overseas or domestically since 1979 have been perpetrated by Arab/Muslim groups,¹⁷⁰ as Appendix 4 demonstrates.

Still, when the burden of government stereotyping falls upon a discrete and insular minority, that group alone pays what Randall Kennedy calls a "racial tax."¹⁷¹ The general public is less likely to complain about intrusive airport screening techniques if it is only Arab-appearing people who must undergo them; thus, a poll taken shortly after 9/11 found that a majority of Americans—including a majority of African-Americans—supported the use of profiling of Arab-Americans.¹⁷² When that burden falls upon everyone, however, the results are different: witness the outrage over the Transportation Security Agency's recent policies of invasive physical searches of

169. For a discussion of the consistent portrayal on fictional television dramas and movies of terrorists as Arabs and Muslims, see Tung Yin, *Through a Screen Darkly: Hollywood as a Measure of Discrimination Against Arabs and Muslims*, 2 DUKE F.L. & SOC. CHANGE 103 (2010) [hereinafter Yin, *Hollywood and Arabs*].

170. I chose 1979 as the starting point for the consideration of terrorist incidents as that was the year Iranian student-activists stormed the U.S. Embassy in Tehran and began holding our diplomats hostages in what Mark Bowden has termed "the first battle in America's war against militant Islam." See MARK BOWDEN, GUESTS OF THE AYATOLLAH: THE FIRST BATTLE IN AMERICA'S WAR WITH MILITANT ISLAM 4-5 (2006).

171. RANDALL KENNEDY, RACE, CRIME, AND THE LAW 159 (1997).

172. *Terror Probe Changes Face of Racial Profiling Debate*, FOX NEWS (Oct. 1, 2001), <http://www.foxnews.com/story/0,2933,35521,00.html>.

children, women with prosthetic breasts, and the like.¹⁷³ Reflexively labeling Arab- or Muslim-American criminal suspects as terrorists, but not other suspects accused of similar conduct, creates a self-reinforcing loop. Each Arab or Muslim terrorist “confirms” the (erroneous) public impression that while not all Arabs/Muslims are terrorists, all (or most) terrorists are Arabs/Muslims.

Timothy McVeigh and the Unabomber are simply the exceptions that prove the rule. That is, one might defend against a charge of racism for asserting that all terrorists are Muslims by noting that, “Well, of course, I recognize that McVeigh and Kaczynski were also terrorists.”¹⁷⁴ Having acknowledged that one recognizes there have been non-Muslim terrorists in the past, one may feel free to henceforth consider all terrorists to be Muslim, without being racist or bigoted.

This self-reinforcing loop can reinforce cognitive biases that lead to faulty conclusions. As Alafair Burke explains:

In the context of prosecutorial decision making, the biasing theory is the prosecutor’s belief that the defendant is guilty. Once that belief is formed, confirmation bias causes her to seek information that confirms the theory of guilt; selective information processing causes her to trust information tending to confirm the theory of guilt and distrust potentially exculpatory evidence; and belief per-

173. See Mike Benner, *Clackamas Mother Outraged Over TSA Screening at PDX*, KGW.COM (Apr. 14, 2011, 6:37 AM), <http://www.kgw.com/news/local/Clackamas-mother-outraged-over-TSA-screening-119816969.html> (discussing a parent’s outrage at seeing her eight-year-old son searched at Portland’s PDX airport); see also Jake Tapper et al., *White House: Terrorists Have Discussed Use of Prosthetics to Conceal Explosives*, ABC NEWS (Nov. 22, 2010), <http://abcnews.go.com/Travel/tsa-responds-passenger-outrages-underwear-search-happen/story?id=12208932> (describing a passenger’s experience having her prosthetic breast searched before flight). Chief Justice Marshall had the same insight in *M’Culloch v. Maryland*, 17 U.S. 316 (1819), when he struck down a state tax assessed against the national bank, in part because there was no effective control over the state legislature, since the impact of the tax would be felt by the nation as a whole, not only by the citizens of Maryland. *Id.* at 433-35.

174. In this way, McVeigh and Kaczynski play an analogous role to that played by the occasional minority “friends” with regard to what some call “closet racists.” See, e.g., Carla D. Pratt, *Should Klansmen Be Lawyers? Racism as an Ethical Barrier to the Legal Profession*, 30 FLA. ST. U. L. REV. 857, 903 (2003); see also Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection,”* 40 CONN. L. REV. 931, 945 (2008) (noting that when the author hears white persons say, “Some of my best friends are black,” the implied meaning is “I’m not a racist”); Jerome McCristal Culp, Jr., *Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy*, 41 DUKE L.J. 1095, 1113 (1992) (critiquing Judge Posner’s racial attitudes and noting that some would no doubt defend him by pointing out that “some of Judge Posner’s friends will be black and will testify to Judge Posner’s genuine friendship and bonhomie [sic]”); Sharon Elizabeth Rush, *The Heart of Equal Protection: Education and Race*, 23 N.Y.U. REV. L. & SOC. CHANGE 1, 27 (1997) (“A declaration by a White person that, ‘Some of my best friends are Black,’ is an expression of unconscious racism.”); Andre Douglas Pond Cummings, *“Open Water”: Affirmative Action, Mismatch Theory and Swarming Predators – A Response to Richard Sander*, 44 BRANDEIS L.J. 795, 841 (2006) (“The common phrase dropped by many racially insensitive individuals who make objectionable comments is: ‘I am no racist, some of my best friends are black.’”).

severance causes her to adhere to the theory of guilt even when the evidence initially supporting that theory is undermined.¹⁷⁵

It is not only prosecutors who can fall prey to these cognitive biases in ways that harm Arab/Muslim-Americans. Numerous studies have shown that a “priming effect” exists, where “people become increasingly harsh when an alleged criminal is darker and more ‘stereotypically black.’”¹⁷⁶ The association of African-American men with criminality—captured in the phrase “criminalblackman [sic]”¹⁷⁷—leads to harsher sentences, among other things.¹⁷⁸ It is reasonable to believe that the same priming effect can take root with Arab/Muslim-Americans.¹⁷⁹

A tragic example of how cognitive biases may have played a role in miscarriage of justice can be seen in the travails of Brandon Mayfield, an Oregon lawyer who found himself caught up in the investigation of the 2004 Madrid train bombings. Spanish authorities lifted a fingerprint from the crime scene, and the FBI identified the fingerprint as belonging to Mayfield.¹⁸⁰ In fact, the fingerprint was only a partial match for Mayfield’s, as well as more than a dozen other people in the database.¹⁸¹ Even after Spanish authorities determined that the fingerprint belonged to someone else, the FBI persisted in its belief that Mayfield was the source.¹⁸² Why was the FBI so fixated on Mayfield, despite the unlikelihood that he was in Madrid prior to the bombing? Perhaps the fact that he was a convert to Islam, and that he had previously represented Jeffrey Battle, one of the first groups of Americans prosecuted after 9/11 as “sleeper cells,”¹⁸³ tended to confirm the suspicion that a Muslim would be involved.¹⁸⁴ After being detained as a material witness, Mayfield was eventually released and

175. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1614 (2006).

176. ALEXANDER, *supra* note 151, at 107, 107 n.50.

177. See KATHRYN K. RUSSELL, *THE COLOR OF CRIME* 3 (1998).

178. ALEXANDER, *supra* note 151, at 107.

179. Consider, for example, that surveys taken shortly after 9/11 found that not only did a majority of Americans support racial profiling of Arab-looking men, but in fact, an even larger majority of African-Americans supported such profiling. See, e.g., Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1413-14 (2002); Jarvis C. Jones, *Second-Class Americans?*, BENCH & BAR OF MINN., Nov. 2001, at 5, available at <http://mnbar.org/benchandbar/2001/nov01/prezpage.htm> (“According to recent polls, 66 percent of whites and 71 percent of African-Americans support the ethnic profiling of individuals who look to be Arab.”).

180. Susan Schmidt & Blaine Harden, *Lawyer Is Cleared of Ties to Bombings; FBI Apologizes for Fingerprint Error*, WASH. POST, May 25, 2004, at A02.

181. See Todd Murphy, *‘100 Percen’ Wrong: How the FBI’s Arrest of Suspected Terrorist Brandon Mayfield Unraveled*, PORTLAND TRIB. (May 28, 2004), http://thetribonline.net/news/story_2nd.php?story_id=24586.

182. *Id.*

183. See *id.* His representation of Battle was unrelated to the criminal case against Battle.

184. See U.S. DEPT. OF JUST., OFFICE OF INSPECTOR GEN., *A REVIEW OF THE FBI’S HANDLING OF THE BRANDON MAYFIELD CASE* 179 (Mar. 2006), available at <http://www.justice.gov/oig/special/s0601/final.pdf>.

received \$2 million from the government in a settlement of his civil rights claim.¹⁸⁵

There have been a number of terrorism crimes or attempted terrorism crimes in recent years perpetrated or allegedly perpetrated by Muslim-Americans, and it would be unreasonable to close our eyes to that fact. At the same time, however, a fixation on Muslims as the *only* terrorists leads to an unhealthy feedback mechanism, whereby the government and public believe that efforts should be focused on the Muslim community,¹⁸⁶ which in turn results in arrests that reinforce the initial belief.

B. *Bad Assumptions and Overlooked Leads*

In addition to the problems discussed in the previous subpart, a presumption that terrorism is perpetrated by Arab/Muslim-Americans runs the risk that the public and law enforcement may fail to notice clues pointing toward non-Arab/Muslim suspects.

After the bombing of the Murrah Federal Building in Oklahoma City in 1995, one immediately popular theory was that Arab terrorists were behind the attack.¹⁸⁷ In fact, federal agents did arrest an Arab-American named Ibrahim Ahmad on suspicion of having carried out the attack, though Ahmad was released later without having been charged with a crime.¹⁸⁸ Even after McVeigh and his accomplice Terry Nichols had been identified as the perpetrators of the Oklahoma City bombing and were due to stand trial in federal court, some, like Laurie Mylroie, former Harvard professor and Iraq consultant to Bill Clinton during the latter's presidential campaign, continued to espouse the theory that Saddam Hussein was involved in the bombing plot.¹⁸⁹ According to Mylroie, Nichols was working with Ramzi Yousef—one of the chief plotters of the 1993 World Trade Center bombing—whom Mylroie has accused of being a secret Iraqi agent.¹⁹⁰ On top of that, in preparing for trial, McVeigh's own lawyer,

185. See Eric Lichtblau, *U.S. Will Pay \$2 Million to Lawyer Wrongly Jailed*, N.Y. TIMES, Nov. 30, 2006, at A18.

186. Cf. Al Baker & Kate Taylor, *Mayor Defends Monitoring Of Muslim Students on Web*, N.Y. TIMES, Feb. 22, 2012, at A18 (noting New York City Mayor Bloomberg's defense of the police department's monitoring of the local Muslim student groups as a counterterrorism measure).

187. See, e.g., MICHEL & HERBECK, *supra* note 48, at 249 ("To many observers—from politicians to average citizens—the obvious assumption was that foreign terrorists, most likely Arab, were responsible."); Penny Bender Fuchs, *Jumping to Conclusions in Oklahoma City?*, AM. JOURNALISM REV. (June 1995), <http://www.ajr.org/article.asp?id=1980> ("[A]uthorities who couldn't be quoted by name said their first suspicion was radical Islamic terrorists.")

188. See Melinda Henneberger, *Terror in Oklahoma: Bias Attacks; Muslims Continue to Feel Apprehensive*, N.Y. TIMES, Apr. 24, 1995, at B10.

189. See generally Peter Bergen, *Armchair Provocateur, Laurie Mylroie: The Neocon's Favorite Conspiracy Theorist*, WASH. MONTHLY (Dec. 2003), <http://www.washingtonmonthly.com/features/2003/0312.bergen.html> (reviewing and critiquing LAURIE MYLROIE, *A STUDY OF REVENGE: SADDAM HUSSEIN'S UNFINISHED WAR AGAINST AMERICA* (2000)).

190. *Id.*

Stephen Jones, clashed with U.S. District Judge Richard Matsch over Jones' desire to "link the bombing to . . . Osama bin Laden and other Arab terrorists . . . [and] to Ramzi Yousef, mastermind of the World Trade Center bombing."¹⁹¹

McVeigh was caught, and Ahmad was released without any charges, so perhaps this concern is much ado about nothing. But McVeigh was caught as a result of a routine highway traffic stop, not because he was at that moment a wanted suspect, and he was arrested for driving with missing license plates and for illegal possession of a firearm.¹⁹² Had the patrol officer not stopped McVeigh or simply issued him a citation, he might have been able to elude the authorities;¹⁹³ any head start would have been further supplemented by the government's chasing down false leads. Moreover, McVeigh actually contemplated killing the officer but decided that he would not attack a *state* trooper; he would have had no compunctions about killing a federal agent and believed that he would have had a good chance at succeeding.¹⁹⁴

Similarly, when weaponized anthrax-laden letters were sent to various politicians and journalists not long after 9/11, government officials initially speculated that foreign entities were responsible.¹⁹⁵ (To be fair to those who had such suspicions, the letters accompanying the anthrax spores contained a note intended to cast suspicion on Muslim terrorists.¹⁹⁶) The FBI subsequently zeroed in on Steven Hatfill as a "person of interest"—inaccurately, as it turned out, with the government ultimately paying Hatfill over \$5 million to settle his legal claims against it.¹⁹⁷ By then, in 2008, the government had settled on another suspect, Bruce Ivins, but Ivins committed suicide before any indictment could be issued.¹⁹⁸ Perhaps the FBI might have been able to identify Ivins sooner and to provide a definitive resolution, either indicting and convicting him in court or clear-

191. MICHEL & HERBECK, *supra* note 48, at 286. Admittedly, we might not place too much weight on a defense lawyer's arguments, although the Model Rules of Professional Conduct do require at least a good faith basis for making such assertions. See Model Rules of Professional Conduct, Rules 3.1, 3.3.

192. Michel & Herbeck, *supra* note 48, at 240-43.

193. For example, fellow military veteran/militia-type Eric Rudolph, spent years as a federal fugitive on the FBI's Top Ten "Most Wanted" List. Darren Fonda, *How Luck Ran Out for a Most Wanted Fugitive*, TIME (June 9, 2003), <http://www.time.com/time/magazine/article/0,9171,1004966,00.html>.

194. MICHEL & HERBECK, *supra* note 48, at 239-40.

195. See, e.g., Donna Leinwand et al., *Questions Linger as Feds Say Ivins was Lone Killer*, USA TODAY, Aug. 7, 2008, at 1A.

196. See, e.g., Susan Schmidt, *Anthrax Letter Suspect Profiled; FBI Says Author Likely Is Male Loner; Ties to Bin Laden Are Doubted*, WASH. POST, Nov. 1, 2001, at A01.

197. See Scott Shane, *Evidence in Anthrax Case Is Said to Be Primarily Circumstantial*, N.Y. TIMES, Aug. 4, 2008, at A13.

198. *Id.*

ing him, had it not been sidetracked with the initial investigation of al Qaeda and Iraq.¹⁹⁹

There are other problems apart from potentially derailing the investigation of completed acts of terrorism. A fixation upon Arabs and Muslims as the only source of terrorism runs the very real risk of missing out on opportunities to use undercover stings and other traditional law enforcement to prevent acts of terrorism by *other* groups. Mike German, a former undercover FBI agent and current ACLU lawyer, notes that “[t]here are a lot of threats out there but the likelihood of being a victim of a domestic terrorist are still greater than being a victim of an international terrorist. Right-wing groups are very active—but the violence they do is not always characterized as terrorism.”²⁰⁰ It is unsettling that German, who infiltrated numerous white supremacist groups as an FBI agent,²⁰¹ has argued that the federal government is overlooking threats from right-wing terrorist groups. In light of alleged FBI training materials that seemed to cast many, if not all, Muslims as radical extremists,²⁰² perhaps German’s suspicions should not surprise us.²⁰³ It is reminiscent of a story told by a former U.S. Attorney in Michelle Alexander’s *The New Jim Crow*:

I had an [assistant U.S. attorney who] wanted to drop the gun charge against the defendant [in a case in which] there were no extenuating circumstances. I asked, “Why do you want to drop the gun offense?” And he said, “He’s a rural guy and grew up on a farm. The gun he had with him was a rifle. He’s a good ol’ boy, and all good ol’ boys have rifles, and it’s not like he was a gun-toting drug dealer.” But he was a gun-toting drug dealer, exactly.²⁰⁴

In this story, the Assistant U.S. Attorney did not envision Caucasians as gun-toting drug dealers, even though a minority defendant in the same

199. See, e.g., William J. Broad & David Johnston, *A Nation Challenged: The Anthrax Trail; U.S. Inquiry Tried, but Failed, to Link Iraq to Anthrax Attack*, N.Y. TIMES, Dec. 22, 2001, at A1.

200. Mike German, *Domestic Terrorist: The Threat From Within*, WASH. POST (June 6, 2005), <http://www.washingtonpost.com/wp-dyn/content/discussion/2005/06/03/DI2005060301359.html> (transcript of online forum discussing domestic terrorism and Sunday Outlook article *Behind the Lone Terrorist, a Pack Mentality*).

201. See, e.g., ACLU, First Amendment Symposium: Speaker Biographies, <http://www.aclu.org/symposium/german.html> (biography of Mike German).

202. See, e.g., Spencer Ackerman, *FBI Teaches Agents: ‘Mainstream’ Muslims Are ‘Violent, Radical,’* WIRED (Sept. 14, 2011, 8:45 PM), <http://www.wired.com/dangerroom/2011/09/fbi-muslims-radical/>.

203. At the same time, one must acknowledge that there are instances where federal agents have targeted right-wing groups with undercover sting operations, as with four elderly men in Georgia, who were arrested for plotting to attack state and federal officials. See generally Scott Shane, *4 Georgia Men Are Arrested in Terror Plot*, N.Y. TIMES, Nov. 2, 2011, at A19.

204. ALEXANDER, *supra* note 153, at 118.

circumstances apparently would have been charged with the gun offense as well.

Past events necessarily impact law enforcement views about how to begin the investigation of a crime. For example, if a woman is murdered, it is statistically more likely that that killer is her spouse/boyfriend/significant other, and as a result, the police may frequently tend to consider that person as a prime suspect.²⁰⁵ At the same time, many female victims were not murdered by their spouses/boyfriends/significant others, and the police would be foolish to consider only those persons to be suspects.²⁰⁶ There have been a number of Muslim terrorists in recent years, but there have also been non-Muslims who have committed similar crimes (and not just McVeigh and Kaczynski).

C. Overcompensation by Deliberate Ignorance

The final problem is the most subtle one, but in some ways, possibly the most disturbing. It is possible that some government officials, aware of the possibility that Arab/Muslim-Americans are too frequently targeted as potential terrorists, overcompensate by deliberately ignoring red flags from specific Arab/Muslim individuals. It is one thing to avoid assuming that an *unknown* perpetrator of apparent terrorism is Arab/Muslim. It is altogether different to close one's eyes to concerns about an *identified* individual.

Nidal Hasan provides perhaps the best example of this phenomenon. Various military officers as well as government agents had an inkling that Hasan was potentially dangerous.²⁰⁷ Prior to his shooting spree, Hasan had on numerous occasions espoused anti-United States rhetoric, such as arguing to other soldiers that "Muslims shouldn't be in the U.S. military, because obviously Muslims shouldn't kill Muslims" and challenging "whether the war on terror is a war against Islam."²⁰⁸ Another soldier reported "[Hasan] said maybe Muslims should stand up and fight against the aggressor. At first we thought he meant help the armed forces, but apparently that wasn't the case."²⁰⁹

205. See, e.g., Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1345 (1997) (proposing that studies demonstrate male to female spousal violence may be the source of police profiling).

206. See Laurence H. Tribe, *Trial By Mathematics: Precision and Ritual in the Legal Process*, 84 Harv. L. Rev. 1329 (1971).

207. See Bob Drogin & Faye Fiore, *Retracing Steps of Suspected Fort Hood Shooter, Nidal Malik Hasan*, L.A. TIMES (Nov. 7, 2009), <http://articles.latimes.com/2009/nov/07/nation/na-fort-hood-hasan7>.

208. *Id.* (internal quotation marks omitted).

209. *Cousin Says Suspected Fort Hood Gunman Feared Impending War Deployment*, FOX NEWS (Nov. 5, 2009), <http://www.foxnews.com/story/0,2933,572405,00.html> (internal quotation marks omitted).

Furthermore, prior to the shooting incident, the FBI actually investigated Hasan due to his email traffic with Anwar al-Awlaki, who was already suspected of instigating or supervising terror plots against the United States.²¹⁰ Shortly after the Fort Hood shooting, a terrorism analyst identified a number of red flags concerning Hasan that should have been looked into by military superiors, but apparently were not.²¹¹ Specifically, the analyst noted that (1) “there’s no reason an active-duty officer should be in any sort of conversation with Anwar al-Awlaki”; and (2) Hasan had “bought into this—the hard line understanding of Islam known as Salafism” combined with the fact that he believed “Muslims [we]re under attack.”²¹²

It may be that the senior officers suspected that the initial reports about Hasan were exaggerated or otherwise based on misinterpretations of less troubling things that he actually said. But it may be that the more senior officers were afraid that if they permitted the investigation of Hasan to go forward based on his alleged, incendiary comments, they would be perceived as racist or anti-Muslim.²¹³

Sensitivity to the possibility that complainants are engaging in strict racial- or religion-based profiling is laudable. After all, the news is replete with instances of people calling the police or FBI with tips about “suspicious” persons where it later turned out that the suspicions were based entirely on the target’s Middle Eastern appearance or use of Arabic.²¹⁴ One can hardly fault all of the complainants, given the message from various government officials to report anything suspicious,²¹⁵ but the result has often been many baseless tips. On the other hand, unwillingness to countenance investigation for fear of being seen as racist may be less understandable if the officials actually do have concerns about that suspect.²¹⁶

210. See, e.g., Homeland Security Committee Report, *supra* note 113, at 35-39; Josh Meyer, *Terrorism Investigation Widens: U.S.-born cleric linked to airline bombing plot*, L.A. Times, Dec. 31, 2009, at 1. Al-Awlaki was killed on September 30, 2011, by a missile fired by a U.S. unmanned aerial drone. Scott Shane, *Coming Soon: The Drone Arms Race*, N.Y. TIMES, Oct. 9, 2011, at SR5.

211. See *Expert Discusses Ties Between Hasan, Radical Imam*, NAT’L PUB. RADIO (Nov. 10, 2009, 4:00 PM), <http://www.npr.org/templates/story/story.php?storyId=120287913>; see also Homeland Security Committee Report, *supra* note 113, at 27-32.

212. *Expert Discusses Ties Between Hasan, Radical Imam*, *supra* note 209.

213. See Homeland Security Committee Report, *supra* note 113, at 31 (“One of the officers who reported Hasan to superiors opined that Hasan was permitted to remain in service because of ‘political correctness’ and ignorance of religious practices.”).

214. See Farhan Bokhari, *Air Passenger’s Massage Shoes Mistaken for Bomb*, CBS NEWS (May 10, 2010, 2:53 PM), http://www.cbsnews.com/8301-503543_162-20004593-503543.html (discussing how a man wearing massage shoes was mistaken for a “shoe bomber”); *Terror Charges Dropped Against Pair Arrested After Buying Cellphones*, USA TODAY (Aug. 15, 2006, 3:17 PM), http://www.usatoday.com/news/nation/2006-08-15-charges-dropped_x.htm.

215. Sara K. Goo, *Private Pilots Enlisted for Security; TSA Seeks Reports of Suspicious Activity*, WASH. POST, Oct. 10, 2002, at A14.

216. This kind of reluctance to act is not limited to counterterrorism. In Portland, for example, a recent scandal involved Ellis McCoy, the city’s parking manager, who despite concerns about his conflicts of interest and poor judgment, kept getting raises and other rewards until finally resigning in

Preferential treatment for certain racial minority groups can and is sometimes justified as compensation for past wrongs that society has inflicted on those groups.²¹⁷ There, however, we are dealing with the allocation of some discretionary benefit (i.e., admission to college or graduate school) with the “cost” usually spread out among a diffuse group, each of whose members “suffers” a *de minimis* harm.²¹⁸ Where the “harm” has been concentrated on a small number of persons in a concrete, rather than speculative fashion, preferential treatment programs have faced more judicial hostility, with courts having struck down the use of race as a tie-breaker or other advantage in terms of avoiding being laid off from employment.²¹⁹

In the counterterrorism context, preferential treatment for members of minority groups in an effort to compensate for perceived past discrimination (in the form of racial profiling and stereotyping) would be disastrous. The persons suffering the cost of that preferential treatment are not those who are merely disappointed over their lack of admittance to their desired college or graduate program or job, but rather actual victims in the instance where the subject of the concern turns out, like Hasan, to have harbored seriously violent intentions toward others.

The solution for addressing the cognitive biases that over-emphasize Muslims as terrorists is not for government officials to adopt willful blindness about red flags concerning a *particular* Muslim-American, any more than it would be reasonable to adopt such behavior for non-Muslims. Rather, the solution is to minimize those cognitive biases and to treat similar cases similarly, so that there is no need to feel as if one must overcompensate for the wrongs inflicted on the Muslim community.

the face of a federal investigation. Brad Schmidt, *Portland Parking Manager Ellis McCoy Resigns*, OREGON LIVE (Sept. 2, 2011, 3:36 PM), http://blog.oregonlive.com/portlandcityhall/2011/09/portland_parking_manager_ellis.html. It appears that McCoy’s supervisors were intimidated in part by his threats to sue for racial discrimination. See Brad Schmidt, *Quick With Explanations, Ellis McCoy Retained Power in Portland Government as Some Investigations Faltered*, OREGON LIVE (Sept. 8, 2011, 9:22 PM), http://www.oregonlive.com/portland/index.ssf/2011/09/quick_with_explanations_ellis.html.

217. Lisa E. Chang, *Remedial Purpose and Affirmative Action: False Limits and Real Harms*, 16 YALE L. & POL’Y REV. 59, 83-84 (1997). As a legal matter, the Supreme Court’s affirmative action cases have rejected this justification unless the entity offering the preferential treatment is doing so to remedy specific, past discrimination that it has engaged in itself. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (1989); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307-09 (1978). The justification may still persuade as a moral or ethical basis, however.

218. See, e.g., Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1078 (2002) (“In any highly selective competition where white applicants greatly outnumber minority applicants, and where multiple objective and nonobjective criteria are relevant, the average white applicant will not fare significantly worse under a selection process that is race-conscious than under a process that is race-neutral.”).

219. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (striking down preferential treatment for minority teachers in terms of avoiding layoffs); *Taxman v. Bd. of Educ. of Piscataway*, 91 F.3d 1547 (3d Cir. 1996) (striking down use of race as tiebreaker in making layoff decisions).

D. Terrorism as Sentencing Enhancement

A final reason that labeling as a “terrorist” or not matters relates to the potential sentences that defendants may receive upon conviction. As noted earlier, in the case of the Turnidges, the fact that they were not called terrorists did not spare them the ultimate penalty of death sentences. In other instances, however, a defendant who is considered a terrorist can receive a significant sentencing enhancement.

For example, the Federal Sentencing Guidelines creates a terrorism enhancement that adds twelve levels to a defendant’s offense level—and brings it up to at least level thirty two in any event—and raises the defendant’s criminal history to the highest category.²²⁰ This means that the *minimum* guideline sentencing range for a federal defendant who receives the terrorism enhancement is 210–262 months.²²¹

A perhaps unusual example illustrates the extreme impact that this provision can have—that of criminal defense lawyer Lynne Stewart, who was convicted of providing material support to a foreign terrorist organization based on her interactions with her client, Omar Abdel-Rahman.²²² Based on a number of factors, such as her age (70), her medical diagnosis of cancer, and her long career of zealous advocacy on behalf of largely poor and disfavored criminal defendants,²²³ the district judge initially sentenced her to twenty-eight months without clear explanation of whether it had applied the terrorism enhancement.²²⁴ The government successfully appealed this sentence, with the Second Circuit noting that the terrorism enhancement “plainly applies as a matter of law.”²²⁵ On remand, the district court resentenced Stewart to a ten-year prison term.²²⁶ In short, in part because of the terrorism enhancement, Stewart’s sentence more than tripled from what the district court had initially thought appropriate based on the same set of facts.

IV. WHAT TO DO: FIRST STEPS AT SOLVING THE PROBLEM

To be sure, nothing here is meant to suggest that the perpetrators (or alleged perpetrators, if ultimately convicted) discussed throughout this Article have been treated unreasonably or unfairly. Indeed, the different

220. FEDERAL SENTENCING GUIDELINES MANUAL § 3A1.4(a) (2011).

221. The sentencing range is advisory, not mandatory. See *United States v. Booker*, 543 U.S. 220, 245 (2005). However, district courts must properly calculate the sentencing range and consider it before reaching the actual sentence to be imposed.

222. For more background on Stewart’s underlying crime of conviction, see Tung Yin, *Boumediene and Lawfare*, 43 U. RICH. L. REV. 865, 883–85 (2009).

223. *United States v. Stewart*, 590 F.3d 93, 147 (2d Cir. 2009).

224. See *id.* at 108.

225. *Id.* at 150.

226. See *United States v. Stewart*, 686 F.3d 156, 161 (2d Cir. 2012).

incidents involve different decision makers, so one cannot even draw an inference as to improper motivations regarding the particular charging decisions.²²⁷ A federal jury concluded that Mohamed Mohamud was not entrapped and came up with the plan to blow up a truck bomb in downtown Portland on his own; as a result, he deserves a lengthy prison sentence. If Nidal Hasan has no legal defense for his shooting spree, then he too deserves a severe sentence (likely life imprisonment or execution). The fact that non-Arab/Muslims who committed similar crimes have not been labeled “terrorists” does not diminish the moral culpability of those Arab/Muslims.

The problem is more subtle, relating to the cognitive biases, and therefore is less susceptible to easy solutions. Indeed, it is unclear that the problem is even capable of being solved. After all, scholars and activists have noted the war on drug’s discriminatory impact on African-Americans for at least seventeen years,²²⁸ and yet, despite studies suggesting that the rate of drug use and drug dealing does not vary significantly by race, African-Americans still make up a vastly disproportionate number of drug convicts.²²⁹ Michelle Alexander contends that “racial bias in the drug war was *inevitable*, once a public consensus was constructed by political and media elites that drug crime is black and brown.”²³⁰

A. *Recognizing and Reducing Cognitive Biases*

The first step is to facilitate more widespread recognition of cognitive biases and to work toward reducing those biases. As noted earlier, the consistent labeling of certain violent crimes or attempted crimes as terrorism when the perpetrators are Arab/Muslim but not so labelled when they are not fuels a number of cognitive biases, ranging from confirmation bias to selective information processing.

Unfortunately, recognition is the easier step; elimination or reduction of cognitive biases is, as Stephanos Bibas has noted, extremely difficult, though not impossible.²³¹ One effective tactic is to “consider the oppo-

227. This, at least, was one of the reasons that the Supreme Court declined in *McCleskey v. Kemp*, 481 U.S. 279 (1987), to recognize an Equal Protection violation even when presented with a detailed statistical study that demonstrated a significant “race of the victim” impact on whether a capital defendant would receive the death penalty. According to the Court, the statistical study failed to establish that *McCleskey’s* prosecutor and jury discriminated against him. *Id.* Critics have fiercely criticized this reasoning, arguing that it realistically shuts the “courthouse doors” to any meaningful review of racial bias in the criminal justice system. See, e.g., ALEXANDER, *supra* note 153, at 109-112; see also WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 291, 297 (2011).

228. Some of the earlier, key works include MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995); KENNEDY, *supra* note 170; Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *YALE L.J.* 677 (1995).

229. See, e.g., ALEXANDER, *supra* note 153, at 98-99.

230. *Id.* at 107.

231. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *HARV. L. REV.* 2463,

site.”²³² In this context, the point is not to absolve the suspects of responsibility for their alleged crimes, but rather, to consider, in instances with Arab/Muslim suspects, whether one would be as quick to jump to the “terrorist” label for non-Arab/Muslim suspects. The converse situation should also call for this kind of introspection: thus, in mass violence cases involving spree shooters or bombers who are neither Arab nor Muslim, one should ask whether they would be viewed as terrorists if they were Arab or Muslim. Admittedly, this is far from a panacea. It is only a starting point for addressing the disparity in perception of people as terrorists or as not. But good faith efforts to practice de-biasing techniques may prompt better macro-level reflection to go along with the sort of micro-level analysis that comes more naturally.

Primary responsibility for taking such steps should reside with spokespersons for law enforcement agencies and prosecution offices, high-ranking government officials, and the mainstream media. The most important issue is for such persons to avoid taking only a micro-level view of these cases because that approach will simply continue the status quo. Prosecutors might well end up making the same decisions that they would have anyway; indeed, as the micro-level analysis earlier suggested, local prosecutors might not have terrorism charges available to bring,²³³ even if they were to believe that the conduct could be described accurately as terrorism. Similarly, federal prosecutors might have no recourse but to charge a defendant with chapter 113B terrorism crimes, such as use of weapons of mass destruction.²³⁴

At the same time, judicious use of the increasingly common Joint Terrorism Task Forces, which join federal and local law enforcement agents and allow sharing of information and investigations,²³⁵ might result in better coordination of the process of determining the appropriate forum in which to charge suspected criminals. For example, given that the federal criminal code’s definition of “weapon of mass destruction” includes any “destructive device,”²³⁶ anyone who plants or attempts to plant a bomb in a way that impacts interstate commerce could be charged under the statute. If there is a bombing attempt in a city with a JTTF, then federal and state law enforcement agents would, at a minimum, share information, even if

2522 (2004) (“Unfortunately, many obvious strategies for debiasing do not work. Simply telling someone about a heuristic or bias does not counteract it.”).

232. *Id.* at 2523. The movie, *A TIME TO KILL* (Warner Bros. Pictures 1996), makes powerful use of this tactic when a defense attorney obtains an acquittal for his client—an African-American male who concededly killed the two white men accused of raping his preteen daughter—by recounting the rape story to the jury and then asking them, “Now, imagine she’s white.”

233. See Jung, *supra* note 142.

234. See 18 U.S.C. §§ 2332a-2332h (2006).

235. See, e.g., Yin, *Joint Terrorism Task Forces*, *supra* note 156, at 3. By 2011, there were over 100 cities with joint terrorism task forces in place. *Id.*

236. 18 U.S.C. § 2332a(c)(2)(A) (2006).

one agency happened to take the lead in investigating the crime. Deciding the appropriate jurisdiction to prosecute (federal or state) would likely lead to discussions about the charges that each could bring, which in turn would highlight the terrorism-like nature of the crime, even if it is ultimately charged in state court.

The mainstream media, in reporting on attempted bombings, mass shootings, and other high casualty crimes of violence, can do a better job of exploring whether these crimes should be viewed as terrorism, at least in colloquial terms. A state prosecutor in a jurisdiction without a state terrorism crime could explain that the choice of indicting the suspects with, say, aggravated murder and not terrorism was due to the available charges. If pressed as to whether “this was a crime of terrorism,” the prosecutor could respond with something like, “This was a horrific crime, and no doubt people have been terrorized.” Fictional portrayals of Arabs and Muslims in the movies and on television can also influence public perceptions. Obvious suggestions along the lines of increasing the number and presence of *non-terrorist* characters of such backgrounds would be helpful.²³⁷

Still, there are practical limits to how much de-biasing the media and Hollywood can realistically achieve. It is one thing to engage in thoughtful discussion and analysis of whether the Turnidges are similarly situated to Mohamed Mohamud, especially given the geographic (and relative temporal) proximity of the two cases. It is an altogether different matter to expect the media, in reporting the arrest of a Muslim terrorism suspect, to include a seemingly out-of-place sentence to the effect of, “Of course, not all domestic terrorists are Muslims,” or “Two years ago, a white Christian terrorist attempted to bomb an abortion clinic.” Perhaps even worse would be, “Of course, nearly all American Muslims are law-abiding citizens.”

There is no panacea to the cognitive biases, but there are steps that the media, prosecutors, and law enforcement agents can take to begin to minimize the impact of those biases.

B. Defining Terrorism Colloquially

Public perception of *who* is engaging in terrorism—as opposed to violent crimes—is impacted not just by cognitive biases but also the malleability of *what* terrorism is. Terrorism has a legal definition—multiple definitions, in fact—but public perception is driven by colloquial understandings of the term.

237. JACK SHAHEEN, GUILTY: HOLLYWOOD'S VERDICT ON ARABS AFTER 9/11 54-85 (2008); Yin, *Hollywood and Arabs*, *supra* note 168; *see, e.g.*, JOHN TEHRANIAN, WHITE WASHED: AMERICA'S INVISIBLE MIDDLE EASTERN MINORITY 92-94 (2009).

Recall that many news accounts and opinion columns emphasized that Major Hasan shouted “Allahu Akbar” as he opened fire at his targets on the Fort Hood base.²³⁸ What was the significance of this cry to the question of whether he engaged in terrorism versus mass murder? A possible inference is that Hasan was motivated to engage in the mass shooting due to his twisted view of Islam, and that his actions constituted terrorism because of the political-religious motivation.

If this inference is accurate, Hasan is certainly not unique in fusing religion and politics. Some scholars have argued that certain variants of Islam essentially argue for the same kind of unified world-view, with the most notorious example being that of Egyptian Sayyid Qutb, the inspiration behind al Qaeda’s theology.²³⁹ Qutb saw Islam as “encompass[ing] all of modern life: manners, morals, art, literature, law, even much of what passed as Islamic culture.”²⁴⁰ The enemy, according to Qutb, consisted not just of the West, but also (in his view) the corrupt leaders of Muslim countries who tolerated Western values and their followers.²⁴¹

But to the extent that terrorism is a political tactic, it is not alone; political motivation in the United States frequently stems from Christian beliefs. Consider, for example, an early 2012 speech by President Obama:

I wake up each morning and I say a brief prayer, and I spend a little time in scripture and devotion. And from time to time, friends of mine, some of who are here today, friends like Joel Hunter or T.D. Jakes, will come by the Oval Office or they’ll call on the phone or they’ll send me a email, and we’ll pray together, and they’ll pray for me and my family, and for our country.

But I don’t stop there. I’d be remiss if I stopped there; if my values were limited to personal moments of prayer or private conversations with pastors or friends. So instead, I must try—imperfectly, but I must try—to make sure those values motivate me as one leader of this great nation.²⁴²

Of course, President Obama was not using his Christian beliefs to justify terrorism. The point is that political positions are sometimes taken due to secular beliefs, sometimes due to religious beliefs,²⁴³ and sometimes due

238. See McKinley & Dao, *supra* note 107.

239. See WRIGHT, *supra* note 18, at 28-31.

240. *Id.* at 29-30.

241. *Id.* at 30.

242. President Barack Obama, Remarks at the National Prayer Breakfast (Feb. 2, 2012) (transcript available at <http://www.whitehouse.gov/photos-and-video/video/2013/02/07/president-obama-speaks-national-prayer-breakfast>).

243. The Catholic Church, for example, opposes abortion and the death penalty on religious grounds, and many (though not all) Catholic politicians vote accordingly due to their religious faith.

to a combination of the two. *Motivation* is related to, but distinct from, a *goal*. A group that uses violence or the threat of violence in an effort to coerce a government into taking some position engages in the essential extortion-like activity that constitutes most definitions of terrorism, regardless of why it seeks to accomplish that outcome. This is true whether the motivation is secular or religious. Islam certainly deserves no special immunity from such a principle. However, neither should Islam be singled out as the *only* religion whose adherents become terrorists when they engage in violence due to their religious beliefs.

More importantly, we should avoid jumping to the conclusion that any particular violent act was in fact motivated by religion merely because the perpetrator happens to be Muslim, or even because he shouted “Allahu Akbar!” An expression of religious faith just before undertaking a violent act may be more of an effort to reinforce one’s intended course of action, whether heroic or criminal. Even if religion motivated the particular criminal act, such motivation need not necessarily be political. That is, there are numerous instances of individuals who have committed crimes due to religious beliefs, but they were neither making a statement against the government (or society) nor seeking to coerce the government into taking or avoiding some action.

For example, criminal law is replete with cases where defendants have committed crimes because God supposedly told them to do so.²⁴⁴ Such defendants are not treated as, or even called, terrorists. Rather, the alleged religious compulsion has tended to arise as a potential defense issue of diminished capacity or insanity—in other words, as mitigation, not aggravation.

Similarly, there are some religious sects that completely oppose medical treatment for their members, with the tragic result that children have died from otherwise treatable diseases. One such sect in Oregon, the Followers of Christ, has seen four sets of parents prosecuted for manslaughter or reckless endangerment of their children since 2008.²⁴⁵ It is hard to imagine any definition of terrorism that would (or should) reach their con-

See, e.g., Rachel Donadio, *Visiting Pope, Pelosi Hears a Call to Protect Life*, N.Y. TIMES, Feb. 19, 2012, at A17 (“Ever since the 2004 presidential campaign of Senator John Kerry . . . a Catholic, United States bishops have debated whether to deny communion to politicians who support abortion rights.”).

244. See, e.g., *State v. Roque*, 141 P.3d 368, 389 (Ariz. 2006) (“God’s voice instruct[ed] him to ‘kill the devils.’”); see also *People v. Coddington*, 2 P.3d 1081 (Cal. 2000) (claiming that God commanded him to execute crimes); *People v. Serravo*, 823 P.2d 128, 131 (Colo. 1992) (discussing how defendant was told by God to stab his wife).

245. See Nicole Dungca, *Dale and Shannon Hickman of the Followers of Christ Church Sentenced to Six Years in Prison*, OREGON LIVE (Oct. 31, 2011, 10:35 AM), http://www.oregonlive.com/oregon-city/index.ssf/2011/10/dale_and_shannon_hickman_of_th.html (reporting the criminal sentences imposed on the Hickmans, Timothy and Rebecca Wyland, Carl Brent Worthington, and Jeffrey and Marci Beagley).

duct, however misguided it happens to be, and that is because religious motivation does not always equate to political motivation.

To be clear, I do not mean to suggest that defendants who commit violent crimes *because of* their Islamic beliefs should necessarily be treated as having diminished capacity or as being insane. Religious beliefs might be relevant if they help to establish the required elements of those defenses, but that would be because the defendant has actually demonstrated diminished capacity or insanity; similarly, religious beliefs might also be relevant—and inculpatory or aggravating—if they help establish the required elements of terrorism crimes or at least meet the general definition of terrorism. The point is that there is a difference between religious beliefs constituting potential evidence of either terroristic intent (or diminished capacity/insanity) versus religious beliefs automatically proving that same intent. This distinction is not a novel concept; in *Wisconsin v. Mitchell*,²⁴⁶ the Supreme Court held that a person's bigoted beliefs, while entitled to First Amendment protection, could nevertheless serve as evidence establishing a hate crime motive for the purposes of sentencing enhancement.²⁴⁷

Much of the problems inherent in the intersection of religious or political motives and the traditional definitions of terrorism stem from the fact that today's terrorism, though seemingly born of a generalized antipathy toward the United States, seek less to broadcast a coherent message than to inflict maximum casualties. Often, the targets are chosen to be "soft," but military targets are not immune. If this is accurate, a better way to think about terrorism may to focus on the intended result of the attack and the methods used to accomplish those results. Given that 18 U.S.C. § 2332a criminalizes the use or attempted use of weapons of mass destruction—including bombs—as a terrorism crime,²⁴⁸ we could, for instance, understand bombing attempts presumptively as acts of terrorism, regardless of how the crime is actually prosecuted. "Intent to cause terror" is not an element of aggravated law under Oregon law, so it potentially would have been unfairly prejudicial during the Turnidges' trial for the prosecutor to lambaste them as "terrorists." Outside of the courtroom, however, there is no reason that the Turnidges should not have been viewed as alleged terrorists—and actual ones, once they were convicted.

CONCLUSION

In this Article, I have focused on two pairs of cases whose characterizations, while perhaps justifiable on an individual level, raise a troubling concern about the impact that race and religion may play in the determina-

246. 508 U.S. 476 (1993).

247. *Id.* at 485-89.

248. 18 U.S.C. §2332a (2006).

tion of those characterizations. Two pairs is not a large sample size, but I focused on those pairs because (1) they all took place in the last few years, and (2) they are remarkably similar when abstracted to their essential facts. Moreover, review of other similar kinds of cases (attempted bombings and shootings) generally confirmed the same trend.

It is undeniable that a large proportion of the acts of terrorism or attempted acts of terrorism against the United States in the past three decades have been perpetrated or allegedly perpetrated by Arab/Muslim persons. We should not be afraid to condemn an act of terrorism as such, once it is clear that the violent crime satisfies our understanding of terrorism, merely because the alleged perpetrator happens to be Arab or Muslim.²⁴⁹ At the same time, however, terrorism is not a tactic practiced only by Arab/Muslim persons. It warps the term “terrorism” when it is understood as containing an implicit limitation to Arab/Muslim persons.

249. Cf. Yin, *Hollywood and Arabs*, *supra* note 168, at 120 (noting criticism of film producers of *THE SUM OF ALL FEARS* (Paramount Pictures 2002) for changing the villains from Arabs in the novel to neo-Nazis in the movie due to “political correctness”).

Appendix 1. Selected Public Descriptions of Mohamed Mohamud

Description	Source
He “plotted ‘a spectacular show’ of terrorism for months.”	Jennifer Meacham, <i>Who Is Mohamed O. Mohamud?</i> , KATU NEWS (Nov. 27, 2010, 7:57 PM), http://www.katu.com/news/local/110917854.html .
Mohamud was “too young to drink but apparently old enough to pursue jihad – the version preached by al-Qaeda.”	Caryn Brooks, <i>Portland’s Bomb Plot: Who Is Mohamed Mohamud?</i> , TIME, Nov. 28, 2010, at 1.
The case “showed American citizens partaking and being mobilized to wage terror attacks[.]”	<i>Feds Arrest Somali Teen in Oregon Bomb Plot</i> , CBSNEWS (Nov. 29, 2010, 9:14 AM), http://www.cbsnews.com/stories/2010/11/27/national/main7093701.shtml .
“Recent terrorist attempt in Oregon[.]”	Brad Knickerbocker, <i>Holiday Season Prompts Stepped-Up Security Against Terrorist Attack</i> , CHRISTIAN SCI. MONITOR (Dec. 22, 2010), http://www.csmonitor.com/USA/2010/1222/Holiday-season-prompts-stepped-up-security-against-terrorist-attack .
“‘Stinging’ would-be terrorists[.]”	Editorial, <i>“Stinging” Would-Be Terrorists</i> , L.A. TIMES, Dec. 16, 2010, at A34.

<p>His “alleged involvement in planning—and attempting to execute—a terror attack during a Christmas Tree-lighting celebration.”</p>	<p>U.S. Dep’t of Justice, Remarks as Prepared for Delivery by Attorney General Eric Holder at the Muslim Advocates’ Annual Dinner (Dec. 10, 2010) (transcript available at 2010 WLNR 24643166).</p>
<p>“Would-be bomber Mohamed Osman Mohamud fits the generic terrorist profile. He is male, like the majority of terrorists. He is young, like most terrorist foot soldiers.”</p>	<p>Editorial, <i>When Religious Discrimination is Vital; Portland Escaped Carnage, but Terrorism is Still a Threat</i>, WASH. TIMES, Dec. 2, 2010, at B2.</p>
<p>“The failed Portland plot is one of several recent cases, from California to Washington, D.C., in which undercover agents helped suspects pursue terrorist plans.”</p>	<p>William Yardley & Jessie McKinley, <i>Terror Cases Strain Ties With Some Who Can Help</i>, N.Y. TIMES, Dec. 1, 2010, at A15.</p>
<p>“The mayor of Portland, Oregon, Sam Adams, was one of the last to know that he had a suspected terrorist in his city.”</p>	<p><i>Should Portland Rejoin Terrorism Task Force?</i>, NAT’L PUB. RADIO (Nov. 30, 2010), http://www.npr.org/2010/11/30/131704364/should-portland-rejoin-terrorism-task-force.</p>
<p>“The terror suspect next door[.]”</p>	<p>Editorial, <i>The Terror Suspect Next Door</i>, USA TODAY, Nov. 30, 2010, at 10A.</p>

Appendix 2. Selected Public Descriptions of the Woodburn Bombers

Description	Source
The “suspect arrested in connection with the deadly Woodburn bank bombing case.” (no mention of terrorism)	Alan Gustafson and Thelma Guerrero-Huston, <i>Woodburn Bank Bombing Suspect Identified</i> , STATESMAN JOURNAL (Salem, Or.), Dec. 16, 2008, at A1.
“Salem man arrested on aggravated murder counts in Woodburn bank bombing[.]” (no mention of terrorism)	Stuart Tomlinson, <i>Salem Man Arrested on Aggravated Murder Counts in Woodburn Bank Bombings</i> , OREGON LIVE, (Dec. 15, 2008, 1:04 PM), http://www.oregonlive.com/news/index.ssf/2008/12/po-lice_release_photos_of_suspe.html .
“In a trial that spanned three months, prosecutors portrayed Bruce and Joshua Turnidge as bigoted men who hated authorities, were desperate for money and feared that newly elected President Obama would take away their guns.” (no mention of terrorism)	<i>‘This is a Murderer With No Remorse;’ Father, Son Sentenced to Death in Oregon Bank Bombing</i> , CHARLESTON GAZETTE, Dec. 23, 2010, at 8A.
“Man Arrested in Bombing That Killed 2” (no mention of terrorism)	Beth Slovic, <i>Man Arrested in Bombing that Killed 2</i> , N.Y. TIMES, Dec. 16, 2008, at A21.
“Jury gives Woodburn bank bombers the death penalty[.]” (no mention of terrorism)	<i>Jury Gives Woodburn Bank Bombers the Death Penalty</i> , KATU (Dec. 22, 2010), http://www.katu.com/news/local/112331724.html .

Appendix 3. Selected Public Descriptions of Nidal Hasan

Description	Source
"Witnesses recall terror, carnage at Fort Hood."	Ann E. Gerhart, <i>Witnesses Recall Terror, Carnage at Fort Hood</i> , WASH. POST, Oct. 14, 2010, at A03.
"...the worst terrorist attack on U.S. soil since September 11, 2001."	COMM. ON HOMELAND SECURITY & GOV'T AFFAIRS, 112TH CONGRESS, A TICKING TIME BOMB: COUNTERTERRO RISM LESSONS FROM THE U.S. GOVERNMENT'S FAILURE TO PREVENT THE FORT HOOD ATTACK (2011) (Special Report by Joseph I. Lieberman & Susan M. Collins), available at http://s3.documentcloud.org/documents/31713/senate-committee-on-homeland-security-report-on-fort-hood-shooting.pdf .
"... the authorities were surprised by a series of terrorist plots or attacks, including the killing of 13 people at Fort Hood, Tex., by an Army psychiatrist who had embraced radical Islam, Maj. Nidal Hasan[.]"	Scott Shane, <i>U.S. Muslims Rarely Seen in Terror Acts, Study Finds</i> , N.Y. TIMES, Feb. 8, 2012, at A10.

<p>“The Fort Hood Killer: Terrified . . . or Terrorist?”</p>	<p>Nancy Gibbs, <i>The Fort Hood Killer: Terrified . . . or Terrorist?</i>, TIME MAG. (Nov. 11, 2009), http://www.time.com/time/magazine/article/0,9171,1938698,00.html.</p>
<p>“Portrait of a Terrorist?”</p>	<p>Patrik Johnson & Tracey D. Samuelson, <i>Fort Hood Suspect: Portrait of a Terrorist?</i>, CHRISTIAN SCI. MONITOR (Nov. 10, 2009), http://www.csmonitor.com/USA/2009/1110/p02s15-usgn.html.</p>
<p>“Yes, he is a terrorist[;]... Religion, insanity, and Nidal Hasan”</p>	<p>Lisa Miller, <i>Yes, He is a Terrorist; Religion, Insanity and Nidal Hasan</i>, NEWSWEEK, Nov. 23, 2009, at 24.</p>
<p>“... Nidal Hasan is every ounce the terrorist as the 9/11 hijackers.”</p>	<p>Sherman Frederick, Opinion, <i>Call Evil by its Rightful Name</i>, LAS VEGAS REV.-J., Nov. 15, 2009, at 1D.</p>

Appendix 4. Some Notable Terrorist Incidents against the U.S. Since 1979

Year	Incident	Death Toll
1983	<p>A Lebanese suicide bomber attacked the U.S. Embassy in Lebanon with a truck bomb.</p> <p><i>History: U.S. Embassy Bombing</i>, BEIRUT MEMORIAL ONLINE (Apr. 26, 2000), http://www.beirut-memorial.org/history/embassy.html; <i>see also</i> Borzou Daragahi, <i>Memorial for 1983 Attack</i>, L.A. TIMES (Apr. 19, 2008), http://articles.latimes.com/2008/apr/19/world/fg-embassy19.</p>	63
1983	<p>An Iranian suicide bomber attacked a U.S. Marines barracks with a truck bomb.</p> <p><i>Beirut Barracks Attack Remembered</i>, CBSNEWS (Feb. 11, 2009, 8:26 PM), http://www.cbsnews.com/2100-202_162-579638.html.</p>	241
1984	<p>A cult led by an Indian man named Bhagwan Shree Rajneesh sickened hundreds of Oregonians by spreading salmonella in local restaurant salad bars.</p> <p>Rick Attig, <i>The Poisoning of an Oregon Town</i>, OREGON LIVE (Oct. 5, 2009, 5:37 PM), http://www.oregonlive.com/opinion/index.ssf/2009/10/the_poisoning_of_an_oregon_tow.html; <i>Special Unit of Rajneeshees Dedicated to 'Dirty Tricks'</i>, OREGON LIVE (Dec. 30, 1985, 2:24 PM), http://www.oregonlive.com/rajneesh/index.ssf/1985/12/special_unit_of_rajneeshees_de.html; <i>see also Rajneeshees Definition</i>, OREGON ENCYCLOPEDIA, http://www.oregonencyclopedia.org/entry/view/rajneeshees/ (last visited Mar. 2, 2013).</p>	9 (over 700 got sick)
1988	<p>Libyan agents blew up Pan Am flight 103.</p> <p><i>Pan Am Flight 103</i>, N.Y. TIMES (Aug. 11, 2009), http://topics.nytimes.com/top/reference/timestopics/subjects/a/airplane_accidents_and_incidents/pan_am_flight_103/index.html.</p>	270 (259 on the flight)

1993	<p>A group of Arab nationals, inspired by Omar Abdel-Rahman (the Blind Sheikh) and led by Ramzi Yousef, blew up a truck bomb in the World Trade Center parking garage.</p> <p><i>1st Trade Center Attack: 10 Years Ago</i>, CBS NEWS (Feb. 11, 2009, 8:49 PM), http://www.cbsnews.com/2100-500164_162-540376.html.</p>	6 (over 1000 injured)
1993-95	<p>Unabomber Ted Kaczynski sent the last four of his mail bombs.</p> <p><i>National Special Report: 16 Bombs, 3 Deaths</i>, WASHINGTONPOST.COM, http://www.washingtonpost.com/wp-srv/national/longterm/unabomber/bkgrdstories.ted.htm (last visited Mar. 7, 2013).</p>	2
1995	<p>Timothy McVeigh and Terry Nichols set off a truck bomb next to the Murrah Federal Building in Oklahoma City.</p> <p><i>Terror Hits Home: The Oklahoma City Bombing</i>, THE FEDERAL BUREAU OF INVESTIGATION, (last visited Mar. 7, 2013), http://www.fbi.gov/about-us/history/famous-cases/oklahoma-city-bombing.</p>	168
1996	<p>Hezbollah members bombed the Khobar Towers housing complex in Saudi Arabia.</p> <p>Carol D. Leonnig, <i>Iran Held Liable for Khobar Attack</i>, WASH. POST (Dec. 23, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/12/22/AR2006122200455.html.</p>	20 (almost 400 injured)
1996-98	<p>Eric Robert Rudolph bombed the 1996 Olympics in Atlanta and three abortion clinics.</p> <p><i>Rudolph Reveals Motives</i>, CNN.COM (Apr. 19, 2005, 5:25 PM), http://www.cnn.com/2005/LAW/04/13/eric.rudolph/.</p>	2 (over 100 injured)
1996-2008	<p>Earth Liberation Front destroyed numerous apartments, condominiums, SUV dealerships, and other buildings.</p> <p>Jeff Barnard, <i>Earth Liberation Front Arsonist Sentenced to 13 years</i>, SEATTLE TIMES (May 24, 2007, 12:00 AM), http://seattletimes.com/html/localnews/</p>	0

	2003719703_ecosentence24m.html; <i>see also Ecoterrorism: Extremism in the Animal Rights and Environmentalist Movements</i> , ANTI-DEFAMATION LEAGUE, http://archive.adl.org/learn/ext_us/ecoterrorism.asp#ELF (last visited Mar. 7, 2013).	
1998	Al Qaeda carried out simultaneous bombing attacks against U.S. Embassies in Kenya and Tanzania. Patricia Hurtado, <i>Al Qaeda Associate Gets Life for U.S. Embassy Bombings in Kenya, Tanzania</i> , BLOOMBERG (Jan. 25, 2011, 2:40 PM), http://www.bloomberg.com/news/2011-01-25/al-qaeda-associate-gets-life-for-u-s-embassy-bombings-in-kenya-tanzania.html .	224
1999	Ahmed Ressam plotted to blow up a car bomb at the Los Angeles International Airport. <i>Ahmed Ressam's Millennium Plot</i> , PBS FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/trail/inside/cron.html .	(foiled)
2000	Al Qaeda used a suicide attack via boat to attack the <i>U.S.S. Cole</i> while it was docked in Yemen. Josh White, <i>Al-Qaeda Suspect Says He Planned Cole Attack</i> , WASH. POST, Mar. 20, 2007, at A01, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/03/19/AR2007031900653.html .	17
2001	Al Qaeda members hijacked four planes and crashed them into the World Trade Center towers and the Pentagon; fourth plane crashed in Pennsylvania short of its intended target. Margaret Webb Pressler, <i>What was 9/11?</i> , WASH. POST (Sept. 8, 2011), http://articles.washingtonpost.com/2011-09-08/lifestyle/35276086_1_al-qaeda-terrorist-attacks-hussein-and-bin-laden .	~ 3000
2001	Letters containing weaponized anthrax spores were mailed to journalists and two U.S. Senators. Editorial, <i>The F.B.I.'s Anthrax Case</i> , N.Y. TIMES, Feb 27, 2010, at WK9, available at	5 (17 injured)

	http://www.nytimes.com/2010/02/28/opinion/28sun2.html?_r=0 .	
2001	Richard Reid tried to set off explosives hidden in his shoes in an effort to blow up American Airlines flight 63. <i>Shoe Bomber: Tale of Another Failed Terrorist Attack</i> , CNN JUSTICE (Dec. 25, 2009, 10:23 PM), http://articles.cnn.com/2009-12-25/justice/richard.reid.shoe.bomber_1_terror-attacks-american-airlines-flight-qaeda?s=PM:CRIME .	(foiled)
2002	John Allen Muhammad and Lee Boyd Malvo shot at random victims over three weeks in Washington, D.C., Maryland, and Virginia. Jeanne Meserve & Mike M. Alhers, <i>Sniper John Allen Muhammad Executed</i> , CNN JUSTICE (Nov. 11, 2009, 3:42 AM), http://articles.cnn.com/2009-11-10/justice/virginia.sniper.execution_1_sniper-john-allen-muhammad-washington-area-sniper-larry-traylor?s=PM:CRIME .	10
2006	British Muslim terrorists plotted to blow up ten trans-Atlantic airplanes headed to the U.S. and Canada. Alan Cowell, <i>Threats and Responses: Conspiracy; Britain Charges 11 in Plane Case; Bomb Gear Cited</i> , N.Y. Times, Aug. 22, 2006, at A1.	(foiled)
2007	Six Muslim-American men plotted to attack Fort Dix in New Jersey. Dale Russakoff & Dan Eggen, <i>Six Charged in Plot to Attack Fort Dix</i> , WASH. POST (May 9, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/05/08/AR2007050800465.html .	(foiled by sting operation)
2009	Hosam Maher Husein Smadi attempted to detonate a truck bomb in the garage of a Dallas skyscraper. Anabelle Garay, <i>Hosam Maher Husein Smadi Arrested for Dallas Bomb Plot</i> , HUFFINGTON POST (Sept. 24, 2009, 9:10 PM), http://www.huffingtonpost.com/2009/09/24/hosam-maher-husein-smadi-_n_299340.html .	(foiled by sting operation)

2009	Najibullah Zazi plotted with others to engage in suicide bombings on the New York subway system. Dina Temple-Raston, <i>NYC Terrorism Suspect Pleads Guilty to Conspiracy</i> , NAT'L PUB. RADIO (Feb. 22, 2010, 11:55 AM), http://www.npr.org/templates/story/story.php?storyId=123970716 .	(foiled)
2009	Umar Farouk Abdulmutallab tried to set off explosives in his underwear in an effort to blow up Northwest Airlines flight 253. <i>Underwear Bomber Abdulmutallab Sentenced to Life</i> , BBC NEWS (Feb. 16, 2012, 4:04 PM), http://www.bbc.co.uk/news/world-us-canada-17065130 .	(foiled)
2009	Major Nidal Hasan shot dozens of people on the Ft. Hood base. <i>Gunman Kills 12, Wounds 31 at Fort Hood</i> , NBCNEWS.COM (Nov. 5, 2009, 10:48 PM), http://www.nbcnews.com/id/33678801/ .	13 (31 wounded)
2010	Joe Stack crashed a small plane into a building containing the local IRS office. <i>See Richard Fausset, Suicide Pilot Crashes Into Building in Texas Housing IRS Offices</i> , L.A. TIMES (Feb. 19, 2010), http://articles.latimes.com/2010/feb/19/nation/la-na-plane-crash-austin19-2010feb19 .	1 (13 injured)
2010	Al Qaeda in the Arabian Peninsula tried to bomb two cargo planes headed to the U.S. Editorial, <i>Disaster Averted</i> , N.Y. Times, Nov. 2, 2010, at A30, available at http://www.nytimes.com/2010/11/02/opinion/02tue2.html?_r=0 .	(foiled)
2010	Faisal Shahzad attempted to set off a car bomb in Times Square. Anne E. Kornblut et al., <i>Pakistan Native Arrested in Times Square Bomb Case</i> , WASH. POST (May 4, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/05/03/AR2010050300847.html .	(foiled)

2010	<p>Mohamed Mohamud tried to blow up a car bomb in downtown Portland.</p> <p>Bryan Denson, <i>FBI Thwarts Terrorist Bombing Attempt at Portland Holiday Tree Lighting, Authorities Say</i>, OREGON LIVE (Nov. 26, 2010, 10:09 PM), http://www.oregonlive.com/portland/index.ssf/2010/11/fbi_thwarts_terrorist_bombing.html.</p>	(foiled by sting operation)
2010	<p>Antonio Martinez tried to blow up a military recruiting station with a car bomb.</p> <p>Charlie Savage & Gary Gately, <i>Man Arrested in Bomb Plot in Maryland</i>, N.Y. TIMES, Dec. 9, 2010, at A26, available at http://www.nytimes.com/2010/12/09/us/09bomb.html; Alex Dominguez, <i>Antonio Martinez, Maryland Man in Recruiting Center Bomb Plot, Sentenced to 25 Years in Prison</i>, HUFFINGTON POST (Apr. 6, 2012, 4:40 PM), http://www.huffingtonpost.com/2012/04/06/antonio-martinez-terror_n_1408078.html.</p>	(foiled by sting operation)
2011	<p>Kevin Harpham planted a bomb along a Dr. Martin Luther King, Jr. parade in Spokane.</p> <p>Associated Press, <i>Washington: Maximum Sentence in Bomb Attempt</i>, N.Y. TIMES, Dec. 21, 2011, at A29, available at http://www.nytimes.com/2011/12/21/us/kevin-harpham-gets-maximum-sentence-in-bomb-attempt.html.</p>	(foiled)
2011	<p>Jared Loughner shot over a dozen people, killing several including a federal judge.</p> <p>Richard Esposito & Lee Ferran, <i>Gabrielle Gifford's Suspected Shooter Identified</i>, ABCNEWS.COM (Jan. 8, 2011), http://abcnews.go.com/Blotter/jared-lee-loughner-gabrielle-giffords-suspected-shooter-identified/story?id=12572164.</p>	6 (13 wounded)

2011	<p>Four elderly men in Georgia plotted to attack state and federal officials.</p> <p><i>Four US Men Arrested Over Biological Attack Plot</i>, TELEGRAPH (Nov. 2, 2011, 7:00 AM), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/8863917/Four-US-men-arrested-over-biological-attack-plot.html.</p>	(foiled by sting operation)
2011	<p>Amine el Khalifi attempted to blow up the U.S. Capitol in a suicide attack.</p> <p>Charlie Savage, <i>F.B.I. Arrests Man in a Suspected Terrorist Plot Near the U.S. Capitol</i>, N.Y. Times, Feb. 18, 2012, at A16.</p>	(foiled by sting operation)
2012	<p>Five young men in Cleveland plotted to blow up a bridge.</p> <p>Thomas J. Sheeran & Kantele Franko, <i>Cleveland Bomb Plot: 5 Arrested in Plot to Bomb Bridge Outside Cleveland, Justice Department Says</i>, HUFFINGTON POST (May 1, 2012, 6:04 PM), http://www.huffingtonpost.com/2012/05/01/cleveland-bomb-plot_n_1467431.html.</p>	(foiled by sting operation)
2012	<p>James Eagan Holmes attacked moviegoers in Aurora, Colorado, with gas grenades and guns.</p> <p>Carol D. Leonnig & Joel Achenback, <i>James Holmes, Held in Colorado Shooting, Had Academic Promise but Was Struggling</i>, WASH. POST (July 20, 2012), http://articles.washingtonpost.com/2012-07-20/national/35489189_1_james-holmes-batman-movie-movie-theater.</p>	12 (58 wounded)
2012	<p>Wade Michael Page opened fire on a Sikh Temple in Wisconsin before shooting himself to death when law enforcement arrived.</p> <p>Matt Williams, <i>Sikh Temple Shooting: At Least Six Worshippers Killed in Wisconsin</i>, GUARDIAN (Aug. 5, 2012, 1:16 PM), http://www.guardian.co.uk/world/2012/aug/05/gunman-sikh-temple-wisconsin.</p>	6 (four wounded)

2013	<p>Brothers Tamerlan and Dzhokhar Tsarnaev set off bombs made from pressure cookers near the finish line of the Boston Marathon.</p> <p>Michael Cooper et al., <i>Boston Suspects Are Seen as Zealots, and Self-Taught</i>, N.Y. Times, Apr. 24, 2013, at A1.</p>	3 (more than 260 wounded)
2013	<p>Buford Rogers allegedly plotted to use pipe bombs and Molotov cocktails.</p> <p>Amy Forliti, <i>Suspected terrorism attack disrupted by Minn. arrest</i>, Wash. Post, May 6, 2013, http://www.washingtonpost.com/national/fbi-raid-of-minn-home-that-netted-suspected-pipe-bombs-firearms-disrupted-terror-attack/2013/05/06/d2c9cee2-b662-11e2-b568-6917f6ac6d9d_story.html</p>	(arrested before plot came to fruition)

