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NOTES

PROTECTING AGAINST TERRORISM OR SYMBOLIC POLITICS?: FATAL FLAWS IN OHIO'S CRIMINAL TERRORISM STATUTE[†]

INTRODUCTION

At approximately four o'clock on the afternoon of Friday, May 9, 2003, an armed gunman wearing a bulletproof vest and a military helmet entered the Weatherhead School of Management on the campus of Case Western Reserve University in Cleveland, Ohio. The gunman broke into the Weatherhead School's Peter B. Lewis Building¹ through a locked rear door.² Once inside, the gunman shot and killed the first person he encountered, graduate student Norman Wallace, a first year honors student in the graduate business program³ who had approached the gunman with his arms raised.⁴

At the time the gunman entered, approximately ninety-three⁵ professors and students were in the building. As gunfire erupted, professors and students huddled in offices, hid under desks, and barricaded

[†] Awarded the tenth annual *Case Western Reserve Law Review* Outstanding Student Note Award, as selected by the Volume 55 Editorial Board.

¹ There are conflicting reports about how the gunman entered the building. Compare Tom Breckenridge, *Frightened Faculty and Students Hid in Locked Offices*, PLAIN DEALER (Cleveland), May 10, 2003, at A12 (claiming that the gunman entered the building by kicking through a back door), with Scott Hiaasen, *Death Penalty Sought in CWRU Siege*, PLAIN DEALER (Cleveland), May 30, 2003, at A1 (reporting that the gunman used a "rubber mallet" to enter the building).

² Mike Tobin, *Search and Survival at CWRU: How SWAT Team Got Gunman*, PLAIN DEALER (Cleveland), May 14, 2003, at A1.

³ John Horton & Molly Kavanaugh, *In the Wake of Tragedy, Graduates Move On: CWRU Ceremonies Celebrate Victim's Life*, PLAIN DEALER (Cleveland), May 19, 2003, at A1.

⁴ Hiaasen, *supra* note 1.

⁵ Telephone Interview with Rick Bell, Assistant Prosecuting Attorney, Cuyahoga County, in Cleveland, Ohio (Dec. 23, 2004).

doors.⁶ The distinctive architecture of the Peter B. Lewis Building, with its curving, undulating ceilings and walls and its open foyer,⁷ made the job of the Cleveland Police SWAT Team and FBI agents particularly difficult,⁸ forcing them to play a “cat-and-mouse game”⁹ with the shooter.

Biswanath Halder, a sixty-four-year-old Indian immigrant with a master of business administration from the university, was charged with the crime. He faced a 338-count indictment, detailing an exhaustive list of charges from kidnapping to aggravated murder.¹⁰ Moreover, Halder was the first person in Ohio to be charged under the state’s new terrorism statute.¹¹

This Note explores whether Biswanath Halder is a “terrorist” and will, thereby, analyze the purpose and validity of state statutes, in particular, Ohio’s statute, criminalizing terrorism. Part I introduces the debate over what action constitutes terrorism and provides several definitional examples and elements inherent in terrorist actions. Part II provides a general overview of early state and federal legislative responses to the terrorist threat against the United States since September 11, 2001, concluding that initial state legislative actions do not rely on the inherent definitional aspects of terrorist action but instead create overly broad criminal elements encompassing a multitude of actions potentially unrelated to terrorism. Part III presents an overview of Ohio’s legislative response to terrorism and analyzes the statute as applied in the Halder case, ultimately calling into question the design and purpose of Ohio’s terrorism legislation. In continuing this

⁶ CNN.com, *Cleveland Police: University Gunman in Custody*, May 10, 2003, <http://www.cnn.com/2003/US/Midwest/05/09/university.gunfire/>.

⁷ Architect Frank Gehry designed the Peter B. Lewis Building.

⁸ Tobin, *supra* note 2, at A2; see also Lila Mills, *National Award Honors Cleveland SWAT Team*, PLAIN DEALER (Cleveland), Sept. 25, 2003, at B7 (noting that the Cleveland Police Department’s SWAT unit described the building as a “tactical nightmare” because of its open foyer, several staircases, and rounded walls).

⁹ Danny Hakim, *One Is Dead, One Arrested in Cleveland Campus Siege*, N.Y. TIMES, May 10, 2003, at A14.

¹⁰ Indictment of Biswanath Halder, *Ohio v. Biswanath Halder*, No. CR-03-437717-ZA (May 29, 2003) [hereinafter Halder Indictment]. The charges against Halder were eventually reduced to 196 counts of kidnapping and aggravated murder. On December 16, 2005 Halder was found guilty of all 196 charges against him, including the aggravated murder of graduate student Norman Wallace. James F. McCarthy, *Case Gunman Guilty; Could Face Death*, PLAIN DEALER (Cleveland), Dec. 17, 2005, at A1. See also Jim Nichols, *Halder’s Defense Tries To Avoid Death Penalty; His Guilt Is Admitted, Premeditation Is Not*, PLAIN DEALER (Cleveland), Dec. 15, 2005, at B1.

¹¹ Hiaasen, *supra* note 1, at A6. After the completion of this Note, Cuyahoga Common Pleas Judge Peggy Foley Jones dismissed the terrorism charge against Halder. This Note continues to evaluate the validity of the original terrorism charge against Halder despite the subsequent dismissal. Its conclusions remain important in evaluating the strengths and weaknesses of Ohio’s terrorism statute and its future application.

analysis, Part IV reviews the legislative intent behind Ohio's statute and argues that the statute was misapplied in the Halder case. Part V contends that state legislative actions inappropriately relied on an overly broad federal definition of terrorism, the components of which were not intended to serve as elements for criminal sanction. Part VI provides a constitutional critique of the Ohio statute, arguing that the Ohio statute and other state statutes that use similar language are in-firm as vague. Part VII brings to light procedural difficulties faced by the Ohio statute and notes its already anomalous application within the state. Part VIII argues that the Ohio terrorism statute, in particular, and state statutes in general, do not appropriately address the threat of terrorism, provide any deterrent effect against genuine terrorism, or perform their intended purpose. This effectively makes the statutes symbolic political actions that have been and will continue to be misapplied. Finally, Part IX concludes that, though a cohesive federal-only approach to combating terrorism is more appropriate and effective, state statutes criminalizing terrorism are likely to flourish. This Note, therefore, offers recommendations for the rectification of Ohio's statute and for future state actions criminalizing terrorism.

I. WHAT IS TERRORISM?

Currently, there is no single, universally accepted definition of terrorism.¹² In a 1983 study, Alex P. Schmid and Albert Jongman identified 109 different definitions of terrorism with twenty-two different elements,¹³ and there is every reason to believe that more definitions have appeared since.¹⁴

Even the various departments and agencies of the United States government are unable to agree upon what constitutes terrorism. The U.S. Department of State, defines terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience."¹⁵ The U.S. Department of Defense classifies terrorism as "the calculated use of unlawful violence or threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological."¹⁶ The Code of Federal

¹² ROBERTA ARNOLD, *THE ICC AS A NEW INSTRUMENT FOR REPRESSING TERRORISM* 3 (2004).

¹³ ALEX SCHMID & ALBERT JONGMAN, *POLITICAL TERRORISM* 119-52 (1983).

¹⁴ WALTER LAQUEUR, *THE AGE OF TERRORISM* 143 (1987).

¹⁵ 22 U.S.C. § 2656f(d)(2) (2005).

¹⁶ DEP'T OF DEF., *DICTIONARY OF MILITARY AND ASSOCIATED TERMS* 538 (Joint Publi-

Regulations defines terrorism as “the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.”¹⁷

Experts and scholars are similarly unable to agree on a definition. Dr. Bruce Hoffman, an internationally recognized expert on terrorism and insurgency, defines terrorism as “the deliberate creation and exploitation of fear through violence or the threat of violence in the pursuit of political change.”¹⁸ Audrey Kurth Cronin, Specialist in Terrorism, Congressional Research Service at the Library of Congress, argues that terrorism is the surprise threat or use of seemingly random violence against innocents for political ends by a nonstate actor.¹⁹ According to *Black’s Law Dictionary*, terrorism is “the use or threat of violence to intimidate or cause panic, esp[ecially] as a means of affecting political conduct.”²⁰

Although the above definitions were not intended to serve as the predicate for the creation of criminal statutes,²¹ and, therefore, clearly reflect “the priorities and particular interests of the specific agency involved,”²² they each provide a basic understanding of concepts inherent in terrorist action. Definitions espoused by both officials and scholars similarly portray the political nature of terrorist attacks, the victims and intended targets, the psychological aims of fear and intimidation, and the use of violence or force.²³

Despite differing perceptions and purposes, understanding what terrorism does and does not include becomes important given the

cation 1-02, Apr. 12, 2001) (as amended through Aug. 31, 2005), available at http://www.dtic.mil/doctrine/jel/new_pubs/jpl_02.pdf.

¹⁷ 28 C.F.R. § 0.85(l) (2005).

¹⁸ BRUCE HOFFMAN, *INSIDE TERRORISM* 43 (1998).

¹⁹ Audrey Kurth Cronin, *Introduction: Meeting and Managing the Threat*, in *ATTACKING TERRORISM* 1, 4 (Audrey Kurth Cronin & James M. Ludes eds., 2004).

²⁰ BLACK’S LAW DICTIONARY 1484 (7th ed. 1999).

²¹ Definitions are written relative to purposes. See James A.R. Nafziger, *The Grave New World of Terrorism: A Lawyer’s View*, 31 DENV. J. INT’L L. & POL’Y 1, 9 (2002) (“[D]efinitions are tailored to national contexts and a specific threat or range of threats to national security.”); Aaron Noteboom, *Terrorism: I Know It When I See It*, 81 OR. L. REV. 553, 568 (2002) (“Each definition has unique ramifications and is only applicable to specific areas of law.”).

²² HOFFMAN, *supra* note 18, at 38.

²³ See YONAH ALEXANDER, *COMBATING TERRORISM* 3-4 (2005) (detailing agreed upon fundamental components to terrorism, including an unlawful act, political objectives, and intended outcomes of fear and defining terrorism as “the calculated employment or the threat of violence by individuals, subnational groups, and state actors to attain political, social, and economic objectives in the violation of law”); BOAZ GANOR, *THE COUNTER-TERRORISM PUZZLE* 17 (2005) (“Terrorism is a form of violent struggle in which violence is deliberately used against civilians in order to achieve political goals (nationalistic, socioeconomic, ideological, religious, etc.).”).

increased legislative response to terrorism in the United States after the attacks of September 11.²⁴ In the months and years following the 9/11 attacks, at least thirty-three states responded by amending their criminal codes²⁵ to reflect the country's new proactive approach²⁶ to preventing terrorism on American soil. Likewise, the federal government created a definition for "domestic terrorism" through the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act, the "PATRIOT Act," or the "Act"), which amended the United States Criminal Code.²⁷

Prior to the advent of state statutes, suspected "terrorists" in the United States were arrested and prosecuted in state criminal courts for the underlying crime, such as murder, kidnapping, or violent threats.²⁸ Today, suspects may be charged not only with the underlying crime but may also be directly charged with terrorism or acts that support or threaten terrorism.²⁹ A similar approach is used in hate-crime legislation, which generally creates penalty-enhancement provisions for

²⁴ Christopher L. Blakesley, *Ruminations on Terrorism and Anti-Terrorism Law and Literature*, 57 U. MIAMI L. REV. 1041, 1074 (2003) (concluding that a working definition of terrorism is required if prosecutions for terrorism occur).

²⁵ National Conference of State Legislatures, *State Legislative Report*, Vol. 27, No. 19, 1 (Nov. 2002) (detailing a comprehensive list of states that have amended their criminal codes to varying degrees to include crimes associated with terrorism, including: Alabama, Alaska, Arizona, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wyoming).

²⁶ Prior to the attacks of September 11, the United States was largely perceived to have an "ebb and flow" response to terrorism. See, e.g., ALEXANDER, *supra* note 23, at 23 (arguing that historically terrorism against the United States was not viewed as a significant threat and that terrorist attacks were handled on an "ad hoc basis"); Martha Crenshaw, *Terrorism, Strategies and Grand Strategies*, in *ATTACKING TERRORISM*, *supra* note 19, at 80 ("With each terrorist crisis [pre 9/11], terrorism rose to the top of the presidential agenda. In between crises, it sank to the bottom . . ."); WALTER LAQUEUR, *NO END TO WAR* 144 (2003) (comparing government support for terrorism to the "electrocardiogram of a healthy person—spikes followed by flat lines").

²⁷ The USA PATRIOT Act was introduced on October 23, 2001 and was signed into law by President George W. Bush just three days later, on October 26, 2001. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter Patriot Act].

²⁸ Suspects who committed crimes in a state would be charged with the ordinary offense, now the underlying crime. See, e.g., Terry Lynn Nichols v. Dist. Ct. of Okla. County, No. PR-2000-703, 2000 Okla. Crim. App. LEXIS 13 (charging Terry Lynn Nichols with 163 felony counts, including 160 counts of first degree murder for his participation in the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma on April 19, 1995); FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, PUBL'N NO. 0308, *TERRORISM 2000/2001* (2004), http://www.fbi.gov/publications/terror/terror2000_2001.htm (noting that Timothy McVeigh was convicted of eleven counts of murder and conspiracy for his part in the Oklahoma City bombing).

²⁹ See Halder Indictment, *supra* note 10.

defendants convicted of a specified offense when the underlying crime was committed because of hatred for a protected class.³⁰ Prior to the passage of hate-crime legislation, the defendant was convicted and sentenced only for the so-called underlying offense, be it homicide, assault, or battery.

When terrorism is criminalized statutorily and a defendant is charged with committing the crime of terrorism, a determination of what acts rise to the level of terrorism becomes imperative³¹ to discern exactly what action is proscribed. Given current state and federal legislative responses to terrorism, it will no longer suffice to take Justice Potter Stewart's approach to defining pornography, that is, "I know it when I see it."³²

A. Fundamental Elements of Terrorism

1. Motive

Scholars overwhelmingly argue that terrorism is inherently political. Hoffman claims that understanding terrorism as politically inspired violence is "paramount to understanding its aims, motivations and purposes."³³ According to this view, terrorists commit violent acts to beget political change, whether for religious liberation, forcing regime change, or the mere expression of a perceived political righteousness.³⁴ Terrorism as a politically motivated crime does not include violence for financial profit³⁵ or personal vengeance³⁶ because terrorism is generally directed in pursuit of a larger political aim³⁷ rather than individual gain. Stephan Nathanson argues that terrorism requires a social or political agenda, and a person who engages in violence that resembles an act of terrorism but whose aims are only for personal profit is not a terrorist.³⁸ In the absence of such personal

³⁰ Eric Shimamoto, *Rethinking Hate Crime in the Age of Terror*, 72 UMKC L. REV. 829, 832 (2004).

³¹ LAQUEUR, *supra* note 26, at 235.

³² *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). *Contra* PAUL PILLAR, TERRORISM AND U.S. FOREIGN POLICY 16-17 (2001) ("For the great majority of counterterrorist activities . . . it is unnecessary to go to great lengths to define it, because one knows it when one sees it.")

³³ HOFFMAN, *supra* note 18, at 14.

³⁴ Cronin, *supra* note 19, at 3.

³⁵ RAPHAEL PERL, FOREIGN AFFAIRS, DEFENSE AND TRADE DIVISION, ISSUE BRIEF FOR CONGRESS: TERRORISM, THE FUTURE AND U.S. FOREIGN POLICY 4 (2003), available at <http://www.fas.org/irp/crs/IB95112.pdf>.

³⁶ PILLAR, *supra* note 32, at 13-14.

³⁷ HOFFMAN, *supra* note 18, at 15.

³⁸ Stephen Nathanson, *Prerequisites for Morally Credible Condemnations of Terrorism*, in *THE POLITICS OF TERROR* 3, 11 (William Crotty ed., 2004).

or political distinctions, Nathanson posits that the lines against which we identify terrorists will become blurred,³⁹ confusing run-of-the-mill criminal activity with terrorism.

Beyond political motivations, as that term is typically understood, terrorism in the twenty-first century has expanded to include religiously motivated violence that combines “ideological and criminal elements.”⁴⁰ Today, along with politically motivated violence, religious and nationalist fanaticism are the predominate features of terrorism,⁴¹ and “political” in this regard encompasses “religious motivations or social issues,”⁴² including changing social or economic policies. Using as examples the bombing of the Alfred P. Murrah Federal Building in Oklahoma City in 1995 and the sarin nerve gas attack on a Tokyo subway in 1995, Hoffman notes that the most serious terrorist attacks of the last decade have been perpetrated either by religiously motivated groups or terrorists with significant religious dimensions.⁴³ The attacks of September 11, known to be perpetrated by the Islamic fundamentalist group Al-Qaeda, support Hoffman’s theory that terrorist attacks by religiously and politically motivated or based groups are the new adversaries. Audrey Kurth Cronin further supports Hoffman’s thesis, noting that terrorism has become an “unprecedented threat” in large part due to its “radical religiously inspired ideology.”⁴⁴

2. Targets

Many definitions of terrorism include acts that target persons solely in order to influence a larger audience.⁴⁵ The immediate victim of the attack is, therefore, not necessarily the target. Terrorist action ultimately targets, and, therefore, intends to influence governments or large civilian bodies among whom terrorists hope to trigger a reaction⁴⁶ that will bring notoriety to or advance their cause. The immediate victim of the attack is usually not as important as the broader message or effect.⁴⁷ For example, terrorists may hijack an airplane to force the release of imprisoned comrades⁴⁸ or educate the world as to

³⁹ *Id.*

⁴⁰ LAQUEUR, *supra* note 26, at 13.

⁴¹ *Id.* at 29.

⁴² PILLAR, *supra* note 32, at 14.

⁴³ HOFFMAN, *supra* note 18, at 92.

⁴⁴ Cronin, *supra* note 19, at 2.

⁴⁵ Nathanson, *supra* note 38, at 7.

⁴⁶ Cronin, *supra* note 19, at 3.

⁴⁷ JOHN RICHARD THACKRATH, *DICTIONARY OF TERRORISM* 265 (2d ed. 2004).

⁴⁸ Nathanson, *supra* note 38, at 7. For example, in 1985 Lebanese Shi’a terrorists hijacked

their particular oppression⁴⁹ and the inequities of a particular government or social system.

A terrorist's ultimate goal is to bring about ends which will coincide with certain political, ideological, or religious aims. To obtain this end, terrorists use well-planned attacks aimed at only a few to intimidate or coerce a larger target audience. Even action aimed at a particular individual, such as the assassination of former Israeli Prime Minister Yitzhak Rabin by a Jewish religious extremist, Yigal Amir, in 1995, holds true to this pattern. The assassination of Rabin was intended to disrupt the entire Israeli-Palestinian peace process.⁵⁰ Violence and the attention it creates are used to portray a broader message, and the immediate victims are a means to this larger end.

3. Psychological Dimensions

Terrorism is not only about violence but, as Hoffman notes, "is as much about the threat of violence as the violent act itself and, accordingly, is deliberately conceived to have far-reaching psychological repercussions beyond the actual target of the act."⁵¹ Terrorist action is taken against the immediate victim to induce fear and intimidation in the larger population or to change their behavior. Terrorists rely on this resulting vulnerability to influence policy-makers to accede to their demands.

Terrorist actions can have enormous psychological effects on large social populations, forcing them to alter their daily activities, change their perceptions of their security and effectively undermine and delegitimize the societal structure of which they are a part.⁵² These effects were clear immediately after the terrorist attacks of September 11. In the weeks following the attacks, nearly one-third of the world's commercial airplanes were grounded⁵³ because of a lack of flight demand. The simultaneous hijacking of four planes within the United States

TWA flight 847 to demand the release of 776 Shi'a held in Israel.

⁴⁹ *Id.*

⁵⁰ HOFFMAN, *supra* note 18, at 92; see also Ehud Sprinzak, *Extremism and Violence in Israel: The Crisis of Messianic Politics*, 555 ANNALS AM. ACAD. POL. & SOC. SCI. 114, 123-25 (1998) (noting that Amir concluded that Rabin "had to be killed for the peace process to stop").

⁵¹ HOFFMAN, *supra* note 18, at 38.

⁵² John Alan Cohan, *Formulation of State's Response to Terrorism and State-Sponsored Terrorism*, 14 PACE INT'L L. REV. 77, 80 (2002) ("[T]errorists seek a psychological goal: to embitter humanity, to polarize people and society; to pit one national against another; and one group of people against another. Terrorists seek to destabilize world order.").

⁵³ Noteboom, *supra* note 21, at 553.

had left not only American citizens, but also the entire world, questioning the safety of air travel.

II. FIRST RESPONDERS—STATE AND FEDERAL LEGISLATION AFTER 9/11

After the attacks of September 11, state lawmakers across the country drafted more than 1,200 bills sanctioning newly anticipated acts of terrorism, ranging from criminal acts of looting during a terrorist attack to committing acts of terrorism.⁵⁴ Undoubtedly, lawmakers designed such legislation to instill confidence in the country's heightened commitment and proactive approach to defending the United States and curbing terrorist attacks on its soil.⁵⁵ The first state legislation criminalizing terrorism and the federal statute defining domestic terrorism in response to the 9/11 attacks, however, did not entirely rely on the fundamental elements of what constitutes "terrorism" as espoused by several government agencies and scholars, particularly the inherent political, social, or religious motivations of terrorist action.

A. New York—The First State Responder

Less than one week after the terrorist attacks of September 11, New York led the way in drafting state legislative responses to terrorism, enacting Penal Law article 490.⁵⁶ In detailing the elements of the crime of terrorism, the New York legislation relied on the pre-September 11 federal definition of international terrorism in 18 U.S.C. § 2331.⁵⁷ Penal Law article 490 defines an act of terrorism as "an act or acts constituting a specified offense . . . that is intended to: (i) intimidate or coerce a civilian population; (ii) influence the policy of a unit of government by intimidation or coercion; or (iii) affect the conduct of a unit of government by murder, assassination or kidnap-

⁵⁴ *State Lawmakers Draft More than 1,200 Sept. 11-Related Bills*, Apr. 22, 2002, <http://www.firstamendmentcenter.org/news.aspx?id=3988&printer-friendly=y>.

⁵⁵ See generally Blakesley, *supra* note 24, at 1045-46 ("In the face of terrorist attack, especially one as senseless and atrocious as that of September 11, we are tempted to promulgate rules for 'protection' and 'security' . . .").

⁵⁶ N.Y. PENAL LAW § 490.05 (McKinney 2005).

⁵⁷ Richard A. Greenberg & Steven Y. Yurowitz, *Analyzing New York's Anti-Terrorism Statute*, N.Y. L.J., May 13, 2002, at 4. The definition of international terrorism under 18 U.S.C. § 2331 includes criminal acts that "appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States." 18 U.S.C. § 2331 (2000).

ping.”⁵⁸ A “specified offense” under the statute includes class A felony offenses, such as murder, kidnapping, and arson; a violent felony offense; manslaughter in the second degree; criminal tampering in the first degree; identity theft; unlawful possession of personal identification information; money laundering in support of terrorism; and “attempt or conspiracy to commit any such offense.”⁵⁹

As a precursor to the statutory section criminalizing terrorism, New York provides a Legislative Findings section, justifying the enactment of the law based upon the terrorist attacks of September 11, the bombing of the federal building in Oklahoma City in 1995, and other terrorist actions both abroad and in the United States.⁶⁰ The Legislative Findings section concludes:

A comprehensive state law is urgently needed to complement federal laws in the fight against terrorism and to better protect all citizens against terrorist acts. Accordingly, the legislature finds that our laws must be strengthened to ensure that terrorists . . . are prosecuted and punished in state courts with appropriate severity.⁶¹

The law thereby proclaims to enhance public safety through the creation of new criminal offenses and increased penalties.⁶²

In its Legislative Findings section, the New York statute claims that preexisting state laws are not sufficient to address the threat of terrorism, citing in relation to its own state the 1993 bombing of the World Trade Center, the 1997 shooting atop the Empire State Building, and the 1994 murder of Ari Halberstam, a Jewish student, on the Brooklyn Bridge.⁶³ Despite this proclamation, the Findings provide

⁵⁸ N.Y. PENAL LAW § 490.05(1)(a) (McKinney Supp. 2005). A person is guilty of the “Crime of Terrorism,” under § 490.25, when “with intent to—(i) intimidate or coerce a civilian population; (ii) influence the policy of a unit of government by intimidation or coercion, or (iii) affect the conduct of a unit of government by murder, assassination or kidnapping he or she commits a specified offense.” Edgar Morales, a member of the St. James Boys street gang, has been indicted under the New York terrorism statute in connection with the gang-shooting death of a ten-year-old girl and is the first gang member to be indicted under the state’s terrorism statute. *Id.* § 490.25 The charge has sparked disagreement among lawmakers who voted for the legislation, from staunch support (“gangs serve as a forum to promote terrorism”) to sharp criticism. See Maria Castro, *New York Gang Member Faces Trial as Terrorist*, www.infowars.com/articles/ps/gang_member_charged_as_terrorist.htm (last visited Jan. 20, 2006); see also Michelle Garcia, *New York Using Terrorism Law To Prosecute Street Gang; Critics Say Post 9-11 Legislation Is Being Applied Too Broadly*, WASH. POST, Feb. 1, 2005, at A3.

⁵⁹ N.Y. PENAL LAW § 490.05(3)(a).

⁶⁰ *Id.* § 490.00.

⁶¹ *Id.*

⁶² *Id.* § 490.05 note (Legislative Intent).

⁶³ *Id.*

no examples of legislative shortfalls supporting this argument. Each of the above-listed crimes was investigated, prosecuted, and punished on the criminal level.

B. USA PATRIOT Act—The Federal Government

The USA PATRIOT Act was similarly passed in direct response to the terrorist attacks of September 11 and serves as a cornerstone of the federal government's effort to prevent terrorist attacks in the United States, providing for the development of a wide array of investigative tools. Section 802 of the PATRIOT Act defines "domestic terrorism" as activities that:

- (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
- (B) appear to be intended—
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping; and
- (C) occur primarily within the territorial jurisdiction of the United States.⁶⁴

The PATRIOT Act amended 18 U.S.C. § 2331 to include the above definition of "domestic terrorism."⁶⁵ This definition was drawn directly from the preexisting definition of "international terrorism" defined in § 2331 as criminal acts that

appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping, and (C) occur primarily outside the territorial jurisdiction of the United States⁶⁶

The Act does not create a new crime of "domestic terrorism" but has "greatly expanded that class of suspects"⁶⁷ considered terrorists that

⁶⁴ Patriot Act, Pub. L. No. 107-56, § 802(a), 115 Stat. 272, 376 (2001).

⁶⁵ *Id.*

⁶⁶ 18 U.S.C. § 2331 (2005).

⁶⁷ John W. Whitehead, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA PATRIOT Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U.L. REV. 1081, 1092-94 (2002) (noting that the USA PATRIOT Act "has

may be further scrutinized under the sweeping investigative authority of the PATRIOT Act. Critics of the Act, such as the American Civil Liberties Union (ACLU), criticize the definition of domestic terrorism as overly broad, potentially encompassing nonterrorist activities and organizations.⁶⁸ Nadine Strossen, President of the ACLU, proclaims that the “definition of terrorism under the new law is so severely broad that it applies far beyond what most people think of as terrorism.”⁶⁹ The definition, the ACLU argues, “is broad enough to encompass the activities of several prominent activist campaigns and organizations”⁷⁰ such as Greenpeace, Operation Rescue, and World Trade Organization protestors.

The argument charging the PATRIOT Act as overly broad is based in part on the fact that a defendant need not have the actual intent to commit a crime to bring him within the scope of the Act.⁷¹ Rather, a defendant who engages in an act in violation of the criminal laws that is “dangerous to human life” need only commit an act that “appear[s] to be intended” to, for example, “intimidate or coerce a civilian population.”⁷² The lack of actual intent, that an act need only appear to be intended, implies a “subjective standard by which terrorism will be measured.”⁷³ A person’s actual intent to commit an underlying criminal act dangerous to human life is not relevant, rather only how the action is perceived is of importance. For example, Environmental Protection Agency protestors opposing the drilling of oil in Alaska’s national wildlife refuge, who exchange blows with antagonized employees, may be deemed terrorists.⁷⁴ Professor Susan Tiefenbrun notes that, absent a described intent, actions not intended as terrorism could be investigated as terrorism. She argues that “[t]he element of intent should be a necessary requirement in the definition of terror-

greatly expanded the class of suspects” whose activities may be considered terrorism).

⁶⁸ ACLU, *How the USA PATRIOT Act Redefines “Domestic Terrorism,”* Dec. 6, 2002, <http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=11437&c=111> [hereinafter *Redefines Domestic Terrorism*].

⁶⁹ Kelly Patricia O’Meara, *Police State*, INSIGHT ON THE NEWS, Dec 3, 2001, <http://www.insightmag.com/media/paper441/news/2001/12/03/National/Police.State-143236.shtml> (last visited Sept. 20, 2005).

⁷⁰ *Redefines Domestic Terrorism*, *supra* note 68.

⁷¹ See Lindsay Kendrick, *Alienable Rights and Unalienable Wrongs: Fighting the “War on Terror” Through the Fourth Amendment*, 47 HOW. L.J. 989, 1000 (2004) (noting that the definition of terrorism in the USA PATRIOT Act could encompass a wide range of activities).

⁷² Patriot Act, Pub. L. No. 107-56, § 802, 115 Stat. 272, 376 (2001).

⁷³ Kendrick, *supra* note 71, at 1000.

⁷⁴ Cf. Susan Tiefenbrun, *A Semiotic Approach to a Legal Definition of Terrorism*, 9 ILSA J. INT’L & COMP. L. 357, 372-73 (2003) (utilizing a similar example to portray the difficulties with Great Britain’s terrorism legislation because it does not include the element of intent).

ism”⁷⁵ so as not to include justifiable acts of self-defense and to appropriately condemn true acts of terrorism, concluding that one of the basic structural elements of a definition of terrorism must include “the intent to cause violence” or the “wanton disregard for its consequences . . . [or] for the purpose of causing fear, coercing or intimidating an enemy.”⁷⁶ If a definition of terrorism does not include an element of intent then it will encompass an array of additional ordinary activities.

In addition, particular statutory sections of both the New York terrorism statute and the PATRIOT Act do not account for the outlined fundamental aspects of motive, target, and psychological dimensions inherent to terrorist action. Specifically, that portion of each statute that criminalizes acts that “intimidate or coerce a civilian population” does not express the political, religious, or social motives innate to terrorism,⁷⁷ but instead permits any motivation including personal vengeance and pecuniary gain. The PATRIOT Act similarly ignores the fundamental aspects of terrorist action motivated by political, religious, or social goals through its lack of an express intent requirement. Accordingly, there becomes a severe disconnect between the espoused legislative notions of acts rising to the level of terrorism and the common understanding of terrorism.⁷⁸

III. APPLICATION OF OHIO’S TERRORISM STATUTE TO THE *HALDER* CASE

A. *The Terrorism Statute*

Less than two months after the 9/11 attacks, state Republican Senator Robert Spada introduced Senate Bill 184 in the Ohio State Legislature. Governor Robert Taft signed the bill seven months later and touted the legislation as “an important tool for our law enforcement to prosecute individuals who commit acts of terror.”⁷⁹ The law,

⁷⁵ *Id.* at 390.

⁷⁶ *Id.* at 362.

⁷⁷ The other elements of both the New York terrorism statute and the USA PATRIOT Act do not encounter this same disconnect as the actions they detail are expressly tailored to political actions. See Patriot Act § 802 (stating that an action must appear to be intended to “affect the conduct of a government by mass destruction, assassination or kidnapping”); N.Y. PENAL LAW § 490.05(a)(ii) (McKinney Supp. 2005) (requiring that an individual commit a specified offense with the intent to “influence the policy of a unit of government by intimidation or coercion”).

⁷⁸ Popular culture tends to think of terrorism as actions similar to actions like those perpetrated against the United States on September 11, 2001, the World Trade Center bombing in 1993, or the bombing of the U.S.S. Cole in 2000.

⁷⁹ Press Release, Governor Bob Taft, Taft Signs Anti-Terrorism Bill (May 15, 2002), <http://governor.ohio.gov/releases/051502sb184.htm>.

Taft claimed, provides a "clear definition for acts of terrorism"⁸⁰ and raises the penalties for persons convicted of terrorist-related crimes.⁸¹

The Ohio Terrorism Statute, section 2909.24 of the Ohio Revised Code, states, "(A) No person shall commit a specified offense with purpose to do any of the following: (1) Intimidate or coerce a civilian population; (2) Influence the policy of any government by intimidation or coercion; (3) Affect the conduct of any government by the specified offense."⁸²

A "specified offense" under the statute means a felony offense of violence; disrupting public services; contaminating a substance for human consumption, the release of a hazardous substance or the spreading of a false report of contamination or release; or an attempt to commit, complicity in committing, or a conspiracy to commit one of the above-listed offenses.⁸³ The cross-reference to a "felony offense of violence" imports a detailed list of aggravated felonies including murder, manslaughter, assault, abduction, sexual battery, arson, robbery, inducing panic, domestic violence, and a variety of other crimes.⁸⁴ The statute makes a terrorist offense one degree higher⁸⁵ than the most serious underlying offense. If the underlying offense is the felony of first degree murder, the sentence is lengthened to life imprisonment without parole, and if the underlying specified offense is aggravated murder, the offender is to be sentenced to life without parole or the death penalty.⁸⁶ The statute further considers terrorism an aggravating circumstance when determining a death sentence.⁸⁷

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² OHIO REV. CODE ANN. § 2909.24 (LexisNexis 2003).

⁸³ *Id.* § 2909.21(E).

⁸⁴ Legislative Service Commission, Substitute Senate Bill 184 (providing a comprehensive list of qualified specified offenses, including: aggravated murder; murder; voluntary manslaughter; involuntary manslaughter; felonious assault; aggravated assault; assault; permitting child abuse; aggravated menacing; menacing by stalking; menacing; kidnapping; abduction; extortion; rape; sexual battery; gross sexual imposition; aggravated arson; arson; aggravated robbery; robbery; aggravated burglary; inciting to violence; aggravated riot; riot; inducing panic; domestic violence; endangering children in certain circumstances; intimidation; intimidation of an attorney, victim or witness in a criminal case; escape; improperly discharging a firearm at or into a habitation or in a school safety zone; burglary in certain instances; or the former offense of felonious sexual penetration).

⁸⁵ OHIO REV. CODE ANN. § 2909.24. The Ohio system for felony sentencing creates definite prison sentences for five degrees of felonies: between three and ten years for first degree felonies; between two and eight years for second degree felonies; between one and five years for third degree felonies; between six and eighteen months for fourth degree felonies; and between six months and one year for fifth degree felonies. *Id.* § 2929.14(A); see also Burt W. Griffin & Lewis R. Katz, *Sentencing Consistency: Basic Principles Instead of Numerical Grids: The Ohio Plan*, 53 CASE W. RES. L. REV. 1, 4-5 (2002).

⁸⁶ OHIO REV. CODE ANN. § 2909.24.

⁸⁷ National Conference of State Legislatures, *Summaries of Crime-Related Terrorism*

The Ohio terrorism statute is expressly based on the terrorism legislation passed in New York.⁸⁸ Both the Ohio and New York statutes are more narrowly defined than the federal definition of domestic terrorism. The Ohio legislature tightened the culpable state of mind standard required for a terrorism conviction from acts that merely “appear to be intended” under the PATRIOT Act definition to acts committed with “purpose.”⁸⁹ Under the Ohio statute, similar to New York, a prosecutor will be required to affirmatively prove a defendant’s purpose.

B. The Halder Case

To convict Biswanath Halder for the crime of terrorism under Ohio law, the Cuyahoga County prosecutor was required to show that Halder committed a “specified offense” with the “purpose” to “intimidate” or “coerce” a “civilian population.”

In this case, the prosecutor was not relying on those sections of the terrorism statute that deal with a specified offense committed either with purpose to influence the policy of any government by intimidation or coercion or that affect the conduct of any government by the specified offense.⁹⁰ Accordingly, these sections of the Ohio statute are not applicable to the Halder case as argued by the prosecutor and will not be discussed further.⁹¹

The indictment against Halder includes the “specified offense” charges of aggravated murder and kidnapping (one charge for every

State Enactments, <http://www.ncsl.org/programs/cj/02terrorsum.htm> (last visited Sept. 21, 2005).

⁸⁸ Press Release, Governor Bob Taft, Taft Urges Swift Passage of Anti-Terrorism Bills (Oct. 30, 2001), <http://www.governor.ohio.gov/releases/Archive2001/103020019021.htm> [hereinafter Swift Passage]. Though the Ohio legislation is expressly based on its counterpart in New York, the Ohio statute makes one interesting change to the New York statute. Part (iii) of an act of terrorism in New York criminalizes specified offenses intended to “affect the conduct of a unit of government by murder, assassination or kidnapping.” N.Y. PENAL LAW § 490.05 (McKinney Supp. 2005). Ohio’s comparable section is significantly broader, criminalizing specified offenses committed with the purpose to “affect the conduct of any government by the specified offense.” OHIO REV. CODE ANN. § 2909.24 (LexisNexis 2003) (emphasis added). Ohio thereby criminalizes a significantly larger degree of conduct than the New York statute. This issue, however, is beyond the scope of this Note.

⁸⁹ Compare Patriot Act, Pub. L. No. 107-56, § 802, 115 Stat. 272, 376 (2001), with OHIO REV. CODE ANN. § 2909.24 (LexisNexis 2003).

⁹⁰ Telephone Interview with Rick Bell, *supra* note 5.

⁹¹ As noted earlier, these statutory sections do not pose the same problems as that portion of the Ohio statute that requires a purpose “to intimidate or coerce a civilian population” as they are appropriately related to conduct inherent in terrorist action, namely political, religious, or social motivations. See *supra* note 77 and accompanying text.

person in the building that day).⁹² Although the prosecutor had to prove that Halder entered the building with the purpose of committing aggravated murder⁹³ and kidnapping,⁹⁴ he also had to show beyond a reasonable doubt that Halder entered the building with the specific intention⁹⁵ to commit aggravated murder and kidnapping to “intimidate or coerce a civilian population.”

1. Purpose

The Ohio terrorism statute requires the commission of a specified offense with the mens rea of “purpose”⁹⁶ to intimidate or coerce. Section 2901.22 of the Ohio Revised Code provides:

A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.⁹⁷

Purpose requires an express intent either to cause a particular result or to engage in conduct of a certain nature regardless of what the offender intends to accomplish through that conduct. The Ohio code equates conduct committed purposely to conduct committed “intentionally, willfully, or deliberately.”⁹⁸

If the prosecutor is able to prove beyond a reasonable doubt that the defendant committed a specified offense with the above-detailed requisite purpose to intimidate the population, he may be convicted of terrorism whether or not the civilian population was in fact intimidated or coerced. The only element of significance is a defendant’s express purpose in committing the specified offense, not

⁹² Halder Indictment, *supra* note 10. Halder is also charged with attempted murder (one count for each bullet Halder allegedly fired at the scene), aggravated burglary, and unlawful possession of a dangerous ordnance.

⁹³ To show aggravated murder, the prosecution must prove that Halder “purposely, and with prior calculation and design, cause[d] the death of another.” OHIO REV. CODE ANN. § 2903.01 (LexisNexis 2003).

⁹⁴ See OHIO REV. CODE ANN. § 2905.01 (outlining the elements of the offense of kidnapping).

⁹⁵ Ohio defines purpose as “specific intention.” *Id.* § 2901.22.

⁹⁶ *Id.* § 2909.24.

⁹⁷ *Id.* § 2901.22.

⁹⁸ *Id.* cmt. (Committee Comment to H 511 (1974)). As cross-referenced to the terrorism statute in section 2909.24, an “Act of Terrorism” is defined in section 2909.21 as “an act that is committed within or outside the territorial jurisdiction of this state or the United States, that constitutes a specified offense . . . and that is *intended* to do one or more of the following” (emphasis added). Therefore, according to the Ohio Revised Code, “purpose” and “intent” are synonymous. *Id.*

any resulting intimidation or coercion. The prosecutor may not simply point out to the jury that the civilian population was intimidated by parading frightened witnesses across the stand. The prosecutor must prove that the defendant acted with the explicit purpose of causing this intimidation.

2. Intimidate

Section 2909.24 does not define the term “intimidate.” In the provisional Ohio Jury Instructions⁹⁹ relating to terrorism, intimidate means “to frighten, scare or bully.”¹⁰⁰

There is no doubt that Halder’s actions frightened, scared, and bullied those inside the building. Faculty and students used telephones and e-mail throughout the seven-hour siege to contact family and friends, relaying their thoughts and fears.¹⁰¹ As Halder roamed the hallways, shots reverberated through the open building, creating a “complete sense of fear.”¹⁰² Some called the events “mind-numbing” as they agonized over the fate of friends and family trapped inside;¹⁰³ it was “a nightmare for all involved.”¹⁰⁴ Whether this was Halder’s purpose though, remains an open question.

3. Coerce

Similarly, the Ohio terrorism statute provides no definition of “coerce.” Related provisional Ohio Jury Instructions provide that coerce means “to compel or force.”¹⁰⁵ Coercion implies a broader goal than mere intimidation, as coercion attempts to bring about a subsequent change or goal. The proscribed coercion serves as an alternative to

⁹⁹ OHIO JUDICIAL CONFERENCE, JURY INSTRUCTIONS CMTE., OHIO JURY INSTRUCTIONS vii (2005) [hereinafter OHIO JURY INSTRUCTIONS] (“When publishing jury instructions under new legislation that has not been authoritatively interpreted by the Ohio appellate courts, the Committee has designated the instructions as PROVISIONAL. The users of OJI are thereby warned that these instructions are a Committee product that is published to be of assistance to the bench and bar of Ohio, but (of necessity) without specific judicial approval.”); *see also id.* at x (“The committee has no authority that implies approval of the instructions or requires their use.”). Although the OJI instructions on terrorism are not designated as “provisional” they should be read as provisional as the courts have not yet tested the statute.

¹⁰⁰ *Id.* at 378.

¹⁰¹ Breckenridge, *supra* note 1.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Editorial, *Horror and Heroism: As Bad as It Was, Gunman’s Assault on Lewis Building Could Have Been Far Worse Without Swift Police Response*, PLAIN DEALER (Cleveland), May 13, 2003, at B8.

¹⁰⁵ OHIO JURY INSTRUCTIONS, *supra* note 99, at 378.

intimidation in the statute, as an offense must be committed with the purpose to intimidate *or* coerce a civilian population.

Whether Halder possessed the express intent to compel or force a civilian population is also open to discussion. Again, whether Halder's alleged actions actually coerced a population is not relevant, only whether he had that purpose. Given the subsequent change or goal inherent in coercion, the prosecutor must show that Halder's specific intention was to compel or force a civilian population to action or reaction.

4. *Civilian Population*

Section 2909.24 does not define "civilian population," and it is not otherwise defined in the Ohio Revised Code or the applicable Jury Instructions. In the absence of a statutory definition, the Ohio Supreme Court has held that a term "is to be accorded its common, everyday meaning."¹⁰⁶ According to *Merriam-Webster's Collegiate Dictionary*, a population can range from "the whole number of people or inhabitants in a country or region" to "the total of individuals occupying an area," or even "a body of persons or individuals having a quality or characteristic in common."¹⁰⁷ The common, everyday meaning of population may be construed differently given the context of the situation. For example, the Japanese attack on Pearl Harbor and America's subsequent reaction provides a clear illustration of the various understandings of population. The attack by Japanese air forces in Hawaii was felt across the entire population of the United States, for, at that time, an attack of such magnitude had never occurred on America's soil. The assault struck at the core psyche of our country's safety, and the entire country felt its effects. The residents of Hawaii, however, more immediately felt the effects of the attack, as the population of that particular state.¹⁰⁸ More narrowly, the strike was limited to the naval base at Pearl Harbor and the population of the U.S. military. The U.S. response further singled out a particular population based on a common characteristic, namely those of Japanese ancestry. Depending upon one's perceptions of the event, how broadly or narrowly it is viewed, the population affected will change. Therefore, absent clear standards regarding the population to be considered, the civilian population affected under the Ohio

¹⁰⁶ *State v. Dorso*, 446 N.E.2d 449, 451 (1983).

¹⁰⁷ MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 966 (11th ed. 2003).

¹⁰⁸ At the time of the attack at Pearl Harbor, Hawaii was only a territory of the United States and did not receive statehood until August 21, 1959. See Hawaii State Government, A Brief History of Hawaii, <http://www.hawaii.gov/about/history.htm> (last visited Oct. 1, 2005).

terrorism statute may constitute only two people, an entire town, the county, the state, or maybe even the entire country.¹⁰⁹

“Civilian” as it is generally understood means a person “not on active duty in the armed services or not on a police or firefighting force.”¹¹⁰ Given the formulation of Ohio’s terrorism statute, a different understanding of civilian is advanced. The second and third elements of the crime of terrorism in Ohio include purposeful conduct aimed to “influence the policy of any government by intimidation or coercion” and “affect the conduct of any government by the specified offense.” As these sections deal specifically with the government, the statute implies that the catch-all “civilian population” outlined in the first section includes the population of the United States, not including the government. The understanding of civilian is thereby subtly changed from its everyday understanding of persons “not in the armed services or the police force” to persons not in the government. A civilian population of persons not in the government excludes a broader range of persons than those simply not in the armed services or police force.¹¹¹

According to Cuyahoga County Assistant Prosecutor Rick Bell, the ninety-three people trapped inside the Peter B. Lewis Building during Halder’s alleged rampage constituted a civilian population.¹¹² Given that population is not defined in the statute, Bell urges that anything more than two people may constitute the necessary civilian population.¹¹³ Bell has further argued that the intense media scrutiny¹¹⁴ centered on Cleveland during the attack strengthens the notion of intimidation that spread throughout a civilian population.¹¹⁵ And, family and friends of those trapped inside the building may also have been intimidated by Halder’s actions, fearful and frightened for the

¹⁰⁹ This argument was also put forth in the Washington-area sniper case against John Allen Muhammad. See Memorandum in Support of Motion to Dismiss The Indictment Herein Due to Constitutional Failure of the Prosecution for Capital Murder Pursuant to Virginia Code §§ 18.2-18.31(13), and 46.4 ET SEQ. at 11, *Virginia v. Muhammad*, No. 102500 (dismissed Oct. 5, 2004). The constitutionality of Virginia’s terrorism statute is currently under review in the state’s supreme court.

¹¹⁰ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 107, at 226.

¹¹¹ Eric Shimamoto, *Rethinking Hate Crime in the Age of Terror*, 72 UMKC L. REV. 829, 837 (2004) (noting that the USA PATRIOT Act’s definition of domestic terrorism subtly alters the meaning of the phrase “a civilian population” as used in the definition of international terrorism).

¹¹² Telephone Interview with Rick Bell, *supra* note 5.

¹¹³ *Id.* (according to Bell a “population of two is on the low end” of what would constitute a civilian population).

¹¹⁴ Scholars argue that terrorists use violence that will generate media attention through which they can communicate their message to a larger audience. See HOFFMAN, *supra* note 18, at 132 (noting that the “modern news media, as the principal conduit of information about such acts, thus play a vital part in the terrorists’ calculus”).

¹¹⁵ Telephone Interview with Rick Bell, *supra* note 5.

lives of their loved ones as they watched events unfold on the national and local news. However, it is important to remember that though Halder may have *affected* a civilian population, under the Ohio statute, the prosecutor would need prove that Halder's *specific purpose* was to intimidate or coerce a civilian population.

5. Analysis

Assistant Prosecutor Bell has argued that Halder's actions fell squarely within the bounds of Ohio's terrorism statute.¹¹⁶ He has contended that not only did Halder have the requisite purpose to commit aggravated murder, but that it was also his specific intention to "intimidate or coerce a civilian population."¹¹⁷

Halder not only has an educational history with the Case Weatherhead School of Management but also a legal history. Although he completed his master of business administration in 1999, Halder continued to take classes at the university sporadically in order to maintain computer lab privileges.¹¹⁸ He spent the majority of his time working on a personal web site aimed at helping Indian immigrants in the business field.¹¹⁹ On July 13, 2000, Halder charged that a hacker entered his personal web site and deleted files.¹²⁰ One month earlier, Halder alleged that someone entered the web site, posting an anonymous, mocking e-mail stating "Bizzy [short for Biswanath] Halder is a moron."¹²¹ Halder blamed university computer lab employee, Shawn Miller,¹²² for sabotaging his web site¹²³ and filed a lawsuit against Miller seeking \$25,000 in damages for intentional infliction of

¹¹⁶ *Id.*

¹¹⁷ OHIO REV. CODE § 2909.24 (LexisNexis 2003).

¹¹⁸ Scott Hiaasen & John Mangels, *Loner's Rage Burned After Ruin of Web Site*, PLAIN DEALER (Cleveland), May 11, 2002, at A1.

¹¹⁹ James F. McCarty, *All Signs There for an Attack: Psychologist*, PLAIN DEALER (Cleveland), May 12, 2003 at A2.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Though not injured in the attack, Shawn Miller was in the building at the time of the attack. See Mike Tobin & Scott Hiaasen, *CWRU Suspect a Reclusive, Quirky Figure*, PLAIN DEALER (Cleveland), May 18, 2003, at A1.

¹²³ Hiaasen, *supra* note 1.

emotional distress.¹²⁴ Miller was found not liable on all charges¹²⁵ and continues to deny any involvement in defacing Halder's web site.¹²⁶

Subsequently, Halder took his complaints regarding Miller to the university administration, the city of Cleveland police department, the mayor of Cleveland, the Federal Bureau of Investigation, and even to Congress, inundating each with letters seeking legal action.¹²⁷ Halder's appeal of his civil suit against Miller was denied just two weeks before the shooting.

Given this complicated history, Bell has argued that Halder's motive was not simply revenge upon Miller, but to make a statement against the university administration and the city of Cleveland for their lack of action in resolving his legal claims.¹²⁸ Thus, Bell has reasoned that Halder's motive was not merely vengeful because of several inflammatory comments Halder made in letters to city officials. In 2001, Halder wrote to then-Mayor Michael White: "if the unholy trio of an incompetent police department, a perfect idiot mayor, and a felon clerk of the council continue to rule Cleveland, very dark days are ahead for Clevelanders."¹²⁹ When his pleas went unnoticed, Halder wrote to Cuyahoga County Common Pleas Judge John Sutula (who sat in the civil suit Halder filed against Miller), stating that "[t]he end result of all of these outright evil actions will be that society will end up paying a severe price."¹³⁰

Based on statements like those above and Halder's use of the relevant chain of command in trying to resolve his claims (working through the university administration, local police, city officials, the courts, and finally, federal officials),¹³¹ Bell has argued that Halder's purpose was to force the university to more appropriately address his legal claims,¹³² that is, intimidate and coerce the university and its administration to action. Thus, Bell has reasoned that Halder possessed both the purpose to intimidate and coerce a civilian population

¹²⁴ Docket, Halder v. Miller, No. CV-01-441308 (May 2003) [hereinafter Halder Docket], available at <http://cpdocket.cuyahoga.oh.us/cjisjs/servlet/cjis.urd/run/cmsw101>.

¹²⁵ During the trial, Miller obtained an injunction against Halder, requiring that Halder remove all references to Miller on his web site, including but not limited to copies of any letters or statements accusing Miller of illegally accessing Halder's web site or Unix Shell Account. Furthermore, Halder was enjoined from publication of any written or oral communications accusing Miller of tampering with, or otherwise accessing his web site. See Halder Docket, *supra* note 124.

¹²⁶ Tobin & Hiaasen, *supra* note 122.

¹²⁷ McCarty, *supra* note 119; see also Hiaasen, *supra* note 1.

¹²⁸ Telephone Interview with Rick Bell, *supra* note 5.

¹²⁹ Hiaasen & Mangels, *supra* note 118.

¹³⁰ *Id.*

¹³¹ Telephone Interview with Rick Bell, *supra* note 5.

¹³² *Id.*

in committing the qualifying specified offenses of aggravated murder and kidnapping.¹³³

Considering Halder's history with Shawn Miller, the question remains as to whether Halder possessed the requisite purpose under the statute. Halder arguably harbored significant anger against Miller, whom he blamed for the destruction of his personal web files and the posting of mocking messages on his web site. According to neighbors and associates, Halder's personal web site was his life.¹³⁴ He spent hours each day working on his web site, writing about his passions, and posting them for others to read.¹³⁵ Halder was arguably distressed and angered by Miller's alleged actions and the ability of Miller to escape justice for the destruction of his life's work, as evidenced by his continued complaints to police¹³⁶ and his attempt to appeal the trial court decision in his civil suit. Miller was in the building, hiding in a locked basement office¹³⁷ at the time Halder stalked through the business school. The door behind which Miller was hiding was sprayed with bullets and, while he was hiding, someone, presumably Halder, tried to enter.¹³⁸ Arguably, this shows that Halder did not seek to make a larger statement against the university's administration, but sought Miller, the man he had pursued legally for years, as a target to revenge the destruction of his life's work.¹³⁹ Miller himself even questioned if the gunman could be Halder, wondering, "what if it *was* him?" while he waited to be rescued.¹⁴⁰

If Halder's actions were motivated only by revenge against Miller, his actions would not rise to the level of terrorism under the Ohio statute because Halder would lack the required purpose to intimidate a civilian population. Even if his acts were acts of retaliation or revenge against the university administration or the entire Case community, it does not mean that Halder had the expectation of causing change or any purpose of creating fear as such. Halder's behavior, without an express purpose to cause intimidation or coercion in a ci-

¹³³ *Id.*

¹³⁴ Hiaasen & Mangels, *supra* note 118.

¹³⁵ *Id.*

¹³⁶ See Tobin & Hiaasen, *supra* note 122.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Several newspaper articles indicate that police believed Halder's grievance with the school inspired the alleged shooting. *E.g.*, Hiaasen & Mangels, *supra* note 118 (reporting that "Cleveland police believe that the feud [between Halder and Miller] was the reason he stormed into the Lewis building"). If Halder's alleged actions were revenge motivated, they should not rise to the level of terrorism as understood by the basic components of what action constitutes terrorism.

¹⁴⁰ Hiaasen & Mangels, *supra* note 118.

vilian population, does not translate into terrorist action under the Ohio statute.

To convict Halder of terrorism, Assistant Prosecutor Bell would have had to establish that Halder's specific intention was not revenge, but to cause intimidation and coercion within a civilian population and that he carried out aggravated murder and kidnapping for that end. Considering evidence of Halder's prior letters to police and other officials, a jury could have conceivably found that Halder possessed this intent. If this is the case, are Biswanath Halder's actions what the Ohio Legislature truly had in mind when it passed its terrorism legislation?

IV. LEGISLATIVE INTENT

A. What Was the Legislative Intent Behind the Passage of Ohio's Terrorism Statute?

Legislative intent is to be ascertained from a consideration of all the terms and provisions of the act. When a statute is ambiguous, the court may attempt to discern intent by considering "among other matters: (A) The object sought to be attained; (B) The circumstances under which the statute was enacted; (C) The legislative history; (D) the common law or former statutory provisions . . . ; (E) The consequences of a particular construction; [and] (F) The administrative construction of the statute."¹⁴¹ Further, it is presumed that the statute is intended to be effective and have a "just and reasonable" result.¹⁴² Although several Senate and House hearings were held regarding the proposed terrorism bill, there was little discussion or commentary on its purpose.¹⁴³

When introducing the legislation shortly after the September 11 attacks, Senator Spada stated, "We need to do everything possible that we can to prevent things from happening and to swiftly and severely punish those who are perpetrating these acts."¹⁴⁴ Governor

¹⁴¹ OHIO REV. CODE ANN. § 1.49 (LexisNexis 2003).

¹⁴² *Id.* § 1.47(B)-(C).

¹⁴³ See generally *Create Offense of Terrorism and Declare Emergency: Hearing on SB184 Before the S. Judiciary on Criminal Justice*, 124th General Assembly (Ohio 2001-2002), available at <http://www.ohcapcon.com/ipc/ipc1.htm?hannah/hanmenu.htm> (on file with Case Western Reserve Law Review). This Note examined hearings from Oct. 31, 2001; Nov. 15, 2001; Nov. 29, 2001; Jan. 9, 2002; Jan. 16, 2002; Jan. 23, 2002; Feb. 5, 2002; and Feb. 26, 2002.

¹⁴⁴ *Taft Urges Quick Passage of Anti-Terror Bills*, Hannah Report (Oct. 30, 2001), available at <http://www.ohcapcon.com/ipc/ipc1.htm?hannah/hanmenu.htm> (on file with Case Western Reserve Law Review). Although Senator Spada sought legislation that more "swiftly" punished those committing terrorist acts, the Ohio terrorism statute provides no authority for hurried investigation, prosecution or punishment authority.

Taft, speaking in support of the legislation, noted that the legislation was intended to update Ohio's laws to address acts of terrorism and safeguard Ohioans "[i]n the wake of further terrorist attacks on our country."¹⁴⁵

Throughout the review process, little disagreement or concern was raised regarding the legislation's enactment. Republican Representative Bill Seitz voiced his unease about the potential for peaceful protests and boycotts intended to "'coerce' the government to take an action, or desist from one" to be prosecutable under the bill.¹⁴⁶ John Murphy, of the Prosecuting Attorney's Association, stated that "the bill is certainly not intended to apply to peaceful protests" and that penalties attach only once a specified offense is committed.¹⁴⁷ As enacted, however, EPA demonstrators protesting oil drilling in Alaska who are drawn into a brawl may still be considered terrorists.

Little additional insight is provided regarding the statute's aims. Given the circumstances under which the statute was enacted (in direct response to 9/11) and Senator Spada's purpose of eliminating of "these acts,"¹⁴⁸ arguably the statute is directed at the prevention of terrorist attacks like those perpetrated by Al-Qaeda on September 11. Reading the terrorism bill in accordance with section 1.49 of the Ohio Revised Code, the statute's purpose appears to be to proscribe domestic terrorist action against the United States similar to the September 11 attacks. Indeed, New York's legislative findings expressly notes that New York's terrorism statute, on which Ohio's is based, is meant to address additional terrorist threats such as the bombing of Pan Am Flight 103 over Lockerbie, Scotland in 1988, the bombings of the World Trade Center in New York in 1993, and the bombing of the Alfred P. Murrah Federal Building in Oklahoma City in 1995.¹⁴⁹

The circumstances under which the Ohio statute was enacted, the statute's desired objective, and the legislative history surrounding it suggest that the legislature's intent was to aptly punish and potentially deter terrorist attacks and violence perpetrated against civilians in the service of some greater political, social, or religious purpose, such as

¹⁴⁵ Swift Passage, *supra* note 88; see also OFFICE OF HOMELAND SECURITY, STATE AND LOCAL ACTIONS FOR HOMELAND SECURITY 81 (2002), available at http://www.ncs.gov/library/policy_docs/State_and_Local_Actions_for_Homeland_Security.pdf (stating that Governor Bob Taft signed Senate Bill 184 "[a]s a response to the September 11th terrorist attacks").

¹⁴⁶ *Committee Activity 124-SB184 House Criminal Justice*, Hannah Report (Feb. 19, 2002), available at <http://www.ohcapcon.com/ipc/ipc1.htm?/hannah/hanmenu.htm> (on file with Case Western Reserve Law Review).

¹⁴⁷ *Id.*

¹⁴⁸ Taft Urges Quick Passage of Anti-Terror Bills, *supra* note 144.

¹⁴⁹ N.Y. PENAL LAW § 490.05 (McKinney Supp. 2005) note (Legislative Intent).

the events of September 11. Arguably, the Ohio legislature was more concerned with terrorist activities similar to those of Al-Qaeda than it was with the alleged criminal actions of Biswanath Halder, who may be adequately prosecuted under preexisting criminal statutes for kidnapping and aggravated murder. In its discussions regarding the bill's introduction and enactment, neither Senator Spada nor Governor Taft related their respective purposes of punishing and deterring more of "these acts"¹⁵⁰ to vengeful murder scenarios or even criminal hostage situations. They considered the statute in its relation to the events of September 11, criminalizing terrorism with a larger aim.

B. The Difference Between the Crime of Terrorism and Ordinary Criminal Activity

There is a critical distinction between terrorism as a crime and so-called ordinary criminal action. The development of state programs to combat the threat of terrorism effectively blurs the lines existing between the understanding of terrorism and common crimes. Although there has been a convergence of terrorism with historically common crimes,¹⁵¹ there remains an essential difference between terrorists and common criminals.

Terrorism as a crime is fundamentally different from criminal activity in its values and the danger it poses to society, the government, and public order.¹⁵² In arguing that terrorism is fundamentally different from ordinary criminal activity in its aims, Paul Pillar argues that "[t]errorists' concerns are macroconcerns about changing a larger order; [while] other violent criminals are focused on the microlevel of pecuniary gain and personal relationships."¹⁵³ Terrorists, Pillar argues, always claim to be serving a greater cause, while common criminals are motivated by personal desires and associations.¹⁵⁴

Halder's alleged actions were, arguably, motivated by revenge against the single individual whom he was convinced sabotaged his personal work, against whom he had exhausted all legal avenues, and who was in the building the day he entered. Even if Halder sought revenge against the administration of the university or the university itself, arguably his actions were motivated exclusively by revenge for

¹⁵⁰ Taft Urges Quick Passage of Anti-Terror Bills, *supra* note 144.

¹⁵¹ See LAQUEUR, *supra* note 26, at 225-26 (noting that the narcotics trade has become one of the main sources of income for terrorist networks and that this money "has enabled the terrorist groups to acquire sophisticated weapons and to engage in costly operations which otherwise would not have been possible").

¹⁵² GANOR, *supra* note 23, at 3.

¹⁵³ PILLAR, *supra* note 32, at 14.

¹⁵⁴ *Id.*

the administration's inaction against Miller. In writing about the actions of Washington-area snipers, John Allen Muhammad and Lee Boyd Malvo, Mark Allenbaugh argues that "there is an enormous difference between criminals who 'terrorize' and 'terrorists.'"¹⁵⁵ Criminals, he argues, act in response to "ego . . . , delusions . . . , or other malignant, but personal, reasons" while terrorists' aims are "motivated by some political end or belief."¹⁵⁶ Actions taken in revenge for personal motives do not rise to the level of terrorism and should not be charged as terrorist action.

There is no indication, based on legislative history or the circumstances under which the statute was enacted, that the Ohio legislature intended to criminalize action committed with the purpose to intimidate or coerce based upon personal motivations. Halder's motivations, if based on personal revenge against Miller or the university would, according to Pillar, qualify as a microlevel concern. Therefore, the intent of the legislature is not reflected by his prosecution under the state's terrorism statute.

Further, there is no additional incentive for the Ohio legislature to create a penalty-enhancing criminal scheme against persons motivated by personal relationships. Criminal activity based on purely personal motivations constitutes more common criminal action that is already criminalized based on ordinary criminal statute sanctions. "Violent crimes are terrible. But they are not always terrorism. It's important that we remember the distinction."¹⁵⁷

V. INAPPROPRIATE FOUNDATION

The state terrorism legislation enacted in both New York and Ohio relied upon the federal definition of "international terrorism" found in 18 U.S.C. § 2331. Using this definition as a foundation, both New York and Ohio made as elements of their respective crimes of "terrorism" those same elements that constitute the federal definition of international terrorism.¹⁵⁸

¹⁵⁵ Mark H. Allenbaugh, *The Sniper Defendants: The Race To Prosecute First*, <http://edition.cnn.com/2002/LAW/11/01/findlaw.analysis.allenbaugh.sniper/> (last visited Oct. 2, 2005).

¹⁵⁶ *Id.*

¹⁵⁷ Elaine Cassel, *Are There Grounds for Reversing D.C.-Sniper's Guilty Verdict?*, CNN.COM, Nov. 24, 2003, <http://www.cnn.com/2003/LAW/11/24/findlaw.analysis.cassel.sniper.appeal/index.html>.

¹⁵⁸ The State of Ohio made slight changes to its definition as noted earlier by including a mens rea requirement and altering the third element of the definition from those actions that appear to be intended to "affect the conduct of a government by mass destruction, assassination or kidnapping" to those actions committed with the purpose to "affect the conduct of any government by the specified offense." See *supra* notes 88-89 and accompanying text. Again, Ohio

Despite its location within the federal criminal code, § 2331's definition of "international terrorism" (and "domestic terrorism" as later added by the USA PATRIOT Act) does not serve as the elements of a criminal offense.¹⁵⁹ The definitions of international and domestic terrorism in § 2331 are simply incorporated into a wide variety of other statutory provisions throughout the code that individually proscribe particular activity (e.g., possession, use, and transfer of biological agents and toxins¹⁶⁰) or provide legal remedies (e.g., determining civil liability for acts of international terrorism against nationals of the United States¹⁶¹). The federal definitions of international and domestic terrorism were not intended to outline the elements of proscribed criminal activity but merely to classify or categorize specific conduct already criminalized by federal and state statutes.¹⁶² Section 2331's categorization of specific conduct as domestic terrorism is primarily for jurisdictional purposes relative to the authority to investigate and prosecute certain types of this conduct.¹⁶³

In creating state sanctions for terrorist activity, several state legislatures¹⁶⁴ have, therefore, mistakenly relied upon a broad definition of

thereby criminalizes a significantly larger degree of conduct than conduct included in the definition of "international terrorism." New York's statute is functionally similar to that of the definition on which it is based, changing only "mass destruction" in the definition to "murder" in its crime of terrorism. See *supra* notes 57-58 and accompanying text.

¹⁵⁹Nicholas J. Perry, *The Numerous Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 257-59 (2004); see also Letter from Thomas E. Getz, Assistant U.S. Attorney, U.S. Department of Justice, to Tasia E. McIntyre (Mar. 22, 2005) (on file with author). Several law review articles mistakenly and summarily determine that "domestic terrorism" as defined in the USA PATRIOT Act has created a corresponding crime of domestic terrorism. See David Lombard Harrison, *The USA PATRIOT Act: A New Way of Thinking, an Old Way of Reacting, Higher Education Responds*, 5 N.C. J.L. & TECH. 177, 206 (2004) ("The PATRIOT Act has also created a new crime of 'domestic terrorism.'"); Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767, 789 (2002) ("[The USA PATRIOT Act] creates a number of new, often vaguely defined crimes. One of the most dangerous to domestic dissenters is the new crime of 'domestic terrorism.'"); Steven A. Osher, *Privacy, Computers and the Patriot Act: The Fourth Amendment Isn't Dead, but No One Will Insure It*, 54 FLA. L. REV. 521, 540 (2002) (claiming that the USA PATRIOT Act "also creates the new crime of 'domestic terrorism'"); Phillip A. Thomas, *Emergency and Anti-Terrorist Power: 9/11 USA and UK*, 26 FORDHAM INT'L L.J. 1193, 1212 (2003) (stating that under the USA PATRIOT Act "Americans engaged in civil disobedience or other forms of civil protest might be charged with 'domestic terrorism'"); Jennifer M. Hannigan, Comment, *Playing Patriot Games: National Security Challenges Civil Liberties*, 41 HOUS. L. REV. 1371, 1380 (2004) (stating that the USA PATRIOT Act modifies the United States Code to create "an expansively defined federal crime of 'domestic terrorism'").

¹⁶⁰ 42 U.S.C.A. § 262(a)(e)(3)(B)(ii)(III) (West Supp. 2003).

¹⁶¹ 18 U.S.C. § 2333 (2000).

¹⁶² Letter from Thomas E. Getz to Tasia E. McIntyre, *supra* note 159.

¹⁶³ *Id.*

¹⁶⁴ At least nineteen state legislatures have used language such as "to intimidate" or "to coerce" a civilian population in creating criminal sanctions for terrorist acts, including Alabama, ALA. CODE § 13A-10-151 (Supp. 2004); Arkansas, ARK. CODE ANN. § 5-54-201 (Supp. 2005);

terrorism that was not intended to outline the elements of criminal activity. In so doing, these state legislatures have criminalized an expansive array of activity that steps beyond the foundational elements inherent in terrorist action. Specifically, state statutes that proscribe acts intended "to intimidate or coerce a civilian population" are subject to constitutional arguments charging them as void for vagueness. Furthermore, such state statutes are likely to encounter procedural application problems and do not otherwise appropriately address the threat of terrorism.

VI. VOID FOR VAGUENESS?

Generally, an act of the state legislature is entitled to a strong presumption of constitutionality.¹⁶⁵ A statute may be considered impermissibly vague if it fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly.¹⁶⁶ Further, a statute may be vague if it lacks minimal legislative guidelines and permits arbitrary or discriminatory enforcement.¹⁶⁷ Consequently, the Ohio terrorism statute may be void for vagueness and challengeable under both the federal and state constitutions on the ground that the statutory language is impermissibly vague.

The Ohio terrorism statute rests on enumerated crimes that are clearly prohibited conduct. To be charged and convicted of terrorism, a defendant must further commit one of these enumerated "specified offenses" with the "purpose to intimidate or coerce a civilian population." The statute does not provide any definitional clarity or enforcement standards as to what constitutes a civilian population. A

Connecticut, CONN. GEN. STAT. ANN. § 53a-300 (West Supp. 2005); District of Columbia, D.C. CODE ANN. § 22-3152 (LexisNexis Supp. 2005); Florida, FLA. STAT. ANN. § 775.30 (West 2005); Georgia, GA. CODE ANN. § 16-4-10 (2003); Iowa, IOWA CODE ANN. § 708A.1 (West 2003); Louisiana, LA. REV. STAT. ANN. § 14:128.1 (2004); Michigan, MICH. COMP. LAWS ANN. § 750.543b (West 2004); Minnesota, MINN. STAT. ANN. § 609.714 (West 2003); New York, N.Y. PENAL LAW § 490.05 (McKinney Supp. 2005); Ohio, OHIO REV. CODE ANN. § 2909.24 (LexisNexis 2004); Oklahoma, OKL. STAT. ANN. Tit. 21, § 1268.1 (West 2002); South Carolina, S.C. CODE ANN. § 16-23-710 (2003); South Dakota, S.D. CODIFIED LAWS § 22-8-12 (Supp. 2003); Tennessee, TENN. CODE ANN. § 39-13-803 (West 2003); Utah, UTAH CODE ANN. § 76-5-107 (2003); Virginia, VA. CODE ANN. § 18.2-46.4 (2004); and West Virginia, W. VA. CODE ANN. § 29B-1-4 (LexisNexis Supp. 2005).

¹⁶⁵ See *ex rel. Jackman v. Ct. of C.P.*, 224 N.E.2d 906, 908-09 (1967) ("When an enactment of the General Assembly is challenged, the challenger must overcome a strong presumption of constitutionality."); see also Michael L. Stokes, *Judicial Restraint and the Presumption of Constitutionality*, 35 U. TOL. L. REV. 347 (2003) (discussing the history of and basis for the presumption of constitutionality within the State of Ohio).

¹⁶⁶ *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

¹⁶⁷ *Id.*

man of ordinary intelligence will have to guess at the statute's meaning, as it is ambiguous and fails to give fair and adequate warning of the conduct proscribed. A defendant is unable to gauge his conduct against an established standard and, therefore, is not effectively on notice of what conduct is criminalized. A defendant who commits a specified offense with the purpose to intimidate has no criterion against which to judge whether those persons he intends to intimidate will constitute a civilian population under the statute.

The statute's ambiguity is apparent when one recognizes the many scenarios through which the unsuspecting may commit the crime of terrorism. As noted earlier in Part II.B, EPA protestors drawn into a brawl who thereby commit assault with the purpose to intimidate oil workers may be charged as terrorists. Ohio State football fans rioting after a defeat by Michigan surely have the intent of intimidating their opponents. Therefore, the fans may effectively be charged and convicted of terrorism, according to the Ohio statute (they have committed the specified offense of "rioting" and have the specific intention of intimidating the civilian population of the Michigan football team). The ordinary individual who commits a specified offense is not effectively on notice of whether his conduct will rise to the level of terrorism or whether he will be charged with terrorism given the vague, indefinite, uncertain, and overbroad language of the Ohio terrorism statute.

The statute is not automatically insulated from a vagueness argument simply because the statute has an express mens rea requirement.¹⁶⁸ Even a mens rea requirement of specific intent, as in the Ohio terrorism statute, does not guarantee that the defendant is on notice that his conduct constitutes a crime.¹⁶⁹ For example, Right to Life protestors blocking an entrance to an abortion clinic who commit assault with the purpose to intimidate a single woman as she walks into the clinic have no standard against which to judge whether this woman will constitute a civilian population and therefore have no effective notice of whether their protest amounts to terrorism. Certainly, the protestors have committed a wrong in the first instance by their assault, but should they be subjected to heightened sentencing measures without notice of whether their conduct is proscribed under the terrorism statute?

¹⁶⁸ Robert Batey, *Vagueness and the Construction of Criminal Statutes – Balancing Acts*, 5 VA. J. SOC. POL'Y & L. 1, 7 (1997) ("[T]he notion that a mens rea requirement can insulate a statute from a vagueness challenge" is an "anomaly.").

¹⁶⁹ *Id.* ("[E]ven that the defendant specifically intended to do the conduct prohibited by the statute, would give no guarantee that the defendant had fair warning that the conduct was a crime.").

The Ohio legislature acted with undue haste in passing the state's terrorism statute to placate the public demand for a proactive counter-terrorism approach, and they did not act with the necessary deliberation. The manifest lack of legislative intent and commentary on this important legislation speaks to the brevity of the consideration that the wording and terminology of the statute received. Such an extraordinarily broad definition of terrorism has the potential to encompass a breadth of activity that may lead to terrorism prosecutions against persons whose alleged criminal conduct has nothing at all to do with terrorism.¹⁷⁰

VII. PROCEDURAL PROBLEMS

A. Potential Anomalous Application

The higher mental culpability standard of the Ohio statute has, interestingly, created a certain anomaly in the statute's application within the state. Throughout the early fall of 2003, commuters living near the Ohio capital city of Columbus were terrified to drive to work as a result of a number of random highway shootings south of the city. For months, an unknown assailant shot at abandoned cars, commuting cars, houses, and a school in the area surrounding the city.¹⁷¹ On November 25, 2003, Gail Knisley was killed while riding as a passenger in a car traveling on I-270 when she was shot from a highway overpass.¹⁷² Police realized that they were dealing with a serial-sniper when they were able to link several previous shootings to the same gun that killed Knisley. After one death and more than twenty-four reported incidents over eight months¹⁷³ the police arrested Charles McCoy.¹⁷⁴ McCoy faces a twenty-four-count indictment¹⁷⁵ for charges on twelve incidents of shootings linked by ballistic evi-

¹⁷⁰ New York ACLU, *Legislative Memo: Anti-Terrorism Preparedness Act of 2004*, http://www.nyclu.org/leg_m15a_2004.html (last visited Oct. 1, 2005).

¹⁷¹ Bruce Cadwallader & Dean Narciso, *Woman Shot to Death on I-270*, COLUMBUS DISPATCH, Nov. 26, 2003, at A1.

¹⁷² *Id.*

¹⁷³ John Futtly, *A Year of Fear: Area Where Sniper Fired First Returns to Normal*, COLUMBUS DISPATCH, May 10, 2004, at A1.

¹⁷⁴ Bruce Cadwallader & John Futtly, *End of the Line: Highway Sniper Suspect Caught: Court Appearance Friday*, COLUMBUS DISPATCH, Mar. 18, 2004, at A1.

¹⁷⁵ Indictment of Charles Allen McCoy, Jr., Ohio v. Charles Allen McCoy, Jr., No. 04CR-2195 (2004), available at <http://www.co.franklin.oh.us/prosecutingattorney/content/pdf/2635march30.pdf>. Specifically, McCoy is charged with felonious assault (nine counts), attempted murder (eight counts), vandalism (two counts), improperly discharging a firearm into a habitation or into a school safety zone (three counts), aggravated murder (one count), and murder (one count).

dence.¹⁷⁶ Despite the nature of his alleged attack, McCoy has not been charged with terrorism.

At first blush, the McCoy case appears strikingly similar to the actions of the Washington-area sniper John Allen Mohammad. Mohammad was convicted of terrorism in a Prince Williams County (Virginia) Court¹⁷⁷ for intentionally instilling fear throughout Washington, D.C., Virginia, and Maryland as he and accomplice Lee Boyd Malvo, drove through suburban neighborhoods shooting civilians.¹⁷⁸ In its prosecution for terrorism,¹⁷⁹ the state called a host of witnesses to the stand to portray the fear felt throughout the Washington, D.C. community.¹⁸⁰ The highway sniper shootings in the metropolitan area of Columbus had a similar effect. Commuters altered their regular routes¹⁸¹ around the state capital to avoid the southern outer belt where a majority of the shootings occurred,¹⁸² and businesses in the area suffered from a loss of patrons.¹⁸³

If McCoy's actions are functionally similar to those of Mohammed, why then is McCoy not charged with terrorism? Under the Virginia Code, an "act of terrorism" is defined as an act of violence committed with the intent "to intimidate the civilian population at large; or influence the conduct or activities of the government of the United States, a state or locality through intimidation."¹⁸⁴ This language is functionally similar to the language employed in the Ohio statute, and each requires the commission of a specified offense or act of violence with the intent (or purpose) to intimidate a civilian population. The actions of both McCoy and Mohammad are also strikingly

¹⁷⁶ Bruce Cadwallader & Encarnacion Pyle, *Prosecutor Seeks Death for McCoy*, COLUMBUS DISPATCH, Apr. 2, 2004, at A1.

¹⁷⁷ See Tom Jackman, *Sniper Makes Appeal to Va. Supreme Court*, WASHINGTON POST, July 21, 2004, at B1.

¹⁷⁸ John Allen Muhammad and Lee Boyd Malvo were charged in thirteen sniper shootings that killed ten people and lasted more than three weeks within Maryland, Virginia, and Washington, D.C. See Neely Tucker & Serge F. Kovaleski, *With Each New Killing A Stronger Dose of Terror*, WASHINGTON POST, Oct. 25, 2002, at A9.

¹⁷⁹ VA. CODE ANN. § 18.2-46.4 (2004) defines terrorism as "an act of violence as defined in clause (i) of subdivision A of § 19.2-297.1 committed with the intent to (1) intimidate the civilian population at large; or (2) influence the conduct or activities of the government of the United States, a state or locality through intimidation."

¹⁸⁰ See Jackman, *supra* note 177 (noting that prosecutors argued "that the fear inflicted by the random attacks and the snipers' demand for \$10 million payment to stop the shootings fulfilled both prongs of the law").

¹⁸¹ Darrel Rowland, *Highway Shootings Worry Area Residents More than Possibility of Terrorism, Poll Finds*, COLUMBUS DISPATCH, Dec. 14, 2003, at A1.

¹⁸² John Futtly, *Serial Sniper Investigation: Driver Handled Situation Well After Gunshot, Authorities Say*, COLUMBUS DISPATCH, Jan. 16, 2004, at C1.

¹⁸³ Futtly, *supra* note 173.

¹⁸⁴ VA. CODE ANN. § 18.2-46.4.

similar, random, sniper-like shootings over an extended period of time.

McCoy, however, has not been charged with terrorism because of the Ohio statute's narrowly tailored mens rea requirement of purpose. Although McCoy's actions may more readily equate to what would be considered terrorism and what the Virginia courts indicated is terrorism in that state, Franklin County, Ohio prosecutors have likely determined that they are unable to meet the mens rea requirement of purpose in charging McCoy.¹⁸⁵ Though McCoy terrorized the city of Columbus with random sniper shootings over a period of eight months, prosecutors feel they are unable to prove that this was McCoy's purpose. The Ohio terrorism statute is being employed against Halder, whose actions may more commonly be considered a revenge-motivated killing and not against McCoy, who terrorized the Columbus area and whose crime is strikingly similar to the actions of convicted Virginian terrorist John Allen Mohammad.

B. Unfettered Prosecutorial Discretion

The overly broad and vague terminology in the Ohio terrorism statute encounters a second potential problem in its application—the inherent prosecutorial discretion accompanying such broad language. A statute runs the risk of being void if it is written in such a manner as to permit or encourage arbitrary or discriminatory enforcement¹⁸⁶ because of unclear standards against which it is to be applied. A statute will likely fall prey to arbitrary enforcement by prosecutors if it lacks minimal enforcement guidelines.

Prosecutors have wide discretion in deciding who to charge and how to charge criminal defendants;¹⁸⁷ these charging decisions are seldom subject to review.¹⁸⁸ A prosecutor's leeway is readily apparent in connection with a statute such as the Ohio terrorism statute, under which not only can the prosecutor choose to charge the defendant

¹⁸⁵ Telephone Interview with Rick Bell, *supra* note 5. A mistrial was subsequently declared in McCoy's trial in Columbus, Ohio after jurors deadlocked on whether McCoy was not guilty by reason of insanity or guilty. It has not yet been determined whether or not Franklin County prosecutors will retry McCoy. See Bruce Cadwallader, *Four Jurors Were Sold on McCoy's Insanity: Deadlock Didn't Vary During Deliberations*, COLUMBUS DISPATCH, May 10, 2005, at A1.

¹⁸⁶ *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (noting that a criminal law may be invalidated for vagueness if it "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement").

¹⁸⁷ See Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 736-37 (1996) (noting that prosecutors are given great discretion for most tasks).

¹⁸⁸ Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1518 (2000).

with a single offense, but he can choose to charge two offenses: the underlying specified offense (i.e., aggravated murder) and the terrorism offense.¹⁸⁹

The vague and overly broad language of the Ohio statute further expands the already enormous control that prosecutors exercise over charging, plea bargaining, and sentencing.¹⁹⁰ By leaving particular terms undefined, a defendant has no standards against which to evaluate his conduct and a prosecutor likewise has no guidelines to follow in charging. The legislature has effectively deferred to the prosecutor to define what criminal conduct will rise to the level of terrorism,¹⁹¹ thus enhancing his discretionary power. Accordingly, though the legislature has outlined the criminal activity, “[i]n practice, the legislature has abdicated much of its authority to the prosecutor,”¹⁹² making the prosecutor the true crime enforcement policy-maker.¹⁹³ Such a scheme persists, Professor William Stuntz argues, because both legislatures and prosecutors benefit from broad crime schemes: legislatures are able to placate public demand for harsh treatment of criminals, and prosecutors may more easily prosecute crime under vaguely defined statutes that inherently provide broader prosecutorial discretion.¹⁹⁴ This broad legislative action and subsequent prosecutorial discretion, Stuntz notes, leads to an inconsistent application of the criminal law between what is written and intended in the code and what is applied on the street, denying defendants due notice of what action is proscribed.¹⁹⁵ If inherent prosecutorial discretion leads to inconsistent application of the criminal law, the law is effectively applied in an arbitrary and discriminatory fashion.

¹⁸⁹ C.f. David Goldberger, *Symposium Essay: The Inherent Unfairness of Hate Crime Statutes*, 41 HARV. J. ON LEGIS. 449, 455-56 (2004) (arguing that hate crime legislation gives prosecutor discretion to charge defendant with underlying offense and the hate crime).

¹⁹⁰ C.f. *id.* at 463 (arguing that hate crimes expand prosecutors' role over every stage of criminal prosecution, including sentencing).

¹⁹¹ See Misner, *supra* note 187, at 742; see also William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 578 (2001) (claiming that prosecutors “are the [criminal justice] system’s real lawmakers”).

¹⁹² Misner, *supra* note 187, at 743.

¹⁹³ *Id.* at 744.

¹⁹⁴ Stuntz, *supra* note 191, at 506, 523-40. Despite the discussed potential for such broad prosecutorial discretion to enhance arbitrary and discriminatory enforcement, supporters of prosecutorial discretion argue that this discretion is necessary for prosecutors to appropriately apply the criminal law. See Amie N. Ely, Note, *Prosecutorial Discretion as an Ethical Necessity: The Ashcroft Memorandum’s Curtailment of the Prosecutor’s Duty to “Seek Justice,”* 90 CORNELL L. REV. 237, 277 (2004) (“[P]rosecutors [in the context of federal charges] are uniquely situated to ‘seek justice’ as a result of their familiarity with the circumstances of each individual case. Constraints on prosecutorial discretion will ultimately deny individualized justice and hinder the prosecutor from pursuing ethical norms which require her to ‘seek justice’”).

¹⁹⁵ Stuntz, *supra* note 191, at 519-23.

Although the Ohio statute has an express intent requirement raising the level of proof required by the prosecutor, this alone will not likely deter arbitrary and discriminatory enforcement¹⁹⁶ because of the variety of conduct caught within the purview of the statute's broad language. As the understanding of "civilian population" in the statute remains undefined, a prosecutor may still bring terrorism charges and sweep an enormity of conduct within the statute's breadth that has nothing at all to do with terrorism. For example, a child is kidnapped from a home and the kidnappers indicate that the child will not be returned until ransom is paid. Clearly the specified offense of kidnapping has been committed, and the defendant has expressed his coercive intent by his unwillingness to return the child until the ransom demand is met. Will the family of the kidnapped child constitute a civilian population? Under the breadth of the Ohio statute the prosecutor could charge the kidnapper as a terrorist, though this is no more than an "ordinary" kidnapping that has no political, social, or religious motivations.

In addition, considering the current age of heightened sensitivity to terrorist action, other important yet irrational factors may play into a prosecutor's decision of whether or not to charge an alleged criminal with terrorism. Despite the government's assurance of continued neutrality and defense of Muslims and Arabs within the United States,¹⁹⁷ recent legislative and practical efforts continue to target this population, such as racial profiling at airports,¹⁹⁸ mandatory immigration registration of aliens from majority Muslim countries,¹⁹⁹ and mass

¹⁹⁶ But see Batey, *supra* note 168, at 7-8 (arguing that the express intent requirement might make the statute stronger because of the harder level of proof for the prosecutor, thereby deterring arbitrary or discriminatory enforcement).

¹⁹⁷ The USA PATRIOT Act takes great care to condemn discrimination against Arab and Muslim Americans within section 102, yet it has had and continues to have a devastating impact on the actual freedom of U.S. Muslims. See PATRIOT Act, Pub. L. No. 107-56, § 102, 115 Stat. 272, 276-77 (2001) (condemning acts of violence against Arab and Muslim Americans and emphasizing their entitlement to full rights); see also Leila Nadya Sadat, *Do All Arabs Really Look Alike? Prejudice and the US "War" on Terror*, 50 WAYNE L. REV. 69, 73 (2004) (arguing that despite neutral rhetoric, the government appears "prepared to take uncharacteristically draconian measures towards Muslims and Arabs").

¹⁹⁸ See Ellen Baker, *Flying While Arab – Racial Profiling and Air Travel Security*, 67 J. AIR L. & COM. 1375 (2002) (examining the issue of profiling Arabs and Muslims in airline security); Sherri Sharma, *Beyond "Driving While Black" and "Flying While Brown": Using Intersectionality to Uncover the Gendered Aspects of Racial Profiling*, 12 COLUM. J. GENDER & L. 275, 295-300 (2003) (highlighting the increase in racial and ethnic profiling, since 9/11, towards both Arab and Muslim men and women); Charu A. Chandrasekhar, Note, *Flying While Brown: Federal Civil Rights Remedies to Post-9/11 Airline Racial Profiling of South Asians*, 10 ASIAN L.J. 215 (2003) (discussing airline profiling of South Asians, specifically South Asian Muslims).

¹⁹⁹ Special registration subjects the nationals of predominately Arab and Muslim countries to additional immigration screening and registration requirements. See U.S. Immigration and Customs Enforcement, Immigration Special Registration, <http://www.ice.gov/graphics/special>

preventative detentions immediately after the September 11 attacks.²⁰⁰ State legislation aimed at targeting terrorism may fall prey to the same biases—targeting Arab and Muslim minorities in the hopes of deterring terrorism or placating public demand for greater punishments. The American public and policy-makers continually connect America's new terrorist threat to the Middle East and broadly to Muslims in general.²⁰¹ Professor Ileana Porras argues that public perception in the United States views “Islamic Fundamentalists’ as terrorist fanatics” and that “[t]he image of terrorists as Arabic fanatics is ubiquitous in the media.”²⁰² Western governments further judge Arabs and the actions of Muslims with distrust²⁰³ and the notion of “Mideast Terrorism” has arguably become synonymous with “Islamic Terrorism.”²⁰⁴ Given this heightened sense of discriminatory enforcement against Arab nationals and American Muslims since the September 11 attacks, the combination of overly broad language and unfettered prosecutorial discretion may combine to place a discriminatory burden on Arab Americans, presuming criminality and charging terrorism because of race, nationality, or religious beliefs.

VIII. DOES THE STATE CRIMINALIZATION OF TERRORISM EFFECTIVELY ADDRESS THE THREAT OF TERRORISM?

The attacks of September 11 took the American public by surprise and the nation quickly learned that there was much more the government could have done to protect us. But does state terrorism legislation truly address the threat that so many Americans feared after September 11? How does sentence-enhancing legislation at the state level serve as a greater deterrent by providing increased penalties for already criminalized acts? Will Ohio's terrorism statute serve as an effective deterrent to terrorist crime or does the statute represent nothing more than symbolic legislation and political pandering enacted for

registration/index.htm (last visited Oct. 1, 2005).

²⁰⁰ See David Cole, *Security and Freedom – Are the Governments' Efforts to Deal With Terrorism Violative of Our Freedoms?*, 29 CAN.-U.S. L.J. 339, 340-41 (2003) (claiming that “in the first seven weeks [after September 11], 1200 people were locked up” and were primarily Arab and Muslim nationals).

²⁰¹ See Ileana M. Porras, *On Terrorism: Reflections on Violence and the Outlaw*, 1994 UTAH L. REV. 119, 134 (1994) (noting American images of terrorism center on Islamic fundamentalists, and perhaps, even extends to Muslims more broadly).

²⁰² *Id.*

²⁰³ Tariq A. Shah, *Islam, Muslims and Terrorism: Secret Evidence and Guilt by Association*, 10 MSU-DCL J. INT'L. L. 589, 596 (2001).

²⁰⁴ Fawaz A. Gerges, *Islam and Muslims in the Mind of America*, 588 ANNALS AM. ACAD. POL. & SOC. SCI. 73, 81 (2003) (citing Anthony Lewis, *This Is America*, N.Y. TIMES, May 1, 1995).

the goal of appeasing the public who cried for protection after September 11?

Proponents of state terrorism legislation will argue that, although federal law exists to curb the incidence of terrorism, there were historically no state laws to facilitate the prosecution and punishment of terrorists in state courts.²⁰⁵ State laws, proponents reason, are needed to complement federal laws to better protect citizens against terrorist attacks.

The intentions of the legislature are clearly well-placed in attempting to prevent terrorism and more harshly punish its perpetrators. However, it is unlikely that Ohio's terrorism statute will have such an effect. It does not seem plausible that an increased penalty based on this overarching purpose to intimidate a population will at all deter someone willing to commit aggravated murder.²⁰⁶ A terrorist who truly believes that he is acting for some higher cause, such as a perceived religious righteousness or to free himself from oppression, is not likely to base his decision of whether or not to commit a crime on the notion that his purpose in committing a felony will subject him to the death penalty rather than life in prison. If terrorism statutes are unlikely to have any deterrent effect, they serve no purpose other than to send a symbolic message to placate public fears.²⁰⁷

In considering the impact of the Ohio terrorism statute on local criminal caseloads, the Ohio General Assembly raised some significant points, citing three primary reasons why the statute will have little to no effect on the local caseload population:

First, the particular conduct incorporated into the definitions of these terrorism related offenses involves, in most instances, activities that already rise to the level of felonies under current law. This means that, if these acts were to be committed in the future absent the bill's terrorism provisions, these would still be acts for which individuals can be arrested, prosecuted, and sanctioned.

²⁰⁵ See, e.g., N.Y. PENAL LAW § 490.05 (McKinney Supp. 2005) note (Legislative Intent) (pointing out the gap in state law).

²⁰⁶ C.f. Brian S. MacNamara, *New York's Hate Crimes Act of 2000: Problematic and Redundant Legislation Aimed at Subjective Motivation*, 66 ALB. L. REV. 519, 531 (2003) (arguing that sentencing-enhancing structures of state hate-crime legislation will likely have no deterrent effect on persons committing hate crimes).

²⁰⁷ Although one may argue that terrorism enhancements may have the effect of incapacitation or a retributive basis, it is important to remember that each of these crimes is previously criminalized and would not otherwise go unpunished.

Second, acts of terrorism and support for terrorism, as defined in the bill, have historically been very rare in the State of Ohio.

Third, should acts of terrorism as defined in the bill occur, it is most likely that the federal government would take the lead in such matters under its terrorism laws and assume the associated investigative, prosecutorial, adjudicatory, and sanctioning costs.²⁰⁸

Without doing so deliberately, the General Assembly has effectively questioned the purpose, validity, and deterrent effect of Ohio's terrorism statute. The commission of a "specified offense" means that the proscribed action would not otherwise have gone uninvestigated, unprosecuted, or unpunished. Further, the General Assembly notes that acts of terrorism within the state "have historically been very rare."²⁰⁹ It can certainly be conceded that the crimes of aggravated murder and kidnapping have not been comparatively "very rare" in the state of Ohio, even in the context of hostage situations. The General Assembly, it appears, would not itself even consider these more ordinary criminal activities, for which Halder is charged, as "acts of terrorism" under the statute. In addition, when and if a genuine act of terrorism does occur within the state, it will likely be preempted and effectively investigated, prosecuted, and sanctioned by the federal government. Accordingly, if Ohio's terrorism statute has no deterrent effect and criminalizes actions punishable under the preexisting criminal law and handled under the federal criminal law, then in effect the terrorism legislation serves no purpose.

Even further than its immediate inability to deter terrorist behavior, state statutes criminalizing terrorism may effectively undermine the country's counterterrorist policy. Laura Donohue argues that state laws undermine the ability of and need for the federal government to "enforce a unified counterterrorist policy," eventually confusing the effectiveness and legitimacy of federal counterterrorism policy.²¹⁰ The advent of terrorist legislation in each of the fifty states will likely create at least fifty competing definitions of what constitutes terrorism, not including the several definitions that already exist in the fed-

²⁰⁸ Fiscal Note and Local Impact Statement, 124th General Assembly of Ohio (Mar. 20, 2002), available at <http://www.lbo.state.oh.us/fiscal/fiscalnotes/124ga/SB0184EN.HTM>.

²⁰⁹ *Id.*

²¹⁰ Laura K. Donohue & Juliette N. Kayyem, *The Rise of Counterterrorist States* 13 (Feb. 2001) (John F. Kennedy School of Law, Harvard University, BCSIA Discussion Paper 2001-1), http://bcsia.ksg.harvard.edu/BCSIA_content/documents/Rise_of_Counterterrorist_States.pdf.

eral government.²¹¹ These multiple legal definitions may result in “overlap, confusion, and ambiguity”²¹² not only for citizens trying to determine what acts constitute terrorism and the application of each statute²¹³ but also in the application of a cohesive antiterrorism policy.

Already there is discussion that prosecutions at the federal level of international terrorist offenses since September 2001 are plagued with unclear standards in classifying terrorist offenses.²¹⁴ Nora Demleitner argues that the increased application of international terrorist statutes may enhance public insecurity in safety and create unnecessary alarm over ordinary criminal activity.²¹⁵ Although Demleitner focuses on increased prosecutions of international terrorism, arguably this problem will be amplified by additional prosecutions under state terrorism statutes. Further, the General Accounting Office has recently determined, in commenting on the variety of federal definitions of terrorism, that “the potential exists for an uncoordinated approach to combating terrorism caused by duplication in efforts or gaps in coverage, misallocation of resources, and inadequate monitoring of expenditures.”²¹⁶ A unified definition of what constitutes terrorism,²¹⁷ between both federal and state authorities, will provide a more coherent approach to combating terrorism in the United States, effectively eliminate inconsistency between state and federal prosecutions and understandings of terrorism, provide improved notice to defendants, and enhance public security.

IX. RECOMMENDATIONS AND CONCLUSION

Over the past few years, state legislatures have hurriedly enacted terrorism legislation aimed at preventing terrorism and prosecuting terrorists who threaten homeland security. The motivation has been primarily political—to placate public demand after the government’s failure to ascertain the threat of terrorism against the United States prior to September 11, and there has been little public dissent.²¹⁸

²¹¹ Twenty-two different definitions of terrorism currently exist in the federal government. Perry, *supra* note 159, at 273.

²¹² Noteboom, *supra* note 21, at 568.

²¹³ *See id.*

²¹⁴ Nora V. Demleitner, *How Many Terrorists Are There? The Escalation in So-Called Terrorism Prosecutions*, 16 FED. SENT’G REP. 38, 38 (2003).

²¹⁵ *Id.* at 42.

²¹⁶ Perry, *supra* note 159, at 273 (quoting *Combating Terrorism: Observations on National Strategies Related to Terrorism: Testimony Before House Subcomm. on Nat’l Sec., Emerging Threats, and Int’l Relations of the House Comm. on Gov’t Reform*, 108th Cong. 7 (2003) (statement of Raymond J. Decker, Director, Defense Capabilities and Management)).

²¹⁷ *See id.* at 272-74 (discussing the benefits and drawbacks of a unified definition of terrorism).

²¹⁸ For example, there was little dissent or discourse prior to the passage of the USA

On first review, state criminal sanction may appear to be a sufficient deterrent and effective means of combating and punishing terrorism. The threat of terrorism arises on all levels and is certainly not limited to attacks the size of those that occurred on September 11. As a symbol of the current political climate, state terrorism legislation may make sense, but as a method of preventing terrorism, protecting the public, or punishing terrorists, state terrorism statutes are less than ideal. These statutes may be seen as a classic example of “symbolic politics,”²¹⁹ satisfying the public’s need for reassurance rather than offering a tangible or pragmatic mechanism to respond to the threat of terrorism in the United States.²²⁰

That portion of the Ohio statute that considers it a crime of terrorism to commit a “specified offense” with the “purpose to intimidate or coerce a civilian population” raises constitutional concerns as a result of its vague terminology and potential for arbitrary and selective enforcement. Further, as evidenced by the *Halder* case, the Ohio terrorism statute captures within its breadth actions not commonly understood as terrorism and serves no effective purpose in deterring terrorist action. The legislation serves only as a sentence-enhancing statute, further criminalizing more ordinary criminal activity already effectively deterred and penalized by preexisting statutes proscribing the underlying behavior.

While this Note argues that a cohesive federal approach to defining and combating terrorism is more appropriate and will result in a fairer, unified application of counterterrorist policy, state-sponsored terrorism statutes are likely to flourish. With more than thirty-three states²²¹ currently using legislation to criminalize terrorism and related acts within their borders, we must determine the appropriate boundaries for state terrorism legislation in implementing an effective

PATRIOT Act, despite later ruminations that the Act was hurriedly passed. See William Crotty, *On the Home Front: Institutional Mobilization to Fight the Threat of International Terrorism*, in *THE POLITICS OF TERROR* 191, 198 (William Crotty ed., 2004) (arguing that “[f]ew in Congress argued for restraint, a reasoned approach, a better understanding of the threat to national security, or the most productive ways to handle such an uncertain venture”).

²¹⁹ Murray Edelman coined the term “symbolic politics” in the 1960’s, arguing that the public views political activity in symbolic terms, distinguishing between political legislative activity that “produces tangible benefits and activity that conveys only symbolic reassurances.” See Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1247-54 (2000) (discussing hate crime legislation as “symbolic politics”); see generally Patricia Ewick & Austin Sarat, *Hidden in Plain View: Murray Edelman in the Law and Society Tradition*, 29 LAW & SOC. INQUIRY 439 (2004) (reviewing Edelman’s work on social life and politics and his contributions to law and sociological studies).

²²⁰ Beale, *supra* note 219 at 1248.

²²¹ National Conference of State Legislatures, *supra* note 25.

counterterrorism approach. To that end, the state of Ohio and future state enactments should clarify statutory language, review alternative measures passed in other states, and limit prosecutorial discretion in charging terrorism.

A. Eliminate or Clarify Language: "To Intimidate or Coerce A Civilian Population"

In comparing similar state legislative responses to terrorism, it is apparent that clearly defined language is necessary to detail those actions rising to the level of terrorism and those that do not. Other state statutes enacted after September 11 have been drafted with significantly greater specificity than Ohio's, more aptly detailing what action will be considered terrorism.

If Ohio is determined to rectify its terrorism legislation, the statute's language should be altered. Specifically, the statute should either eliminate entirely or significantly clarify that portion of the statute that requires a "specified offense" to be committed with the purpose to "intimidate or coerce the civilian population." As earlier discussed, this language poses significant constitutional concern and procedural problems, and it fails to adequately address or prevent the threat of terrorism as required by the legislative intent. In addition, this portion of the Ohio statute and those of similar state statutes do not equate to elements inherent in terrorist action and, therefore, encompasses a broad array of activity that may be in no way related to terrorism.

If the state of Ohio chooses to maintain this portion of its terrorism legislation, the term "civilian population" must be defined to include, at minimum, a particular number of individuals.²²² Further, the statute must relate this activity to motives inherent to the definition of terrorism: violence perpetrated for larger political, social, or religious aims. As currently written, the Ohio terrorism statute subjects a common criminal who commits a specified offense for personal gain or vengeance to prosecution as a terrorist, bringing within its purview more ordinary criminal actions. Accordingly, that portion of the statute that punishes a defendant for actions committed with the purpose "to intimidate or coerce a civilian population" by itself, without a determination of appropriate motives or a clear understanding of what consti-

²²² This approach has been taken by the State of New Jersey in its terrorism legislation, requiring that a specified offense be committed with the purpose "to terrorize five or more persons." N.J. STAT. ANN. § 2C:38-2 (West 2004). An analysis of the benefits of this approach is provided below. See *infra* Part IX.B.

tutes a civilian population, is overly broad and vague and necessitates revision.

B. Consider Alternatives Provided By Other States

Statutes passed in New Jersey and Oklahoma serve as examples of state terrorism legislation with potentially effective alternatives to the language employed in the Ohio legislation. Although not faultless, these statutes provide additional options that forthcoming state statutes may consider to avoid the vague terminology employed by Ohio's terrorism legislation.

Specifically, New Jersey Statute Annotated 2C:38-2 claims that a person is guilty of terrorism if he commits or attempts, conspires or threatens to commit (a specified offense) with the purpose:

- (1) to promote an act of terror; or
- (2) to terrorize five or more persons; or
- (3) to influence the policy or affect the conduct of government by terror; or
- (4) to cause by an act of terror the impairment or interruption of public communications, public transportation, public or private buildings, common carriers, public utilities or other public services.²²³

"Terror" is defined within the statute as "the menace or fear of death or serious bodily injury"²²⁴ and terrorism "convey[s] the menace or fear of death or serious bodily injury by words or actions."²²⁵ This statutory scheme improves notice of the proscribed criminal activity by specifically defining core terms and requiring that "five or more persons"²²⁶ be terrorized for an action to rise to the level of terrorism. Further, the statute criminalizes specific actions: the impairment or interruption of public communications, transportation, buildings, common carriers, public utilities, or other public services. Such detail will provide defendants with the notice they require to determine whether their actions will rise to the level of terrorism.

The State of Oklahoma defines terrorism as

an act of violence resulting in damage to property or personal injury perpetrated to coerce a civilian population or government into granting illegal political or economic

²²³ N.J. STAT. ANN. § 2C:38-2.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

demands; or conduct intended to incite violence in order to create apprehension of bodily injury or damage to property in order to coerce a civilian population or government into granting illegal political or economic demands. Peaceful picketing or boycotts and other nonviolent action shall not be considered terrorism.²²⁷

While the statute maintains the broad language of “civilian population,” it succeeds in considerably strengthening other portions of its statute. An act of violence must result in damage to property or personal injury, a more measurable standard as compared to the subjective concept of intimidation under the Ohio statute. Further, the statute requires coercion for specific ends, namely “illegal political or economic demands,” instituting the foundational elements of terrorist action into the crime. The Oklahoma statute additionally provides detailed examples of action it is not meant to encompass, such as “peaceful picketing, . . . boycotts, . . . [or] other nonviolent action.”²²⁸

C. Limit Prosecutorial Discretion

Enacting guidelines that will reduce prosecutorial discretion in charging a defendant with terrorism will help to limit the negative effects of overcharging and the potential for discriminatory charging. Although application of the criminal law requires the use of judgment,²²⁹ the creation of specific policies, mandated training, consultation, and supervision of discretionary choices²³⁰ will help to avoid inefficient and discriminatory application of the criminal law.

The New Jersey terrorism statute addresses this issue by placing restrictions on a prosecutor’s discretionary charging decision. In New Jersey, a county prosecutor or assistant prosecutor must obtain prior approval “expressly authorized in writing by the Attorney General”²³¹ before a defendant is charged with terrorism. This effective check and balance system will limit that prosecutorial discretion inherent in Ohio’s terrorism statute. The Attorney General, against whom a prosecutor must first defend his decision to charge terrorism, will effectively serve to consult with and supervise the discretionary decisions of local prosecutors.

²²⁷ OKLA. STAT. ANN. tit. 21, § 1268.1 (West 2002).

²²⁸ *Id.*

²²⁹ Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 306-07 (2001) (explaining why criminal law cannot be applied mechanically).

²³⁰ *Id.* at 307 (concluding that prosecutorial offices require “specific policies of discretion, and mandate[d] training, consultation, supervision and review of discretionary choices”).

²³¹ N.J. STAT. ANN. § 2C:38-2.

The significant potential for selective prosecution and disparate treatment of Arab Americans and Muslims under the broad language of the Ohio statute, and similar state statutes, requires oversight of prosecutorial discretion when charging terrorism. In addition to immediate supervisory oversight, prosecutors should be subject to strict orientation programs, training, and stringent office policies on charging.²³² "While strict rules designed to meet every conceivable situation would be impossible, detailed outlines, explicit hypotheticals, and mechanisms for accountability are feasible and needed."²³³

D. Conclusion

That portion of the Ohio statute criminalizing actions committed with the purpose "to intimidate or coerce a civilian population" is flawed in both its drafting and its application. Following the lead of New York, the Ohio legislature has created an overly broad statute that potentially subjects a host of ordinary criminals to enhanced prison sentences and additional public stigmatization as a terrorist.

As evidenced by the *Halder* case, the Ohio statute does not serve the legislative purpose for which it was enacted. Furthermore, it is being employed against ordinary criminal activity in the absence of intimidation or coercion for the specific ends inherent in terrorist action, namely political, social, or religious goals. In addition, the statute raises significant questions regarding its constitutionally vague language and its potentially arbitrary and discriminatory enforcement. Finally, even though deterrence is one of the fundamental aims of the criminal law, the Ohio terrorism statute provides no realistic deterrent effect of preventing terrorism within the state or the nation, despite its sentence enhancing scheme.

Although a single, unified definition of terrorism and a federal-only approach to controlling terrorism may be more effective, state statutes are likely to prosper in the coming years. To avoid continuing the anomalous application of the statute within the state, the Ohio legislature should undertake an initiative to amend the statute's overly broad language, incorporate specific aims inherent in terrorist action, and limit the statute's inherent prosecutorial discretion.

Providing additional law enforcement capabilities in the deterrence and punishment of terrorist activities is certainly a necessary step in protecting the United States and each individual state from the threat

²³² See Griffin, *supra* note 229, at 293-95 (discussing how to develop individual prosecutorial discretion).

²³³ *Id.* at 262 (quoting Comment, *Justice Department's Prosecution Guidelines of Little Value to State and Local Prosecutors*, 72 J. CRIM. L. & CRIMINOLOGY 955, 961 (1981)).

or commission of terrorist actions. However, it is important to truly address the existing threat rather than only enact hurriedly passed symbolic legislation designed solely to placate the public. Current state terrorism statutes should be reassessed to conform with a cohesive federal counterterrorist policy and appropriately define, address, and punish only genuine terrorist threats. States considering the toughening of their criminal laws should take into considerations the flaws of their predecessors and consider alternative measures.

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