Ohio's Statutory and Common Law History with Terrorism: A Study in Domestic Terrorism Law

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"Any government which cannot protect its people from violence and terrorism is a government in name only." 1

I. INTRODUCTION

In 2004, Ohio district attorneys sat uniquely poised to prosecute two high-profile murder cases under the state's new anti-terrorism legislation. Both cases had garnered national attention and potentially provided an opportunity for lawmakers, judges, prosecutors, and defense counselors nationwide to witness a rare and virtually simultaneous application of domestic terrorism law in two unrelated crimes. Cuyahoga County prosecutors were the first to file terrorism charges under Ohio's new law, indicting Biswanath Halder for his deadly rampage through Case Western Reserve University's Peter B. Lewis Building on May 9, 2003. 2 Halder surrendered to Cleveland police after firing hundreds of rounds in a seven-hour "cat-and-mouse" standoff through the building's serpentine halls. 3 His 338-count indictment included murder, attempted murder, kidnapping, and terrorism and offered Ohio prosecutors their first run at a domestic terrorism conviction. 4


Halder, 62, faces a range of charges, including aggravated murder, kidnapping—282 counts, two for every hostage—and even terrorism. The indictment includes 36 counts of attempted murder—one count, Prosecutor Bill Mason said, for each bullet Halder is accused of firing at 24 police officers and six civilians during the seven-hour standoff inside the building's undulating walls. Halder is subject to the death penalty under several legal theories, Mason said, including the state's terrorism law, enacted in May 2002 in response to the Sept. 11, 2001, terrorist attacks.
But within several months, Ohio had a second potential “terrorist” on its hands. From October 2003 until he was apprehended in March 2004, Charles McCoy waged a “terrorizing” sniper attack on I-270 in Franklin County, shooting randomly at motorists and killing a woman. His five-month shooting spree along the Columbus-area highway eerily echoed the attacks staged by the Washington, D.C. “Beltway Snipers,” John Allen Muhammed and John Lee Malvo, in 2002. As one news report explained, in response to McCoy’s attacks “[s]chools canceled recess, parents kept their children indoors, people changed their routes to work, and central Ohio became national news as the shootings continued . . . .” Despite the terrifying effect of his assault, when county prosecutors finally brought charges against McCoy, terrorism was not on their list. Instead, McCoy faced “charges of aggravated murder, murder, felonious assault, vandalism and improper discharge of a firearm.” Ultimately, after his death-penalty proceedings ended in a mistrial, McCoy pleaded guilty to involuntary manslaughter and ten other related charges and was sentenced to twenty-seven years in prison.

These cases present what may seem to be an odd, legal twist. After all, McCoy, whose crimes were strikingly similar to other acts of domestic terrorism in both nature and effect, was not prosecuted for terrorism under the state’s new law. Halder, on the other hand, whose crimes though deadly and tragic, arguably resembled a man “going postal” more than a hardened terrorist, was charged with terrorism. Why? The

The law toughens penalties for criminals who “intimidate or coerce a civilian population.” Halder is the first person in Ohio charged under this law, Mason said.

Id.; see also Jim Nichols, Shooting Defendant Ruled Competent: Man to be Tried for Case Incident, THE PLAIN DEALER (Cleveland), Apr. 20, 2005, at B1.

5. See Bruce Cadwallader, McCoy Tearfully Takes Blame; Victim’s Family, Friends Aren’t Forgiving as Shooter Begins 27-year Prison Term, COLUMBUS DISPATCH, Aug. 10, 2005, at 1A (“The central Ohio shooter who terrorized motorists for months sobbed in court yesterday as he apologized for killing a woman and for instilling fear in local drivers.”).

6. See Josh White & Tom Jackman, Sentences Not End of Sniper Cases; No Consensus on 2nd Trials, WASH. POST, Mar. 7, 2004, at C01 (reporting that John Allen Muhammad and Lee Boyd Malvo, were “charged with 10 slayings in the Washington region” and “sentenced in separate Virginia courtrooms for committing terrorism and murder”).

7. Bruce Cadwallader, Selection of Jury Begins in Sniper Case, COLUMBUS DISPATCH, Apr. 8, 2005, at 01B.

8. Id.


10. See Carol Morello & Jamie Stockwell, No Attacks, No Arrests, No Shortage Of Anxiety; Area Faces New Week Under the Sniper’s Gun, WASH. POST, Oct. 14, 2002, at A01 (discussing the Beltway Sniper killings); see also Peter Whoriskey, Home Depot Slaying Defies All Theories; Shooting Spreads Fear to Fairfax, WASH. POST, Oct. 16, 2002, at B01.

11. Wikipedia has defined the phrase as follows:

Going postal is an American English slang term, used as a verb meaning to commit murder, mass murder or a killing spree in the workplace, generally by a current or former employee. The term derives from a series of incidents from 1986 onwards in which United States Postal Service (USPS) workers shot and killed managers, fellow workers, and members of the police or general public.

On August 20, 1986, 14 employees were killed at the Edmond, Oklahoma, Post Office by postman Patrick Sherrill, who then committed suicide, bringing the total to 15 dead. Between 1986 and 1997, more than 40 people were killed in more than 20 incidents. Following this series of events, the idiom has entered into common usage, and is applied to murders committed by employees in the workplace, irrespective of the employer; and occasionally more loosely to describe killings in the workplace other than by employees in situations in which the motive is not commonplace.
answer is not straightforward and likely involves any number of variables in a legal calculus that includes the crimes' evidence, legal strategies, the prosecutors and their individual and political discretion, as well as the respective defendants and their motives. But a common denominator in both cases, of course, was Ohio's anti-terrorism statute. The state conceivably could have held two domestic terrorism trials simultaneously. It didn't; that is the important point.

Indeed, as this article was going to press, Cuyahoga County Common Pleas Judge Peggy Foley Jones dismissed the terrorism charge against Biswanath Halder. At the conclusion of the evidence, Judge Jones ruled that "the attack against a 'small, random' group of people in the business school building did not constitute a terrorist attack as defined by Ohio law."12 The jury subsequently convicted Halder of all 196 charges remaining against him at trial.13 Thus, although the state has prosecuted its first case under the new law, Ohio has yet to convict its first "terrorist."

But rather than attempt to distinguish Biswanath Halder and Charles McCoy, or to explain why Halder stood trial for terrorism while McCoy was not even charged, this article highlights these cases to demonstrate the ambiguities of state terrorism law and the inherent difficulty in defining domestic terrorism. That the Halder and McCoy cases could play out as they have suggests that Ohio's anti-terrorism statute is open to interpretation. Too open, some might say. As such, the statute will undoubtedly be applied (or not applied) variously by county prosecutors and district attorneys across the state and may require extensive court and jury interpretation—though as Judge Jones' ruling suggests, perhaps not too extensive. This article offers an "interpretive tool" and historical context for courts and theorists to employ in those efforts and in assessing any future crimes of terrorism.

Section II briefly sketches the ongoing and especially difficult task of defining "terrorism." Section III examines Ohio's current anti-terrorism statute, focusing on the prosecution's burden and the components of the newly defined crime. Section IV then looks to Ohio's earlier statutory and common law treatment of "terrorism," with Section V noting some of the state's other uses of both "terrorism" and "terror." Section VI concludes. It is worth emphasizing upfront that the article does not offer its own definition of terrorism, nor does it advocate adopting any one particular or set of definitions. Rather, it denotes some of the similarities and subtle differences between the state's current statutory scheme and its former statutory and common law understandings of "terror" in order to provide a historical context through which to interpret Ohio's most recent anti-terrorism provisions. Looking at how earlier state legislatures, courts, and juries used and understood these interrelated words may illuminate their current meaning and advance future legislative efforts to address our evolving notions of terrorism.

The significance of this approach transcends Ohio law. Any state prosecuting terrorism or struggling to interpret the latent ambiguities within its own terrorism laws

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should find it useful to explore its earlier statutory uses, judicial interpretations, and common law understandings. As will hopefully become clear, these histories are likely to reveal a slow evolution of “terror” and “terrorism” and the meanings legislatures, judges, and juries ascribed to them. Those meanings, while not dispositive for our contemporary understanding, may help to explain or give context to the most recent legislative initiatives. Ohio is one of dozens of states with its own anti-terrorism statutes enacted after September 11. Its language models other federal and state terrorism laws and is not peculiar to Ohio. As such, this article takes up Ohio’s law as a viable case study for the application and interpretation of the nation’s domestic terrorism law. Thus, lessons gleaned from this interpretive method, namely, studying prior statutory and common law history with “terrorism,” can be readily and similarly applied in almost any other state in the Union.

II. THE PROBLEM OF THE PROBLEM OF DEFINITIONS

Scholars and lawmakers have long-struggled to find a workable definition of terrorism, some going so far as to compare the search for a single definition to the mythical quest for the Holy Grail. The desire and attempts to define terrorism, particularly in the post-September 11 era, combined with the sheer difficulty in arriving at an acceptable description, have created an almost overwhelming amount of literature on the subject.


on the subject. Other theorists, recognizing the inherent complexity and controversy in the term, have advocated using simple definitions as concise, for instance, as Brian Jenkins', "the use or threatened use of force designed to bring about political change," and Walter Lacqueur's, "the illegitimate use of force to achieve a political objective by targeting innocent people." Others have objected, however, that "simplicity does not solve the problem" because "there is no meaningful way to apply a simple definition to specific acts of terrorism," and attempts to do so invariably "leave academicians, policymakers, and social scientists frustrated."

The political and legal nature of the term and surrounding debate understandably have led many politicians, legislators, and scholars to focus on legal definitions of terrorism that "give governments specific crimes that can be used to take action against terrorist activities." As Nicholas J. Perry recently documented, federal law alone now contains "at least nineteen definitions or descriptions of terrorism, as well as three terms relating to the support of terrorism." But legal definitions often ignore the social and political nature of terrorism and are likely to "contain internal contradictions" so that "some groups can be labeled as terrorists, while other groups engaged in the same activities may be described as legitimate revolutionaries." Thus, as many have observed, one man's terrorist is another man's freedom fighter.

17. OMAR MALIK, ENOUGH OF THE DEFINITION OF TERRORISM xvii (2001); see also Michael P. Scharf, Defining Terrorism as the Peace Time Equivalent of War Crimes: A Case of Too Much Convergence Between International Humanitarian Law and International Criminal Law?, 7 ILSA J. INT'L & COMP. L. 391, 391 (2001) ("The problem of defining 'terrorism' has vexed the international community for years."); Nicholas J. Perry, The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails, 30 J. LEGIS. 249, 252 (2004) ("The scholarly literature on terrorism is 'vast and ever expanding' . . . . The difficulties in defining terrorism caused by the changing nature of the term apply not only to the past but also to the future, since no definition can cover all of what a prospective terrorist might do.").

18. R.R. Baxter, A Skeptical Look at the Concept of Terrorism, 7 AKRON L. REV. 380, 380 (1973) ("The term is imprecise, it is ambiguous; and above all, it serves no operative legal purpose.").


20. Id. (referring to a definition offered by Walter Laqueur in 1987).

21. Id.

22. Id.

23. Perry, supra note 17, at 255.

24. WHITE, supra note 19, at 8.

25. Id. See also Susan Tiefenbrun, A Semiotic Approach to a Legal Definition of Terrorism, 9 ILSA J. INT'L & COMP. L. 357, 358–59 (2003):

   Terrorism must be deconstructed to distinguish between domestic and international terrorism, state-sponsored and non-state sponsored terrorism, and terrorism per se and legal revolutionary violence that falls within the laws of war. Semiotics is the science of signs. A semiotic approach to the meaning of the term "terrorism" includes an investigation of its hidden meanings, its connotations as well as denotations, in order to expose the deep structure of the term and to unravel its complexities. A semiotic approach is designed to uncover the basic structural elements of the meaning of a term, and each element acts as a sign for the identification of a terrorist act. The elements of the definition are either necessary or sufficient for the act to be deemed a terrorist act.

26. As Richard E. Rubenstein explains: "Clearly, no such definition will tell us whether the kidnappers of Israeli athletes at the 1972 Munich Olympics were 'terrorist criminals' or 'heroic freedom fighters,' or which terms best describe [the] Nicaraguan Contras." RICHARD E. RUBENSTEIN, ALCHEMISTS OF REVOLUTION: TERRORISM IN THE MODERN WORLD 19 (1987); see also Cooper, supra note 15, at 106-7.
Other nuanced attempts, like those offered by Martha Crenshaw, have analyzed terrorism's "act, target, and possibility of success" so as not to confuse terrorism with revolutionary violence.\(^\text{27}\) In her view, "terrorism means socially and politically unacceptable violence aimed at an innocent target to achieve a psychological effect."\(^\text{28}\) Still others, like Michael Walzer, require a "random-act" component for terrorism,\(^\text{29}\) while some have focused on state-sponsored terrorism and the political and economic sources of the terrorist activities, and others have framed terrorism as a form of state repression.\(^\text{30}\) Then, of course, there are the religiously zealous terrorists,\(^\text{32}\) cyberterrorists,\(^\text{33}\) narcoterrorists,\(^\text{34}\) and even so-called corporate terrorists.\(^\text{35}\) In short, "terrorism" has proven an elusive, multifaceted term with any number of applications and for which no unified theory or controlling definition seems acceptable or even appropriate.\(^\text{36}\) However, its many competing and overlapping


27. WHITE, supra note 19, at 9 (referring to Crenshaw's definition offered in 1983).

28. Id.

29. MICHAEL WALZER, ARGUING ABOUT WAR 130 (2004) ("[Terrorism] is the deliberate killing of innocent people, at random, in order to spread fear through a whole population and force the hand of its political leaders."). The seemingly random nature of terrorist killing, as suggested by Walzer, was poetically captured in Nobel Poet Laureate Wislawa Szymborska's verse, "The Terrorist, He's Watching," the opening lines of which read:

The bomb in the bar will explode at thirteen twenty.
Now it's just thirteen sixteen.
There's still time for some to go in,
and some to come out.


30. See WHITE, supra note 19, at 9 (discussing definitions focused on terrorist states and terroristic governments); see also WENDELL BERRY, CIVILIZING PAPERS 3 (2003) (suggesting that "a more correct definition of 'terrorism' would be this: violence perpetrated unexpectedly without the authorization of a national government").


32. Referring to those who commit destructive acts in order to save the environment. See WHITE, supra note 19, at 7 (counting ecological terrorists among those who "become so consumed with a particular cause that they create a surrogate religion and take violent action to advance their beliefs").

33. See id. (referring to "computer attacks, viruses, or destruction of an information infrastructure").

34. Id. (noting that "drug organizations frequently use terrorist tactics, and some terrorist organizations sell drugs to support their political activities" and referring to these groups as "narcoterrorists").


36. For a discussion of the current and historical difficulty within the United Nations General Assembly in reaching international agreement on defining terrorism, see Gerhard Hafner, Certain Issues of the Work of the Sixth Committee at the Fifty-sixth General Assembly, 97 Am. J. Int'l L. 147, 156–58 (2003).

The problem of defining terrorism, which has long bothered the General Assembly, arose during the negotiation of conventions dealing with various special forms of terrorism, such as the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation. None of these global conventions contain a satisfactory generic definition; only the 1999 International Convention for the Suppression of the Financing of Terrorism includes a definition in its Article 2(1)(b) that goes beyond the definitions of special conduct found in other conventions.

The difficulty of reaching an agreement on a generally acceptable definition reflects the...
definitions do suggest that the term itself may be used to describe a continuum of aggressive behavior ranging from isolated criminal activity to highly trained state-sponsored militias moving in concert toward a political or ideological objective.\textsuperscript{37} Thus, long before America's current "War on Terror" and the tragic events of September 11, 2001 that inspired it, scholars recognized that "there is no satisfactory political definition of terror extant or forthcoming . . . no common academic consensus as to the essence of terror and no common language with which to shape a model acceptable to political scientists or social psychologists."\textsuperscript{38} Indeed, terrorism has been described as "a condition known implicitly to most men, but which is somehow beyond rigorous examination."\textsuperscript{39} As a result, writes Richard Rubenstein, terrorism maintains

\textit{Id.} (citations omitted).

37. See Tiefenbrun, \textit{supra} note 25, at 359 (explaining the necessity of "distinguish[ing] between three different conceptions of terrorism: terrorism as a crime in itself, terrorism as a method to perpetrate other crimes, and terrorism as an act of war").


The scholarly literature on terrorism is "vast and ever expanding." Although some scholars ignore the need for a definition of terrorism or resort to Justice Stewart's comment on obscenity, "I know it when I see it," many others join the definitional quest. As H.H.A. Cooper observed, "Many conferences and writings on the subject of terrorism begin with the obligatory, almost ritualistic recitation by the presenter of some preferred definition of terrorism." These obligatory definitional recitations have resulted in numerous definitions of terrorism in the scholarship on the topic. A 1983 study by Alex P. Schmid catalogued 109 different definitions of terrorism used between 1936 and 1980, and "more definitions have appeared since."

The search for a definition of terrorism has been described by Cooper in an earlier article as "the problem of the problem of definition." The problem continues notwithstanding, or perhaps in part because of, the numerous scholars seeking a definition. It has been lamented that further progress has not been made in defining terrorism, "despite the increasingly large volume of publications addressing terrorism". . . . The lack of definitional consensus on terrorism, however, is attributable to more than the nature of scholarship; more fundamentally, it reflects the nature of the term being defined.

Perry, \textit{supra} note 17, at 250–51 (citations omitted).

39. BELL, \textit{supra} note 38, at 6. This quality has provoked countless comparisons in legal literature to Justice Stewart's observation on obscenity, "I know it when I see it." See, e.g., H.H.A. Cooper, \textit{Terrorism: The Problem of Definitions Revisited}, 44 AM. BEHAV. SCIENTIST 881, 892 (2001) ("As with obscenity, we know terrorism well enough when we see it.").
"an aura of mystery."\textsuperscript{40}

In her own attempt to pierce this aural veil, the state of Ohio defined and criminalized "acts of terror" in the wake of September 11, joining many of her sisters in an effort to bolster the legal arsenal against terrorism and terrorist threats.\textsuperscript{41} In doing so, the state adopted a legal definition that inevitably placed "terror" somewhere on the continuum of currently modeled definitions, and it did so with more than a modicum of ambiguity. When faced with an ambiguous statute, the Ohio legislature and the state's Supreme Court have directed the bench to "first look[ ] to the language of the statute and the purpose to be accomplished,\"\textsuperscript{42} and then to consider a series of interpretive tools, including the legislative history, the circumstances under which the statute was enacted, the common law, and former statutory provisions on similar subjects.\textsuperscript{43}

This article aims to provide an "interpretive tool" by way of an abridged catalogue of Ohio's statutory and common law history with "terror" and "terrorism" in an effort to help interpret and ultimately apply the state's most recent anti-terrorism statute more accurately by examining their uses contextually. As one federal court has observed, "words are like chameleons; they frequently have different shades of meaning depending upon the circumstances.\"\textsuperscript{44} But beyond the mutable nature of words and the Ohio Supreme Court's directive to consider such interpretive tools, there is at least a persuasive, if not compelling, precedent for pursuing a contextual approach like this and arriving at definitions according to their prior, contemporary and common usage, rather than through a more theoretical analysis of motives, causes, victims and agendas. A brief lexicographical history illustrates:

On Guy Fawkes Day, 1857, Doctor Richard Chenevix Trench addressed fellow members of England's prestigious Philological Society regarding "Some Deficiencies in Our English Dictionaries.\"\textsuperscript{45} To those gathered in London Library he proposed a monumental lexicographical undertaking above and beyond what even esteemed lexicographers like the great Samuel Johnson had achieved—a complete "inventory of the language."\textsuperscript{46} As one biographer has described it, Trench's "new project would present all of it: every word, every nuance, every shading of meaning and spelling and pronunciation, every twist of etymology, every possible illustrative citation from every English author."\textsuperscript{47} This "new project" traced the language's history and usage of words through a unique and "rigorous dependence on gathering quotations from published or otherwise recorded uses of English and using them to illustrate the use of the sense of every single word in the language\"\textsuperscript{48}—a rigor that would require "the reading of everything and the quoting of everything that showed anything of the history of the

\textsuperscript{40} RUBENSTEIN, supra note 26, at 20.
\textsuperscript{41} See OHIO REV. CODE ANN. § 2909.21-25 (LexisNexis 2004).
\textsuperscript{42} Christe v. GMS Mgmt. Co., 726 N.E.2d 497, 498 (Ohio 2000); OHIO REV. CODE ANN. § 1.49 (LexisNexis 2004).
\textsuperscript{43} OHIO REV. CODE ANN. § 1.49 (LexisNexis 2004).
\textsuperscript{44} United States v. Romain, 393 F.3d 63, 74 (1st Cir. 2004).
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id. at 25.
words that were to be cited.49 This, of course, presented an impossible task, beyond the skills of any devoted staff of researchers. But to the learned Philological Society, Trench countered with a revolutionary idea: lexicographic volunteers. Over the next seventy years, the dictionary’s editorial staff solicited and collected contributions from thousands of unpaid amateur researchers and philologists providing the editors with documented uses of words found in every conceivable corner of English literature.50 From these amateur contributions, the research staff compiled and catalogued the history, usage, and meaning of every word in the English language. Upon publication in 1928, comprising twelve large volumes and defining over five hundred thousand words,51 the once affectionately dubbed “big dictionary” received its proper title—the Oxford English Dictionary.

This article serves as a “volunteer’s” limited contribution to the veritable dictionary of definitions currently being offered by politicians, scholars, lawyers and journalists in the grail-like quests to define and prosecute “terrorism.”52 Rather than add yet another meaning of the word, the following discussion focuses on one aspect of one state’s legal usage of “terrorism,” providing an archival reading of one corner of the law and its legal literature. It attempts, in the spirit of Richard Trench, a thorough, albeit less-than-exhaustive, inventory of the statutory and common law context surrounding the state’s definition, tracing Ohio’s legal etymology of the word.

III. OHIO’S CODIFIED “TERRORISM”

In the immediate aftermath of the September 11, 2001 terrorist attacks, the nation’s legislatures took up the challenge of defining and outlawing “terrorism” in their respective criminal codes. Not surprisingly, New York was one of the first states to craft anti-terrorism legislation,54 followed by the federal government’s counter-terrorism provisions in The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, more commonly

49. Id. at 106.
50. The volunteer contribution proceeded as follows:

The volunteers’ duties were simple enough, if onerous. They would write to the society offering their services in reading certain books; they would be asked to read and make word-lists of all that they read, and would then be asked to look, super-specifically, for certain words that currently interested the dictionary team. Each volunteer would take a slip of paper, write at its top left-hand side the target word, and below, also on the left, the date of the details that followed: ... the title of the book or paper, its volume and page number, and then, below that, the full sentence that illustrated the use of the target word.

WINCHESTER, supra note 45, at 108. Ultimately, the dictionary staff received over six million such slips of paper. Id. at 109.

51. Id. at 25.
52. Id. at 103. For a more thorough history of the OED’s creation, see Simon Winchester’s sequel, THE MEANING OF EVERYTHING: THE STORY OF THE OXFORD ENGLISH DICTIONARY (2003).
53. As far back as 1983, terrorism analyst Alex Schmid documented at least 109 definitions of terrorism and concluded that there cannot be one correct or true definition of terrorism. ALEX SCHMID & ALBERT J. JONGMAN, POLITICAL TERRORISM 5 (1984).
54. New York passed N.Y. PENAL LAW § 490.05 (Consol. Supp. 2005) less than one week after September 11, 2001. New York’s anti-terrorism statute criminalizes the “Crime of Terrorism,” defined as one of a number of specified acts committed “with the intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping ...” N.Y. PENAL LAW § 490.25.
known as the USA PATRIOT Act, which was followed in turn by similarly inspired state laws. Since September 11, at least thirty-three states and the District of Columbia have amended their criminal codes with their own anti-terrorism language, some explicitly defining terrorism and establishing penalties and punishments for engaging in "terroristic threats" and "acts of terrorism." Ohio is one of those states.

Within months of the al-Qaeda assault, Ohio patterned its anti-terrorism statute after New York’s foray into criminal terrorism law. Ohio’s law provides in part:

(A) "Act of terrorism" means an act that is committed within or outside the territorial jurisdiction of this state or the United States, that constitutes a specified offense if committed in this state or constitutes an offense in any jurisdiction within or outside the territorial jurisdiction of the United States containing all of the essential elements of a specified offense, and that is intended to do one or more 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 act that constitutes the offense.

Having so defined an "act of terrorism," the Ohio Code then criminalizes "terrorism," stating:

(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;

55. Pub. L. No. 107-56, 115 Stat. 272 (2001). The USA PATRIOT Act defines "domestic terrorism" as activities occurring "primarily within the territorial jurisdiction of the United States" that "(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State" and "(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." Id. The federal government entertains other definitions of terrorism as well. The Department of Defense defines terrorism as "the unlawful use of force or violence or threatened use of force or violence against individuals or property to coerce or intimidate governments or societies, often to achieve political, religious, or ideological objectives." Department of Defense, Joint Chiefs of Staff, Dictionary of Military and Associated Terms, Joint Publication 1-02, April 12, 2001. The Code of Federal Regulations condemns 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." 28 C.F.R. § 0.85 (2005).


57. See statutes cited supra note 14.


59. See statute cited supra note 54.

60. OHIO REV. CODE ANN. § 2909.21 (LexisNexis 2004).
(3) Affect the conduct of any government by the specified offense.

(B) (1) Whoever violates this section is guilty of terrorism.

(2) Except as otherwise provided in divisions (B)(3) and (4) of this section, terrorism is an offense one degree higher than the most serious underlying specified offense the defendant committed.61

In both sections 2909.21 and 2909.24, the “specified offenses” underlying the “acts of terrorism” have been defined as meaning any of the following:

(E) (1) A felony offense of violence, a violation of section 2909.04 or 2927.24 of the Revised Code, or a felony of the first degree that is not a violation of any provision in Chapter 2925 or 3719 of the Revised Code;

(2) An attempt to commit, complicity in committing, or a conspiracy to commit an offense listed in division (E)(1) of this section.62

In addition to “felony offense[s] of violence,” the enumerated sections of the Ohio Code, sections 2909.04 and 2927.24, respectively concern disrupting public services such as television, radio, telephone, mass communication, transportation, law enforcement, firefighting, computer systems,63 and contaminating substances for human consumption with hazardous chemical, biological, or radioactive material.64

Ohio’s statutory scheme effectively turns certain already criminal activity, or “specified offenses” into “acts of terrorism” by adding a “purpose” element to the underlying offense. Thus, there are three components to “terrorism” under Ohio law. In broad terms, a defendant must (1) commit one of the specified criminal offenses and (2) do so with the purpose to intimidate, coerce, influence or affect (3) either a civilian population, or governmental policy or conduct.65 At trial, the prosecution must show not only that the defendant committed criminal acts of violence, for example, but also that the defendant intended those acts to influence or coerce the policies of a government or the people at-large.66

62. Id. § 2909.21(E).
63. Id. § 2909.04.
64. Id. § 2927.24.
65. See id. § 2909.24.
66. The penalty for committing acts of terrorism is a sentence enhancement based upon the underlying offense. The statute provides as follows:

(B)(2) . . . terrorism is an offense one degree higher than the most serious underlying specified offense the defendant committed.

(3) If the most serious underlying specified offense the defendant committed is a felony of the first degree or murder, the person shall be sentenced to life imprisonment without parole.

(4) If the most serious underlying specified offense the defendant committed is aggravated murder, the offender shall be sentenced to life imprisonment without parole or death pursuant to sections 2929.02 to 2929.06 of the Revised Code.

Id. § 2909.24.
Ohio’s statute is arguably simultaneously limited and expansive. In at least one respect, the statute’s language is broad, vague, and undefined, thereby granting vast prosecutorial discretion. It is not clear, for example, what prosecutors must show to demonstrate that the defendant intended to “intimidate or coerce a civilian population.” The term “civilian population” remains conspicuously undefined anywhere in the Ohio Code, and it might be argued that certain criminal activity by its very nature has the effect of “intimidating” whole city blocks, neighborhoods, towns, even counties. Consider, for instance, serial rapists and murderers who intend for their intimidating and coercive violence to influence not only their immediate victims, but others in the surrounding area as they taunt law enforcement with letters or communication released to the local media threatening to strike again until caught.

Under Ohio law, these felons might meet the statutory definition of a “terrorist,” someone intending to commit crimes in order to intimidate the general public. Accordingly, the statute is quite broad, affording prosecutors wide latitude in bringing “terrorism” charges against defendants whose crimes have affected communities at-large.

On the other hand, “purpose” or “intent” is generally regarded as perhaps the most difficult mental state for the prosecution to prove. Ohio courts have understood and defined “purpose” as a decision of the mind to do an act with a conscious objective of producing a specific result or engaging in a specific conduct. To do and act purposely is to do it intentionally. The purpose with which any person does any act is known only to
himself, unless he expresses it to others or indicates it by his conduct.\textsuperscript{71}

By requiring prosecutors to demonstrate "a decision of the mind," a "conscious objective" that is "known only to [the defendant] himself," the statute sets a high evidentiary hurdle. To be sure, a defendant's "purpose" to commit a crime can be and often is shown and proven at trial, but the terrorism statute requires something slightly different. It requires, for example, the additional intent to "influence the policy of any government by the specified offense."\textsuperscript{72} Thus, it is not only the purpose to commit the offense, but also the overarching aim of the offense that must be demonstrated. Arguably, far fewer "mere criminals" can be shown to intend not only to influence and intimidate the immediate victims of their crimes, but a governmental or civilian body as well—as evidenced by there being only one defendant, Biswanath Halder, charged under the Ohio statute since its passage in 2001, with the judge ultimately dismissing those charges before the jury's deliberation.\textsuperscript{73} In this respect, Ohio's statutory scheme may be viewed as narrowly crafted and limited, designed to apply only to the kinds of crimes and activities that first inspired the legislation: the planes of September 11.

Indeed, it is largely undisputed that the sort of politically or religiously motivated terrorism of that infamous day would fall squarely within a natural reading of Ohio's terrorism statute; that is, violent attacks of mass murder aimed at "terrorizing" the American people and influencing the government's foreign policies would undoubtedly be covered and anticipated by the language of the Ohio Code. Thus, to the extent that the Ohio legislature intended to draft anti-terrorism legislation that could be used to prosecute future al-Qaeda or Timothy McVeigh-style\textsuperscript{74} attackers—a very real concern in the months after September 11—the legislature seems to have succeeded.\textsuperscript{75}

It is precisely this limited "political purpose" requirement, however, that presents a subtle but potentially significant break from Ohio's common law understanding of terrorism's corollary terms: "terror" and "terrorize." To the extent that "terrorism" might naturally be considered to involve crimes of "terror" that are in turn intended to precipitate popular or political change, it may be instructive to examine how Ohio

\textsuperscript{72} OHIO REV. CODE ANN. § 2909.24(A)(2) (LexisNexis 2004).
\textsuperscript{73} See supra Part I. For a more detailed discussion of Halder's terrorism prosecution and the application of Ohio's terrorism statute, see McIntyr, supra note 69. It may be argued that Halder's terrorism prosecution is evidence of the statute's breadth and vagueness leading to prosecutorial misapplication. A full analysis of this argument and whether Halder's case falls within the statute's intended scope lies beyond the bounds of this article, as indicated in the Introduction. That there has been only one terrorism indictment under the new statute suggests, however, that prosecutors have not so far used the statute to prosecute serial criminals or the more "common criminals" whose crimes may have induced terror in the surrounding community, and have limited prosecution to a single case involving a violent school murder and kidnapping with nearly 100 victims.
\textsuperscript{74} See United States v. McVeigh, 153 F.3d 1166, 1176 (10th Cir. 1998) (affirming Timothy McVeigh's death sentence and conviction "on eleven counts stemming from the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, that resulted in the deaths of 168 people").
\textsuperscript{75} See, e.g., Hannah Report, Taft Urges Quick Passage of Anti-Terror Bills (Oct. 30, 2001) (describing Ohio State Senator Bill Spada's comments on September 11 and the terrorism legislation: "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"); see also Press Release, Governor Robert Taft, Taft Signs Anti-Terrorism Bill (May 15, 2002), available at http://governor.ohio.gov/releases/Archive2002/051502sb184.htm (discussing Ohio Governor Robert Taft's remarks that Ohio's terrorism statute provides "an important tool for our law enforcement to prosecute individuals who commit acts of terror").
jurisprudence has historically understood crimes of “terror.” Such an examination may inform our reading of the broader and less-defined language of Ohio’s anti-terrorism statute, and provide some indication of how the events of September 11 may have fundamentally altered our country’s notions of terrorism.

IV. “TERRORISM” IN OHIO’S STATUTORY AND COMMON LAW

Ohio has grappled with the semantic difficulties of “terror” before. At least two state statutes have employed the words “terrorism” and “terrorize” before September 11, and both failed to define the terms, effectively leaving it to the courts to provide a definition. How Ohio courts have interpreted those statutes may shed light on how prosecutors and courts should understand and interpret the state’s current anti-terrorism language. This section looks at how Ohio courts have treated terror-related statutory provisions in the criminal syndicalism and kidnapping contexts, and explores a number of the other ways in which the courts have understood, used, and in some sense helped provide a legal framework for defining “terrorism” and “terrorize” contextually.

A. Criminal Syndicalism

In the aftermath of the First World War, Ohio, like many states, drafted criminal syndicalism statutes “designed to punish those of communistic habits of thought who prefer force to reason.” The state’s Criminal Syndicalism Act of 1919 criminalized spreading the “doctrine [of criminal syndicalism] which advocates crime, sabotage—which is defined as the malicious injury or destruction of the property of another—violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.” The statute referred to “unlawful methods of terrorism” without any elaboration and then, having so defined criminal syndicalism, the statute declared its mere advocacy to be a felony.

76. Indeed, the Ohio Revised Code provides that to interpret ambiguous statutory language and discern the legislature’s intent, the courts may consider “among other matters: the object sought to be attained; the circumstances under which the statute was enacted; the legislative history; the common law or former statutory provisions; the consequences of a particular construction; the administrative construction.” OHIO REV. CODE ANN. § 1.49 (LexisNexis 2004) (emphasis added).

77. See id. § 2905.01 (making “terrorize” an aggravating factor in kidnapping); id. § 13421-23 (repealed) (making it illegal to engage in “unlawful methods of terrorism”).

78. Of course, it may be argued that today’s definition or understanding of “terrorism” is only semantically or tangentially related to the root words “terror” and “terrorize,” in which case the Ohio statute departs significantly from any common law understanding of those terms, and there is little to be gleaned from their contextual study. If this is the case, however, studying the common law usage of those terms will reveal such a radical shift in meaning and prompt a search for alternative interpretive theories for understanding “terrorism” today.


80. Ohio v. Kassay, 184 N.E. 521, 527 (Ohio 1932) (observing in dicta that “[t]he various statutes on criminal syndicalism have been enacted since the conclusion of the World War. Criminal syndicalism is the overhang of that conflict”).


82. Id. § 2923.12, invalidated by Brandenburg v. Ohio, 395 U.S. 444 (1969) (emphasis added).

83. Id. §§ 13421-23, invalidated by Brandenburg v. Ohio, 395 U.S. 444 (1969). The provision read in full:
In *State v. Kassay*, the Ohio Supreme Court upheld the statute as a constitutional exercise of the state's police power to "impose punishment upon those who make utterances inimical to the public welfare and which have a natural tendency to incite to crime or to disturb the public peace." Nearly forty years later, the United States Supreme Court famously struck down the Ohio law on First Amendment grounds in *Brandenburg v. Ohio*. But by *Kassay*, in 1932, the U.S. Supreme Court's First Amendment jurisprudence had proceeded only as far as *Whitney v. California*, and the Ohio Supreme Court, in part relying on *Whitney*, affirmed the statute's constitutionality. In doing so, the Ohio court made several references to the statute's "unlawful methods of terrorism" language—without itself defining the phrase—in discussing the state's obligation to protect its citizens from violence. Applying what
amounted to a "rational basis" review\textsuperscript{90} the state supreme court noted the state's broad powers in the area of "public safety and welfare" and ruled that it is one thing to speak and publish freely, but "the right to advocate and teach the propriety of violence and terrorism as a means of compelling others to agree with one's sentiments is quite another."\textsuperscript{91} Thus, said the court, while the Constitution clearly protects "[t]he right to advocate industrial and political reforms, and even the overthrow of an existing order by peaceful argument and persuasion," no such protection exists for those who would "advocate the use of violence and terrorism . . ."\textsuperscript{92}

Finding "[t]he Legislature [to be] a proper judge of the need and of the propriety of the remedy,"\textsuperscript{93} the court cited Chief Justice Hughes' opinion in \textit{Stromberg v. California}\textsuperscript{94} in holding that "[t]here is no question but that the State may thus provide for the punishment of those who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means. There is no constitutional immunity for such conduct abhorrent to our institutions."\textsuperscript{95} Offering its own view of the threat presented by criminal syndicalism and the historical and then-present justifications for its outlaw, the Ohio Supreme Court rather forcefully concluded that protecting the free speech rights of "those who advocate and teach the . . . propriety of the employment of violence and terrorism in an effort to overturn an existing political order . . . does violence to the genius of our institutions."\textsuperscript{96} In upholding the criminal syndicalism statute, the court had determined that such statutes "only seek to prevent the use of force, violence, and terrorism with their concomitant destruction of life and property as a means of promoting proposed reforms rather than appeal to reason."\textsuperscript{97}

The Ohio Supreme Court's discussion of criminal syndicalism in the early 1930s is, in certain respects, closely analogous to the contemporary debate emerging over terrorism, and it suggests several things about the court's earlier understanding of and concern for terrorist activity. As an initial matter, Kassay's description of the legislative impetus for the rapid spread of criminal syndicalism statutes after the First World War\textsuperscript{98} roughly parallels the quick passage of anti-terrorism laws across the country immediately following September 11.\textsuperscript{99} Both sets of laws seem propelled by a

\textsuperscript{90} Id. at 524-25.

The authority for the enactment of these statutes is found in the exercise of the police power, and a wide discretion and latitude are permitted the Legislature in determining whether its action is within the reasonable exercise of that power. This discretion, reasonably exercised, is a legislative function, and does not become justiciable unless the statute is found to have no reasonable relation to the public welfare. This is only one of the tests of constitutionality. The other test is whether or not it violates clearly and beyond a reasonable doubt the express limitations of the Bill of Rights.

\textsuperscript{91} Id. at 525.

\textsuperscript{92} Id.

\textsuperscript{93} Id.

\textsuperscript{94} 283 U.S. 359 (1931).

\textsuperscript{95} Kassay, 184 N.E. at 527 (quoting Stromberg v. California, 283 U.S. 359, 368 (1931)).

\textsuperscript{96} Id.

\textsuperscript{97} Id.

\textsuperscript{98} Id.

fear that existing criminal laws were insufficient legal weapons for combating a new, domestic threat—in the first case, communism, and in the second, terrorism. In both cases, the laws seem aimed at those most hostile to the American system of law, economics, and government, and, as the Ohio court suggested, the statutes are "designed to punish those . . . who prefer force to reason."

In 1932, such persons were believed to be those "of communistic habit" who, in the words of one Ohio court of appeals, posed an unlawful threat to the republican form of American government insofar as they "admitted that the purpose of their organization was to bring about fundamental changes in the political and industrial systems of the United States, and to that extent admitted in a revolutionary purpose."

Today, similar fears often focus on the "radical," "fundamentalist," religiously motivated terrorist cells that have vowed "Holy terror" on the enemies of God and Islam. Clerics like Omar Abdel Rahman of Brooklyn, for example, "welcome being

I mean, do you realize the threat we face at this time? It is far greater than the so-called "Communist Menace" that existed from 1945 until 1992. The Communist agents in the United States, such as they were, were not prepared to sacrifice their lives. They thought, as we thought, in terms of life. That is not true of the enlists in the Jihad that we are dealing with now. These are people who are prepared to give their lives. I do not know if we are going to see more sophisticated plots such as happened on September 11th, but I am afraid, I am desperately afraid, that we are going to begin to see random, isolated instances of people who have strapped-on bombs and just walk into a bus or a shopping mall or a Sbarro's Pizza Place and detonate the bomb, blowing themselves up and people around them. How do you fight that? I do not know how you fight that, but obviously we are going to have to [find a] balance.

Id. at 245-46.

Hoffman says terrorists motivated by religious imperatives differ from political terrorists in several ways. "Holy terror" contains a value system that stands in opposition to "secular terror." Hoffman says secular terrorists operate with the realm of dominant political and cultural framework. They want to win, to beat the political system that is oppressing them. Their goal may be to destroy social structure, but they want to put something in its place. . . . Holy terrorists, however, are under no such constraints. They see the world as a battlefield between the forces of light and darkness. . . . The purpose of their operation is to kill. Pointing to Islamic terrorism as an example, Hoffman says the purpose of terrorism is to kill the enemies of God or convert them to Islam.

Id. (summarizing Bruce Hoffman's explanation of religiously inspired terrorism).
terrorists," because, as he understands it, "[t]he Qur’an makes it among the means to perform jihad for the sake of Allah, which is to terrorize the enemies of God and our enemies too." And thus, he believes, "we must be terrorists, and we must terrorize the enemies of Islam, and frighten them, and disturb them, and shake the earth under their feet." Similarly, prosecutors showed jurors footage of Imam Fawaz Damra, the spiritual leader of Ohio’s largest mosque, declaring that “terrorism and terrorism alone is the path to liberation.” Damra was convicted in 2004 of concealing his ties to known terrorist organizations on his 1994 immigration application.107

Not surprisingly, it seems that both criminal syndicalism and today’s terrorism are in some way related to effecting political change. With some, like Rahman, vowing to rattle the foundations of Western civilization, crimes of sabotage, mass murder, and violence against the United States have been met with new state and federal laws designed to prevent and prosecute such crimes, effectively renaming them “terrorism.” Criminal syndicalism statutes were crafted to help stop the spread of communist dissidents that were known to pursue both violent and non-violent means to "accomplish[] industrial or political reform." Likewise, two parts of Ohio’s anti-terrorism statute expressly define “terrorism” as the commission of a specified offense “with purpose to . . . [i]nfluence the policy of any government . . . [or] [a]ffect the conduct of any government . . . "

Beyond these notable similarities between anti-terrorism statutes and the criminal syndicalism laws of the post-World War I era, Ohio’s Criminal Syndicalism Act and the Ohio Supreme Court’s analysis in Kassay offer a useful framework for understanding how “unlawful methods of terrorism” were conceived at common law and, in turn, an instructive comparison to Ohio’s current attempt at a statutory definition of terrorism. A comparison of the use of “methods of terrorism” in the Criminal Syndicalism Act with the use of “terrorism” as defined in Ohio’s 2001 anti-terrorism statute yields two distinctions.

First, whereas syndicalism “advocate[s] . . . unlawful methods of terrorism as a means of accomplishing industrial or political reform,” Ohio’s current definition of “terrorism” understands such political reform or influence to be an elemental part of terrorism itself. That is, the former views “terrorism” as a mechanism for bringing about political or social change, with such a purpose being related but ultimately not necessary to the crime known by “unlawful methods of terrorism.” Conversely, the latter perceives “political reform” as a virtually inherent and inextricable component of “terrorism” itself, and without the purpose to influence government policy, the underlying act is not “terrorism.” Thus, if criminal syndicalism regarded “terrorism” as

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105. Id.
107. Id.
a means to an end, the terrorism statutes seem to regard “terrorism” today as both means and end.

This is belied by Kassay’s treatment of the syndicalism act. Nowhere does the Ohio court discuss or define what the legislature meant by “unlawful methods of terrorism.” Nor does the court appear troubled by the lack of any legislative guidance on its meaning. Rather, the court blithely accepts that the government must “protect its people from violence and terrorism,” and that “the right to advocate and teach the propriety of violence and terrorism” lies beyond the gates of First Amendment protection. To be sure, the relevant First Amendment concerns occupy the court’s attention, but it nevertheless seems content to allow for a “common meaning” of the term “terrorism” to guide its understanding of the statute, requiring no legal or technical definition whatsoever. In almost every instance the Kassay court refers to “terrorism,” it considers it a means to accomplishing a political or industrial end, just as the syndicalism statute itself also suggests. Indeed, if the court had viewed the phrase “unlawful methods of terrorism” to require the additional element of a political purpose, then the statute’s next clause—“as a means of accomplishing industrial or political reform”—would have been a meaningless redundancy. If “methods of terrorism” were understood, by definition, to also require a political purpose, then there would be no need for the statute to define criminal syndicalism as engaging in “terrorism” in order to “accomplish[] industrial or political reform.”

This first distinction leads to a second significant difference between today’s “acts of terrorism” and yesterday’s “methods of terrorism.” Kassay’s treatment of criminal syndicalism’s “unlawful methods of terrorism,” adopting as it does a seemingly common meaning of the phrase, refers to “terrorism” much as it refers to other kinds of violence and crimes against persons and property. Indeed, “methods of terrorism” is distinguished from “crime,” “sabotage,” and “violence” almost as a catch-all phrase used merely to expand, not narrow or define, the statute’s scope. Of the four illegal activities comprising “criminal syndicalism,” the legislature defined only sabotage, presumably leaving crime, violence, and terrorism to prosecutorial discretion and a jury’s ability to understand words of common parlance. By implication, “unlawful methods of terrorism” constituted crimes on par with other crimes of violence, destruction, and sabotage, not necessitating further definition or explanation, and allowed the court to observe axiomatically that “[a]ny government which cannot protect its people from violence and terrorism is a government in name only.” Thus, whereas contemporary scholars, legislators, and courts are groping to define the metes and bounds of “terrorism,” earlier Ohio legislatures and courts were unconcerned with providing any legal or technical definition of the term and perhaps

112. See id. at 525–26.
113. One wonders, of course, what might constitute a “lawful method of terrorism” which the statutory language implicitly suggests exists, but this curious implication will not be explored or speculated upon here.
115. See Kassay, 184 N.E. at 524 (quoting OHIO REV. CODE §§ 13421-23 (LexisNexis 1932)).
116. See id. at 524. “Sabotage” is defined as “the malicious injury or destruction of the property of another.” Id. (quoting OHIO REV. CODE §§ 13421-23 (LexisNexis 1932)).
117. Id. at 525.
118. See supra Part I.
understood that its meaning, taken in the context of crime, violence, and sabotage, was commonly understood. Indeed, as discussed in Section V, the common law usage of terrorism’s derivative words “terror” and “terrorize” may have informed the court’s subsequent treatment of “terrorism” in the criminal syndicalism context.

Before moving to those other common law uses, however, it is worth noting that both of the just-discussed distinctions between “acts of terrorism” and “unlawful methods of terrorism” may help to make sense of the less-than-defined “intimidate or coerce a civilian population” language in Ohio’s current anti-terrorism statute. By leaving “civilian population” entirely undefined in the modern code, this language broadens the statute considerably and allows prosecutors and courts to decide whether a defendant’s intimidation or coercion of as few as three or four people, for example, amounts to “intimidating a civilian population.” Furthermore, having removed the “influence governmental policy” requirement, the “civilian population” prong may be the least consistent with today’s trend toward understanding terrorism as primarily politically or religiously motivated violence. 119

The “civilian population” language, however, may not be inconsistent with Kassay’s understanding of “unlawful methods of terrorism” as a means to an end that may or may not have a political agenda. Indeed, by including the “intimidate or coerce a civilian population” language, Ohio’s terrorism statute seems to incorporate the earlier view that one can engage in a “method of terrorism” without seeking political reform or influence. It suggests that if the prosecution can show that the underlying “specified offense”—whether sabotage, kidnapping, arson, or murder—was intended to “intimidate or coerce” the people at-large, then it arguably may be regarded as a “method of terrorism.”

It is in this context, of course, that the line between “crime” and “terrorism” blurs. After all, some might argue, if terrorism is nothing more than a violent crime that coerces larger numbers of people (or even relatively small numbers of people that might nevertheless be considered a “civilian population”) then perhaps the additional stigma and charge of “terrorism” are unnecessary and redundant. Moreover, blurring the line between violent crime and terrorism, and failing to draw an adequate distinction between the terms, may make it more difficult to distinguish legally, conceptually, or even semantically between the events of September 11, for instance, and the terrifying shootings in Columbine High School. The Columbine slayings lacked any known political or religious motivation but were nonetheless carried out with the requisite purpose to intimidate an arguably “civilian population” of students and faculty. 120

119. See BRUCE HOFFMAN, INSIDE TERRORISM 40 (1998) (defining terrorism as “the deliberate creation and exploitation of fear through violence or the threat of violence in the pursuit of political change”); Audrey Kurth Cronin, Introduction: Meeting and Managing the Threat, in ATTACKING TERRORISM: ELEMENTS OF A GRAND STRATEGY 76-80 (Audrey Kurth Cronin & James M. Ludes eds. 2004); YONAH ALEXANDER, COMBATING TERRORISM 3-4 (2005) (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. These acts are intended to create an overwhelming fear in a target area larger than the victims attacked or threatened”).

120. See, e.g., News Services, Columbine High Shooters Had Plotted to Kill 500 Plus Hijack and Crash a Plane, Investigators Say Friends Provided Material to Make Bombs, Police Say, ST. LOUIS POST-DISPATCH, Apr. 27, 1999, at 1 (reporting that “[a] diary kept by Eric Harris described his and Klebold’s plans for continuing their murderous rampage through the school’s neighborhood . . .”); Randy Holtz, Shootings Fuel Debate Over ‘Jock Elitism’ at Columbine, Athletes Say Stories Exaggerated; Others Tell of Harrassment,
fact, the difficulty in drawing this distinction epitomizes good portions of the current debate over defining “terrorism.”

Under Ohio’s new statutory definition it would seem that both the airborne siege on the World Trade Center and the Columbine massacre would constitute “terrorism”—a legal oddity that might nevertheless be consistent with Ohio’s earlier and common law understanding of the term.

B. Kidnapping

Like all states exercising their police power, Ohio has criminalized kidnapping. The state’s kidnapping statute, Ohio Revised Code section 2905.01, reads in part:

(A) No person, by force, threat, or deception, or . . . by any means, shall remove another from the place where he is found or restrain him of his liberty, for any of the following purposes: . . .

(3) To terrorize, or to inflict serious physical harm on the victim or another.

Nowhere, however, does the code define or explain “[t]o terrorize,” an omission that prompts defendants to challenge and appeal their convictions based upon a statutorily undefined element of the crime.

In State v. Carter, Ohio’s Eighth District Court of Appeals rejected the appellant’s contention that “the trial court’s failure to define the term ‘terrorize’ when instructing the jury on the elements of kidnapping” deprived him of a fair trial because it “freed the jury to ‘speculate’ about the legal definition of the word.” The court of appeals reasoned that “a jury is presumed to know the meaning of common words.” Thus, the court continued, “[t]he word ‘terrorize’ is not a legal term. It is, therefore, not
error to not define the term, but to allow the jury to give the common meaning to it pursuant to [Ohio Jury Instructions] 1.80.’’

Refusing to substitute its own legal or technical definition for the jury’s “common meaning” of “terrorize,” the appellate court let stand the jury’s finding that Anthony Carter had committed kidnapping with the purpose “to terrorize” his victim as required by Ohio Revised Code section 2905.01. The following facts underlying that finding are thus instructive in formulating a “common meaning” of the term “terrorize.” Carter broke into the home of his ex-girlfriend, Pamela Ballad. After she demanded that he leave, a brief struggle ensued with Carter striking Pamela, pushing her to the couch, brandishing a .25 automatic handgun, and threatening to shoot her in the head. Carter decided not to shoot and after a second struggle forced Pamela and their daughter out of the house and into his car. Arriving at his mother’s house, Carter locked Pamela in his bedroom where he “held her down by kneeling on her arms,” hit her when she refused intercourse, and then raped her. The jury convicted Anthony Carter of rape and kidnapping with intent “to terrorize.” From this it follows that the jury understood the “common meaning” of “terrorize” to include the kind of trauma inflicted on Pamela Ballad.

Ohio’s lack of a statutory definition for “terrorize” in its kidnapping statute was again challenged in State v. Canter. In Canter, like Carter, the appellant argued that “the trial court committed reversible error by excluding an instruction on the essential element of ‘terrorizing’.” He urged that “because the dictionary definitions of ‘fear’ (which is an element of abduction) and ‘terrorize’ are indistinguishable, it can be inferred that the jury used ‘fear’ interchangeably with ‘terrorize’ in order to convict him of kidnapping.” Noting that the 10th Appellate District had “not had the opportunity to address whether ‘terrorize’ need be defined,” the court followed Judge Harper’s opinion in Carter and concluded with him “that, because ‘terrorize’ was not a term with special or technical meaning in the law, the jury was presumed to know its meaning . . . [and could] apply the common meaning of ‘terrorize.’” The Canter court rejected appellant’s argument “that it could be inferred that the jury defined ‘terrorize’ and ‘fear’ interchangeably,” dismissing it as “mere speculation on his part.”

Thus, as in Carter, the appeals court in Canter affirmed a jury’s application of a “common meaning” of “terrorize,” and upheld a kidnapping-with-a-purpose-to-terrorize conviction based on the following: Canter approached sixteen-year-old April Schaible holding a gun and said “he needed a favor and asked her to accompany him.” The victim testified that she was forcibly led into the woods where she was told that Canter

126. Id.
127. Id. at *4.
128. Id.
129. Id. at *5.
131. Id. at *5.
132. Id.
133. Id.
134. Id. at *6.
135. Id. at *7.
136. Id. at *1.
“wanted to tape her hands to a tree.” When she resisted, he pulled out a gun, pointed it at her, and tried to tape her to the tree. After two police cruisers drove by the wooded area, Canter released Schaible and they walked out of the woods together. 137

It may be logically inferred from the courts’ treatment of both Carter and Canter that the “common meaning” of “to terrorize” may be entrusted to the jury’s deliberation. Those juries, in turn, have found that various combinations of threatening statements, the brandishing of firearms, and the temporary abduction and restraint of victims at gunpoint, meet that commonly understood definition and satisfy the statutory element of “terrorize.”

But Ohio courts have not relied on juries alone to divine the common meaning of “terrorize” in the kidnapping context. In State v. Garduno, 138 for example, the Eleventh District Court of Appeals found no error in the trial court’s definition of “terrorize.” 139 The court found no error where “[t]errorize’ was defined as ‘to impress with terror or fear or to intimidate by coercion.’” 140 It is not clear from where the trial court drew its definition, but it was accepted as an entirely reasonable one on appeal. More recently, and noting both the Carter and Canter decisions to leave the definition of terrorize to the jury, State v. Leasure looked sua sponte to Merriam Webster’s Collegiate Dictionary in finding “terrorize” to mean: “to fill with terror or anxiety.” 141

In Leasure, like the cases discussed above, the court upheld the jury’s determination that the defendant had intended to terrorize the victim, “find[ing] that a rational factfinder could have found the essential elements of kidnapping, particularly the ‘terrorize another’ language, proven beyond a reasonable doubt.” 142

In the kidnapping context, the Ohio legislature has granted the state judiciary wide latitude in defining the “terrorize” element of kidnapping, and the courts remain unwilling to require the legislature to provide any additional guidance on the subject. Thus, it seems that what satisfies the prosecution’s burden of proving a “purpose to terrorize” is to be decided on an as-applied, case-by-case basis, with the fact finders assessing the circumstances of each case, and applying anything from a dictionary definition to their own common understanding of the term.

It is perhaps helpful to understanding Ohio’s post-September 11 terrorism legislation to realize that it is not unprecedented for the legislature to give broad discretion to the courts and prosecutors in determining what constitutes “terror,” or a “purpose to terrorize.” Furthermore, the state’s willingness to see “terror” effectively defined on an as-applied basis, controlled by the facts of the individual cases, and left to the common understanding of the juries, stands in stark contrast to calls for a simple or universally accepted and applied definition of “terrorism.” Allowing juries to use the term’s “common meaning” appears paradoxical on one level in light of “terrorism’s” multiple and competing definitions and its relative lack of any “commonly” accepted meaning. On another level, however, assessing “terror” and “terrorize” on a case-by-

137. Id.
139. Id. at *10.
140. Id.
142. Id. at **16.
case basis implicitly recognizes “the problem of the problem of definition,”¹⁴³ and leaves these words in the hands of a contemporary jury of peers to determine, as fact finders, whether specific criminal acts perpetrated against specific individuals or communities comport with their current notions of terror. In effect, this allows the law to take stock of the people’s evolving conception of terrorism.

V. OTHER USES OF “TERRORISM” AND “TERROR” IN OHIO’S COMMON LAW

At least part of the Ohio legislature’s unmodified use of “methods of terrorism” in defining criminal syndicalism, and the Kassay court’s willingness to write of “violence and terror” in nearly synonymous terms, may have been born of the same deference that still allows a jury’s common understanding of the term “to terrorize” to control a kidnapping verdict.¹⁴⁴ That is, although the state’s criminal code now employs the terms “terrorize” and “terrorism,” they were not, until just recently, legal terms¹⁴⁵ and “a jury is presumed to know the meaning of common words.”¹⁴⁶ This section explores how and in what contexts the words “terror” and “terrorism” were used by Ohio courts before and after both Kassay and Ohio’s post-September 11 anti-terrorism statute.¹⁴⁷ Though this examination falls far short of exhaustive, looking at these contextual uses may inform the current debate over how state law should define and prosecute terrorism in the future.

A. “Terrorism”

Ohio courts referred to “terrorism” as early as 1917. The word seems first to have appeared in a beautifully written opinion by Judge Martin Ambrose Foran of the Cuyahoga County Court of Common Pleas. In Epoch Producing Corporation v. Davis,¹⁴⁸ Judge Foran granted the plaintiff’s petition to enjoin Cleveland’s mayor, Harry L. Davis, from preventing the exhibition of “a certain photo-play called ‘The Birth of a Nation.’”¹⁴⁹ That play depicted “in vivid moving pictures the scenes of strife, confusion, and social chaos pertaining to what is known as the reconstruction of the states that had seceded from the Union.”¹⁵⁰ Given the later Kassay and Brandenburg line of cases involving “terrorism” and the First Amendment, it is somewhat fitting that “terrorism” debuted on Ohio’s legal stage in a case that balanced government censorship aimed at preserving the public peace against the freedoms of speech and expression.

¹⁴³. See Cooper, supra note 15.
¹⁴⁷. This section will not formally examine the common law appearances of “terrorize” in light of the prior discussion of “to terrorize” in Section II and the forthcoming discussion of “terror” in Section IV(2).
¹⁴⁸. 19 Ohio N.P. (n.s.) 465 (Ct. C.P. 1917).
¹⁴⁹. Id.
¹⁵⁰. Id. at 469. Judge Foran objected that “[t]he name of this photo-play is a misnomer. It ought to be called the ‘Phoenix of Liberty Arising from the Ashes of Treason.’” Id.
“The Birth of a Nation" was a false\textsuperscript{151} and demonizing parody\textsuperscript{152} of southern reconstruction, a piece of revisionist history in the vein of “The Clansman”\textsuperscript{153} and the “The Fool’s Errand”\textsuperscript{154} that served as “an apology for conduct and for [racist] acts that can not [sic] be commended or condoned.”\textsuperscript{155} The film was, for all practical purposes, racist propaganda, and the question before the court was whether “if exhibited, it would have a tendency to create and would probably result in a serious breach of the peace” in light of “certain scenes in the play [that] either depict or suggest acts and operations of certain men organized in a conspiracy, secret or otherwise, against law and order and in defiance of governmental authority.”\textsuperscript{156} Ultimately, “governed by the iron rule of legal exegesis, and not by any question of sentiment or personal predilection,”\textsuperscript{157} the court granted the petitioner’s request and refused to allow the Mayor of Cleveland to bar the film’s screening, but it was in this context of racial animus that “terrorism” was first penned by the Ohio judiciary. Writing of the political struggle between the Republican and Democratic parties over the enfranchisement of the former slaves after the Civil War,\textsuperscript{158} Judge Foran’s following observation provides the context of the word’s first common law appearance:

Hence arose a divergence of opinion and a clash of political ideas. And this contest grew so bitter that I, who was a participant in many of the scenes I witnessed [in the photo-play] last evening, was frequently of the opinion that the rebellion did not end at Appomattox. Between the Freedman’s Bureau on the one hand, with its horde of hungry carpet-bagging agents, and the Ku Klux Klan on the other with its \textit{slogan of terrorism}, the lot of the colored man was indeed sad and pitiable.\textsuperscript{159}

That “terrorism” at common law should first describe the Ku Klux Klan creates an

\textsuperscript{151}. \textit{id.} at 473–74 (“Turning now to the incidents of this play, it may be said without fear of contradiction that scenes are depicted which have but very slight foundation in fact, if any at all . . . . Besides, it is a travesty on historical fact, or at least a gross and misleading exaggeration.”).

\textsuperscript{152}. \textit{id.} at 474–75.

The character of Silas Lynch, if it is intended to represent John R. Lynch of Mississippi, is not only a caricature and a travesty, but a falsification of history . . . . [But] if it is intended to typify Silas Lynch as a representative or embodiment of Senator Bruce [of Louisiana], the character is not only overdrawn, distorted and a travesty, but it is absolutely false and untrue.

\textit{id.}

\textsuperscript{153}. “The Clansman” was a “historical romance of the Ku Klux Klan,” a play based on the novel of the same title written in 1905 by Thomas Dixon, Jr.

\textsuperscript{154}. \textit{Epoch Producing Corp.}, 19 Ohio N.P. (n.s.) at 471.

\textsuperscript{155}. \textit{id.} at 475.

\textsuperscript{156}. \textit{id.} at 466.

\textsuperscript{157}. \textit{id.} at 477. Judge Foran’s opinion was a clear and forceful condemnation of the film, and he wished to make equally clear, stating twice, that “[t]he issues involved in this proceeding are to be governed by the iron rule of legal exegesis, and not by any question of sentiment or expediency.” \textit{id.} at 466.

\textsuperscript{158}. \textit{id.} at 470.

By emancipation the colored person became a whole human being; and this necessarily increased the representation in Congress of the southern states. The radicals in the North, fearing lest the South might again become dominant, desired above all things to enfranchise these people. The old Democratic Party, north and south, believed that, with the accession of this large vote, the Republican Party would be permanently entrenched in power for perhaps a century to come.

\textit{id.}

\textsuperscript{159}. \textit{Epoch Producing Corp.}, 19 Ohio N.P. (n.s.) at 470 (emphasis added).
almost poetic etymology, posturing members of the KKK as Ohio's first ascribed "terrorists."¹⁶⁰ Like other instances of "terrorism" in Ohio law and jurisprudence,¹⁶¹ Judge Foran used the term without elaboration, as if taking for granted that his reader would understand precisely what he meant with no explanation necessary. Of course, the stated goals and antagonizing tactics of the Klan were not unknown to his readership in 1917, and the judge went on to write that "the southern historian, William Garrott Brown, admits that the Ku Klux Klan often resorted to violence, and that negroes as well as carpet-baggers were whipped and flogged and murdered."¹⁶² A full discussion of the Klan as an American terrorist organization lies beyond the scope of this article, though certain comparisons to our contemporary understanding and statutory definition of terrorism prove readily apparent.

First, the Klan did "often resort[] to violence," whipping and flogging and murdering,¹⁶³ and those acts would satisfy the "specified acts of violence" component of Ohio's anti-terrorism statute.¹⁶⁴ Second, the statute's "target" component is arguably implicated in the recorded Klan statements at issue in Brandenburg calling for political marches on Congress, Mississippi, and St. Augustine, Florida, suggesting that the group targeted governmental policy and conduct.¹⁶⁵ Furthermore, the discernible portions of the Klansman rally transcribed in a Brandenburg footnote suggest that the Klan also targeted certain "civilian populations," as members were heard saying "[s]end the Jews back to Israel," "[b]ury the niggers," and "[n]igger will have to fight for every inch he gets from now on,"¹⁶⁶ thereby satisfying the statute's broader "intimidate or coerce a civilian population" provision.¹⁶⁷ The remaining question is whether the whippings, floggings, and murders described by William Garrott Brown, or the infamous cross-burnings and church bombings¹⁶⁸ were intended to intimidate, coerce, or influence a civilian population, a governmental policy, or both. Here, Mr. Brandenburg's speech at the "organizers' meeting," where members called for "constitutional betterment," arguably demonstrates the group's purpose: "We're not a revengeant [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken."¹⁶⁹ If prosecutors could show that the Klan's violent


¹⁶¹. See supra Parts I, II(A) and II(B).

¹⁶². Epoch Producing Corp., 19 Ohio N.P. (n.s.) at 471.


¹⁶⁴. OHIO REV. CODE ANN. § 2909.21(E)(1) (LexisNexis 2004) ("Specified offense" means any of the following: (1) A felony offense of violence, a violation of section 2909.04 or 2927.24 of the Revised Code, or a felony of the first degree that is not a violation of any provision in Chapter 2925 or 3719 of the Revised Code.").

¹⁶⁵. Id. § 2909.24(A)(2) ("No person shall commit a specified offense with purpose to do any of the following: (2) Influence the policy of any government by intimidation or coercion.").

¹⁶⁶. Brandenburg, 395 U.S. at 446 n.1.

¹⁶⁷. Id. § 2909.24(A)(1) ("No person shall commit a specified offense with purpose to do any of the following: (1) Intimidate or coerce a civilian population.").

¹⁶⁸. See supra note 163.

¹⁶⁹. Brandenburg, 395 U.S. at 446.
"revengeance" was taken with the purpose to intimidate the people of Mississippi, St. Augustine, the President, Congress, or the Supreme Court, then such "revengeance" would constitute terrorism as currently defined by Ohio law. In this respect, Ohio's post-September 11 statutory understanding of terrorism echoes its earlier common law recognition of the "revengeant" "slogans of terrorism" executed by the state's Ku Klux Klan.

More generally, much like the kidnapping and criminal syndicalism statutes and cases, Judge Foran relied on a common meaning of the term and considered it obvious that the Ku Klux Klan employed a "slogan of terrorism." The court, in its first usage of the word, presumed a common meaning and "terrorism" was essentially defined contextually, its meaning derived from common usage and the well-known violence of the Klan.

Since its 1917 debut in *Epoch Corporation v. Davis*, the term "terrorism" has appeared in less than twenty other Ohio cases, and although several of these instances do little to advance our contemporary understanding of terrorism, their usage runs the term's definitional gamut, from describing the highly political to the merely criminal acts of Ohio's "terrorists." After *Epoch*, it next surfaced in *Burke v. American Legion of Ohio*, a 1921 case from the First Appellate District again involving Ohio's criminal syndicalism statute. In *Burke*, the plaintiff alleged that members of the American Legion had destroyed books and pamphlets belonging to the Cincinnati Local of the Communist Labor Party of Ohio, and "terrorism" appeared only as it did in the criminal syndicalism act. The court did not expound on the statutory use or meaning of "unlawful method of terrorism," other than to describe the plaintiff's admitted "plan proposed for bringing about this [political] change." It refused to overturn the jury's determination that the plaintiff had not been damaged, believing that "[s]uch a holding

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171. *Id.* at 244-45. That is, the court summarized the defendant's chief argument as being that its actions were justified because:

172. *Id.* at 246. As the court explained:

The literature destroyed [by the defendants] advocated the seizure of government, the transportation facilities, the food supply, and the business organizations of the country. And while the plaintiff disclaimed any intention to use force in the seizure above stated, her counsel admitted that force would be used to hold possession after it had once been taken.

173. *Id.* at 246. As the court explained:

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would in effect be that the court would lend its aid in the destruction of the laws and constitutions of the United States and of Ohio."\(^{174}\) Thus, in *Burke*, "terrorism" falls closer to the political or revolutionary end of terrorism's definitional continuum. It was used contextually to describe the conversion and forceful keeping of America by communist sympathizers. Despite writing of "unlawful methods of terrorism" employed as a means toward accomplishing a political end, the *Burke* court suggests that the execution of those methods and the desired political revolution were, in fact, one and the same: "the seizure of government, the transportation facilities, the food supply, and the organizations of the country."\(^{175}\)

"Terrorism" did not surface again in Ohio jurisprudence until 1932 when it appeared twice, first in *Deutsch v. State*\(^{176}\) and then in *Kassay*, as already discussed. If *Epoch, Burke, and Kassay* represent the more political end of the word's definitional spectrum, \(^{177}\) *Deutsch v. State* begins the courts' recognition that "terrorism" includes a more typically criminal element as well. At issue in *Deutsch* was whether "the language used by the prosecutor in [his] closing argument [at trial] was highly prejudicial to the rights of plaintiff in error..."\(^{178}\) The court of appeals ruled that the following language in the soliloquy went too far in prejudicing the jury against the defendant: "Where is the terrorism in this community except that which defies the law alone? The underworld gangs, racketeers. They are the terrorism to people of the communities."\(^{179}\)

Ruling that the closing argument had crossed the line, *Deutsch* merely conveys an understanding by the prosecutor that is not explicitly disputed by the court, namely, that the "underworld gangs" perpetrate a kind of terrorism against the community. Almost five decades later, Justice Locher expressed a similar sentiment in his dissent from *State v. Young*.\(^{180}\) In *Young*, the Ohio Supreme Court struck down on vagueness grounds the state's anti-crime syndicate statute, R.C. 2923.04.\(^{181}\) Without defining the term any

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174. *Id.* at 250 (citing Lord v. Chadbourne, 42 Me. 429, 440 (1856)).
175. *Id.* at 250.
176. 188 N.E. 399 (Ohio Ct. App. 1932).
177. See also *State v. Raley*, 136 N.E.2d 295 (Ohio Ct. App. 1954). *Raley* involved contempt charges against defendants who refused to testify before the Ohio Un-American Activities Commission. The case does not advance our understanding of "terrorism" beyond the idea that terrorism is a "means of effecting political or economic change." The court, without elaboration, noted that "the Smith Act of Congress, making sedition a crime, and the Ohio statute making syndicalism, that is, advocacy of force, violence and terrorism as a means of effecting political or economic change, a crime, were in force." *Id.* at 308.
179. *Id.*
181. The court reasoned:

The vague language of the statute, which subjects an individual to criminal sanctions for activities, the legality of which cannot be determined solely by the conduct itself but must be determined by factors which a person may be unaware of at the time of the conduct, violates due process. [It] lacks the ascertainable standards of guilt that "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *Id.* at 504.

In particular, the court found the statute far-reaching due to the definition of 'criminal syndicate'... A criminal syndicate is defined as 'five or more persons collaborating to promote or engage in': (1) extortion or coercion; (2) prostitution; (3) theft; (4) gambling; (5) illegal traffic in drugs, liquor, or firearms; (6) usury; or (7) any offense for the purpose of gain.

*Id.* The court considered the last two elements of the definition too broad to pass constitutional muster.
further, Justice Locher, like the Deutsch prosecutor, saw the underworld engaged in "terrorism" against the community and viewed the crime syndicate statute as a necessary weapon "to effectively combat at the abhorrent escalation of organized crime, which is often accompanied by acts of terrorism or illegal use of group pressure in order to achieve unlawful ends."¹⁸²

Neither Deutsch nor Justice Locher's dissent requires "terrorism" to sustain a political motive or to seek political influence. Rather, terrorism, in this context, consists of organized criminal acts carried out against communities in pursuit of "unlawful ends." Indeed, in 1986, the Ohio Supreme Court's Justice Holmes used "acts of terrorism" to describe union officers intimidating several "scabs."¹⁸³ Their "terrorist" tactics evidenced at trial included "utterly vicious" threats of bodily harm, cursing and screaming, followed by union officers running their cars onto the sidewalk, tire-slashings, window-smashings, and other violent property damage.¹⁸⁴ To be sure, the striking union officers arguably had a political or industrial motive—preventing so-called "scabs" from crossing the picket line in order to maintain bargaining power in their labor negotiation—but Justice Holmes' description focused on the nature of the acts themselves, not their underlying motivation, and he considered these violent threats as nothing short of "terrorism," "[f]ar from an exercise of First Amendment rights..."¹⁸⁵ Thus, to Justice Holmes, terrorism can be waged against as few as a handful of picket-breakers and comprises behavior not unheard of in overheated labor disputes.

Likewise, State v. Keith¹⁸⁶ and State v. Douglas¹⁸⁷ suggest that "terrorism" holds a more mundane criminal meaning and may target a very small number of victims. Keith found that the defendant's string of seven crimes, including stalking, personal entreaties, and arsons "illustrat[ed] defendant's modus operandi or pattern of terrorism to achieve his ends."¹⁸⁸ In Keith there was a single victim, and in Douglas the court used terrorism in quotes to describe a one-day series of shootings and felonious assaults that resulted in two murders. The Douglas court ruled that "evidence that appellant was involved with certain members of a group in a whole series of acts of 'terrorism' on January 31, 1991 was highly relevant to the state's case."¹⁸⁹

Notably, in all of these cases the courts use "terrorism" descriptively and find it

¹⁸². Id. at 507 (Locher, J., dissenting).
¹⁸³. See Local Lodge 1297 v. Allen, 490 N.E.2d 865, 867 (Ohio 1986) (noting that "[t]he threshold issue is whether use of the epithet 'scab' may underpin a state tort action").
¹⁸⁴. Id. at 877 (Holmes, J., dissenting).
¹⁸⁵. Id. at 878.
¹⁸⁸. Keith, 1997 Ohio App. LEXIS 914, at *20. The court explained the facts as follows: The case below involved a string of seven crimes impacting Ms. Baker and innocent third parties close to her over an eight month period in 1992. The stalking by driving up and down Jamie Baker's street, the tracking her down when she moved, the repeated contacts to resume the relationship, the leaflets, the brick incident, and finally the arsons and theft represented a measured and escalating modus operandi, whereby defendant sought to isolate Ms. Baker from her friends and compel her to return to him. The identity of the perpetrator of this string of crimes was the key issue in this case. The defendant at trial denied any involvement in the crimes.
unnecessary to explain its meaning beyond the context of the criminal events described. This is consistent with the bench’s willingness to afford the corollaries, “terror” and “terrorize,” their “common meaning” and not to treat them as legal terms of art requiring legal or technical definitions. Despite having under twenty explicit references—an admittedly small sample pool—it is clear at the very least that “terrorism” has modified a wide range of criminal activity, from the politically and racially charged crimes of the Ku Klux Klan and its “slogans of terrorism,” to the notorious violence of the organized crime syndicates, to the modus operandi of a single victim's stalker.

If these historical uses and understandings of terrorism guide our modern usage and interpretation of Ohio’s anti-terror statute at all, they suggest that the statute’s broad scope, including a purpose to influence both governments and civilians, may not be far removed from our historical and legal perspectives of terrorism. Indeed, recognition of the word’s broad and non-legal meaning seems to run through both its common law and statutory use and should not be ignored when interpreting the more nebulous components of Ohio’s criminal terrorism statute.

B. “Terror”

There is a natural, semantic connection between “terror,” “terrorize,” and their derivative—“terrorism.” Dr. Trench’s own “big dictionary,” for instance, defines terrorism as “a system of terror,” “a policy intended to strike with terror those against whom it is adopted,” and “the fact of terrorizing or condition of being terrorized.”

Certainly, since September 11 and even before, a host of popular book titles and newspaper headlines reflect the synonymous relationship between “terror” and “terrorism,” to the point of near interchangeability.

190. OXFORD ENGLISH DICTIONARY 820 (2nd ed. 1989). Of course, the United States Supreme Court addressed the relative value of dictionaries for determining the meaning of words at law in Nix v. Hedden. In a short case humorously concerned with “[t]he single question... whether tomatoes, considered as provisions, are to be classed as 'vegetables' or as 'fruit,'” the Court observed:

There being no evidence that the words “fruit” and “vegetables” have acquired any special meaning in trade or commerce, they must receive their ordinary meaning. Of that meaning the court is bound to take judicial notice, as it does in regard to all words in our own tongue; and upon such a question dictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court.


story to forego any examination of “terror” in the common law, since its usage there might augment the meaning of “terrorism” and inform today’s statutory scheme designed to prosecute it.

A cursory glance through Ohio’s cases, however, reveals not only that state courts have penned “terror” and “terrorize” far more frequently than “terrorism,” but also that “terror” at common law overwhelmingly refers to “fear,” “fright,” and heightened conditions of emotional duress rather than any explicit reference to its more complicated cousin, terrorism. Indeed, recall counsel’s argument on appeal in State v. Canter that “because the dictionary definitions of ‘fear’ (which is an element of abduction) and ‘terrorize’ are indistinguishable, it can be inferred that the jury used ‘fear’ interchangeably with ‘terrorize’ in order to convict him of kidnapping.” One may be tempted to conclude, then, that a common law study of “terror” adds little to a discussion of today’s anti-terrorism statute. After all, if “terror” may refer either to “fear” or to “terrorism” but is almost exclusively used to describe the former, then examining that usage in order to better understand the latter may be misguided. But this suggests a schism between “fear” and “terrorism,” and it ignores the implicit and close connection between terror’s two meanings: “terror” as an induced fear; and “terror” as a mechanism for achieving political or civilian influence.

On the contrary, Ohio’s common law makes plain that “terror”—even used as a form of fear—is tightly linked to coercion and behavioral influence. For example, some

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Terror Case; WASH. POST, Mar. 22, 2005, at A03.

193. See State v. Perdue, No. 00CA244, 2003 Ohio App. LEXIS 3959, *15 (Ohio Ct. App. Aug. 21, 2003) (noting that the State argued that a “sudden passion is an emotion such as terror which would render the mind incapable of reflection. It then defines terror as, among other things, fear caused by the apprehension of danger”).


of the earliest appearances of "terror" described the "terror of arrest" and hailed the threat of punishment as "a terror to offenders"—referring to the law's deterrent power to shape social human action. Moreover, the courts have recognized that criminals perpetrate terror against their victims in order to intimidate and thereby influence the victim's behavior. The Ohio Supreme Court most explicitly drew this connection in *State v. Davis*, noting:

The use or threat of immediate use of force element of the offense of robbery, as expressed in [the statute] is satisfied if the fear of the alleged victim was of such a nature as in reason and common experience is likely to induce a person to part with property against his will and temporarily suspend his power to exercise his will by virtue of the influence of the terror impressed.

Several appellate decisions illustrate this confluence as well, characterizing particularly egregious intimidation and violent coercion as nothing less than a "reign of terror." In *State v. Rock*, the court described a four-year "reign of terror" within a home that went "way beyond the mere establishment of a parent/child dominance as argued by appellant." The court reported that the child "testified to numerous occasions when appellant hit [them], threatened to shoot and kill everyone and waved a gun around the house." These incidents were contemporaneous with sexual touching and threats "to kill them and let their mother watch . . . ." Similarly, in *State v. McHenry*, the panel cited "overwhelming evidence of kidnapping for sexual conduct, rape, and gross sexual imposition" and concluded that the "[a]ppellant created a reign of terror in the household" and abused his position of trust in order "to control their mother."

Outside of the home and child abuse context, the Second District Court of Appeals

197. Anderson v. Soward, 40 Ohio St. 325, 337 (1883).
198. Railway Co. v. Hutchins, 32 Ohio St. 571, 582 (1877).
201. It is worth noting here as Bradley Larschan recounted:

The first usage of the term 'terrorism' appears to have been in response to the systematic policy of violence, intimidation and the use of the guillotine by the Jacobin and Thermidorian movements in revolutionary France. It has been observed that 'terrorism,' 'terrorist,' and 'terrorize' stem from the French words 'terrorisme,' 'terroriste,' and 'terroriser,' which developed during the French Revolution.


203. *Id.* at *5–6.
204. *Id.* at *6.
reiterated in State v. Herring what the trial court “aptly described as a reign of terror.” Extending over a period of two weeks, the reign included “three . . . armed and violent entrances into three private homes, followed by brutal, bloody, vicious and revengeful acts, during which . . . many victims were then beaten, crippled, shot, stripped of their clothing, tortured, threatened with death and otherwise terrorized and injured by the armed gang.”

Additionally, a number of Ohio’s firearms cases at the turn of the twentieth century also suggest that “terror,” as a kind of debilitating fear with a coercive influence, may be perpetrated against civilian bodies and the people at-large. In 1904, Martin Walter was convicted by a justice of the peace for “having in the open air, for the purpose of shooting, implements for shooting, to wit, one shotgun and cartridges . . .” On appeal, the Cuyahoga County Court of Common Pleas took up the defendant’s constitutional claims and observed that “[t]he offense of going armed with unusual or dangerous weapons, to the terror of the people, has always been indictable . . . at common law.”

Whereas Mr. Walter’s arrest concerned an “open air” firearms incident, the state’s supreme court applied this same common law principle to the concealed carrying of arms. In State v. Hogan, the court saw “no real difficulty” with the constitutionality of Ohio’s law that “forbids the tramp to bear arms.” Addressing the proscription in dicta, the court surmised that although the Second Amendment to the Constitution of the United States of America “guarantee[s] to the people in support of just government such right [to bear arms] and to afford the citizen means for defense of self and property,” the bill of rights does not vindicate a person who “employ[s] those arms . . . to the annoyance and terror and danger of its citizens . . .” Moreover, the court explained, the Second Amendment promise was not “a warrant for vicious persons to carry weapons with which to terrorize others,” and, as the court reminded, “[g]oing armed with unusual and dangerous weapons to the terror of the people is an offense at common law.”

Hogan has since been followed and cited for the proposition that the public carrying of firearms may be state-regulated on grounds that it may incite public panic, fear, and terror in the people. This suggests that the common law has recognized a

207. Id. (“The casualties included one death, several shot (one with multiple gunshot wounds), broken bones, sexual orgy and other traumatic personal injuries inflicted on persons in private homes.”).
209. Id. (quoting 5 Am. & Eng. Enc. Law (2d ed.) 729).
210. State v. Hogan, 63 Ohio St. 202, 218 (Ohio 1900).
211. Id.
212. U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).
213. Hogan, 63 Ohio St. at 218–19.
214. Id. at 219.
215. Id.
216. Id.
"public terror," one affecting "a peaceful people," or, perhaps in the legislature's more recent parlance, the "civilian population."218

These cases should inform any modern discussion of terrorism and Ohio's anti-terrorism statutes in particular. Taken together they demonstrate that courts have viewed crimes as disparate as theft, child abuse, and firearms possession to be crimes of "terror." Likewise, seeing "terror" at common law so closely aligned with fear, apprehension, and attempts to intimidate a "peaceful people," helps to make sense of recent legislative efforts like Ohio's that have enacted statutes targeting such purposeful intimidation and called it "terrorism." Insofar as terrorism is conceptually understood and statutorily defined as a crime committed with intent to influence populations and policies, its meaning proves remarkably consistent with its semantic common law relative, "terror."

VI. CONCLUSION

Several important lessons can be drawn from a study of Ohio's earlier statutory and common law treatment of "terror" and "terrorism." First, prior to the legislature's 2001 definition of "acts of terror" the state was content to leave the statutory meanings of "terror," "terrorize," and even "terrorism" in the hands of the jury. This deference provided for an as-applied discovery of terror's "common meaning" that tracked the gradual evolution of the term in the public square and suggests that such conceptions were neither static nor engraved in law. Second, the common law reflects the admitted lack of a uniform definition of "terrorism," and displays the full spectrum of the word's meaning, from the violent but all-too-common crimes of kidnapping and child abuse, to the orchestrated efforts of the Ku Klux Klan and communist saboteurs who use violence in pursuit of political or social goals. Finally, the common law seems not to require a political or ideological purpose to lie behind every "reign of terror." Instead, Ohio courts understood that "terror"—in virtually all of its manifest meanings—could be, and most often was, waged against individuals, communities, or the people at-large for any number of invidious reasons but was always intended to intimidate, influence, and control.

The difficulty with imposing these common law perspectives of "terror" upon the current struggle to define "terrorism" legally, however, may lie in the nation's perception of terrorism in a post-9/11 world. That is, after September 11, "terrorism" and its semantic corollaries may in fact carry a kind of social stigma, a connotation that whatever the underlying crime may have been, it has risen well above "mere crime."219

The sheer magnitude of the 2001 attacks, the international and military nature of the


The right of free speech is not without limits . . . While the right of free speech entitles citizens to express their ideas, beliefs, and emotions, regardless of their popularity, it does not extend to the threatening of terror, inciting of riots, or verbalizing of false information that induces panic in a public place.

Id.

219. See Cooper, supra note 15, at 106 (observing that "[t]he term 'terrorism' is a judgmental one in that it not only encompasses some event produced by human behavior but seeks to assign or ascribe a value or quality to that behavior . . .").
"War on Terror," and the severity of the crimes at issue in Virginia's terror prosecutions of the "Beltway Snipers," John Allen Muhammad and John Lee Malvo,²²⁰ may strengthen the public's desire for the law to distinguish between "mere crime" and true "terrorism."

If anti-terror laws, such as Ohio's, define and criminalize terrorism per se, enhancing the penalties for the underlying offense based entirely on the aggressor's purpose (intimidation) and nature of his victims (government or civilian population), those definitions must be flexible enough to accommodate unforeseeable cases and circumstances, but not so broad as to effectively turn every intimidating crime of violence into a terrorism trial—for at that point "terrorism" has lost its meaning and legal gravitas. In crafting its terrorism statute, the Ohio legislature attempted to walk this fine line.

Yet here critics may disparage the state's effort most severely and argue that the provision that allows criminal "terrorism" to include specified underlying offenses intended to "intimidate or coerce a civilian population,"²²¹ all but divests "terrorism" of any significant meaning. Terrorism theorists like Bruce Hoffman,²²² Audrey Kurth Cronin,²²³ and Raphael Perl,²²⁴ who contend that "terrorism," as defined, must recognize the political motivations and targets of the crime, presumably would object to Ohio's looser statutory language that theoretically allows for any number of "common criminals" to be prosecuted as terrorists. The law's apparent inability to distinguish, for example, between a man brandishing a pistol in order to incite panic and intimidate a "peaceful people," and a man who detonates explosives in a crowded football stadium for the purpose of affecting the Administration's foreign policy, suggests that the two crimes are in some measure legal equals. It may be objected that trying both men as

²²⁰. See Josh White and Tom Jackman, Sentences Not End of Sniper Cases; No Consensus on ²nd Trials, WASH. POST, Mar. 7, 2004, at C01 (reporting that John Allen Muhammad and John Lee Malvo, "charged with 10 slayings in the Washington region," were "sentenced in separate Virginia courtrooms for committing terrorism and murder"). See also Carol Morello, Victims' Relatives Still Ask "Why?": Snipers' Motives Remain Unresolved, WASH. POST, Mar. 11, 2004, at All (reporting on the "Beltway Snipers" prosecuted under Virginia's anti-terrorism law). The Washington Post reported:

Yet one question lingers, as unanswerable today as it was Oct. 24, 2002, the day Muhammad and Malvo were arrested at a Maryland rest area and the killing stopped:

Why did they do it?

Prosecutors were not short of possible motives.

In Muhammad's trial, they suggested that the sniper attacks were an attempt to create a cover so that Muhammad could kill his ex-wife and get his children back. At his sentencing hearing, Muhammad tried to throw cold water on that theory, saying that his life had been "wonderful" and that nothing in particular had frustrated or angered him.

Prosecutors in Malvo's trial brought psychiatrists to the stand who said Malvo told them the snipers tried to extort $10 million from the government in order to start a multiracial utopia in the woods of Canada. Not many found that explanation convincing, however.

Id.


²²². BRUCE HOFFMAN, INSIDE TERRORISM 14 (1998) (arguing that terrorism is an inherently political act).

²²³. Audrey Kurth Cronin, Introduction: Meeting and Managing the Threat, in ATTACKING TERRORISM: ELEMENTS OF A GRAND STRATEGY 4 (Audrey Kurth Cronin and James M. Ludes eds., 2004) (arguing that terrorism is "[t]he surprise threat or use of seemingly random violence against innocents for political ends by a nonstate actor") (emphasis added).

"terrorists" threatens to weaken the law and confound the public's contemporary notion of terrorism. The relative ambiguity in Ohio's "civilian population" language—divorced from any political motivation or aim—arguably runs just such a risk. Thus, the question remains whether much can be gained from the common law's earlier suggestion that common criminals and child abusers can preside over "reigns of terror," that aggravated kidnapping "terrorizes" its victim, and that the Ku Klux Klan and political dissidents can engage in "methods" and "slogans of terrorism."

These difficulties notwithstanding, the common law perspective proves particularly instructive for interpreting precisely this more ambiguous component of Ohio's terrorism law. The statutory recognition that violent crimes perpetrated with intent to "intimidate or coerce a civilian population" finds support in the state's case law history. Furthermore, the law's grant of wide prosecutorial latitude in bringing terrorism charges against the most violent defendants also comports with a distinguished common law tradition of allowing prosecutors, judges, and juries to sketch the contours of criminal "terror." Indeed, it is this very discretion that will ultimately reflect and accommodate the country's evolving post-September 11 notions of terrorism and allow the law to arrive at a "common meaning" for a politically charged word that has otherwise proven impossible to define. Once the inherent difficulties in framing a unified legal definition of terrorism are acknowledged, however the nation and its policymakers may come to conceive of terrorism in the 21st century, the common law stands to serve as a valuable interpretive tool, and taking inventory of its considerable history with "terror" only informs and advances the law's current efforts to understand and combat criminal terrorism.