FROM STALIN TO BIN LADEN: COMPARING YESTERYEAR'S ANTI-COMMUNIST STATUTES WITH THE PUBLIC EMPLOYER PROVISION OF THE OHIO PATRIOT ACT

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In the beginning decades of the twentieth century, membership in communist organizations in the United States began to increase significantly. Governing bodies across the country, worried that members of these organizations were a threat to national security, responded by enacting laws that attempted to deter people from participating in these, often legitimate, organizations. These statutes, however, failed to take into account the right to association guaranteed in the First Amendment, and because of this, many were invalidated by the Supreme Court of the United States because they were unconstitutionally overbroad and violated the doctrine of due process.

The start of the twenty-first century saw a new threat to national security emerge—terrorism, illustrated most horrifically in the terrorist attacks on September 11, 2001. And again, state and federal governments reacted by enacting laws attempting to combat terrorism and prohibiting people from assisting or associating with groups that were thought to be supporting terrorism. This Note argues that like the anti-communist laws of the early twentieth century, these anti-terrorism laws similarly impermissibly restrict freedom of association and should similarly be held unconstitutional.

The author focuses on the Ohio Patriot Act, which has not yet been challenged on constitutional grounds. This Note outlines the relevant doctrines and arguments that courts have used to hold both the early twentieth-century anti-communism laws and certain more recent federal anti-terrorism laws unconstitutional. The author then applies these doctrines to the Ohio Patriot Act and argues that if challenged, it should be held unconstitutional by the Supreme Court of the United States. The author does acknowledge, however, that prohibiting people from assisting known terrorist organizations is a legitimate state goal, and so the author concludes by suggesting amendments Ohio could make to its Patriot Act that would accomplish this goal, while still complying with constitutional requirements.

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I. INTRODUCTION

During the first half of the twentieth century, the United States witnessed increasing membership in communist organizations and, as a result, federal, state, and local governments took notice.[1] In response to this growing threat, governments across the United States implemented a series of security measures, which some have characterized as overzealous and overintrusive.[2] Law enforcement agencies spied on legitimate organizations and—in the process—violated their members' civil liberties.[3] During the 1930s, for example, the Chicago police Red Squad monitored and conducted surveillance on several legitimate groups, including the League of Women Voters, the NAACP, the American Jewish War Veterans, and the Catholic Interracial Council of Chicago—none of which were proven to have engaged in illegal activity.[4]

In addition to surveillance, several state and local governments enacted laws aimed at deterring persons from aiding or joining communist groups.[5] Many of these laws, which were primarily enacted in the 1950s, required public employees to sign loyalty oaths in which they disaffirmed membership in, and support to, communist and/or subversive organizations.[6] Under these statutes, an employee's refusal to sign the oath resulted in discharge, and failure to disclose or even deny association potentially led to criminal prosecution.[7] Governments argued that such measures were necessary to protect the national security of the United States.[8] The Supreme Court of the United States invalidated most of these statutes, however, because they encroached upon public

1. *See* Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 ARIZ. L. REV. 621, 628 (2004).

2. *Id.*

3. *Id.* at 632–33.

4. *Id.* The Red Squad harassed these organizations and even infiltrated their legal teams but was unable to find any evidence of illegality. *Id.* at 633. And the Chicago Police Department was not alone. In 1920, the U.S. Department of Justice conducted several communist raids that affected many innocent people. *Id.* at 629. In the "Palmer Raids," for example, 10,000 persons were arrested, many of whom were not connected to communism. In 1936, President Roosevelt issued his first of many orders authorizing the FBI to gather intelligence regarding fascist, communist, and all subversive activities in the United States. *Id.* at 630. Much like the Chicago Red Squad, the FBI also conducted surveillance on, and attempted to "neutralize," legitimate groups such as the NAACP, church and university groups, and persons working to further the Civil Rights Movement. *Id.* at 631–32. The FBI went as far as tracking all of Dr. Martin Luther King Jr.'s movements, and it employed several covert tactics in attempts to discredit him. *Id.*

5. *See, e.g.*, United States v. Robel, 389 U.S. 258, 260 (1967) (invalidating the Subversive Activities Control Act, which forbade members of designated communist-action groups from working in federal defense facilities); Baggett v. Bullitt, 377 U.S. 360, 361–62, 367 (1964) (invalidating a statute that required all public employees to sign an oath declaring that they were not members of the Communist Party or any subversive organization); Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 279, 288 (1961) (invalidating a Florida statute that required all public employees to execute a written oath swearing they had not lent "aid, support, advice, counsel or influence" to the Communist Party).

6. *See, e.g.*, *Cramp*, 368 U.S. at 279, 288 (invalidating a Florida statute that required all public employees to execute a written oath swearing they had not lent "aid, support, advice, counsel or influence" to the Communist Party). This Note refers to these statutes as the anti-communist statutes.

7. *See infra* Part II.C–D (discussing the provisions of anti-communist statutes).

8. Fisher, *supra* note 1, at 628.

employees' First Amendment right of freedom of association,[9] holding that such statutes were overbroad and/or violated the Due Process Clause of the U.S. Constitution.[10]

Almost a half-century later, the United States finds itself in similar circumstances. Today's national security threat, however, is no longer communism. Instead, terrorism is yesteryear's communism. And just like in the 1950s, today's governments have responded with statutes that potentially encroach upon civil liberties. Immediately after the terrorist attacks of September 11, 2001, the United States passed legislation that amended previous terror laws[11] in an attempt to secure our nation's borders.[12] Congress enacted, for example, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) and the Intelligence Reform and Terrorism Prevention Act (IRTPA), both of which amended definitions in the Anti-Terrorism and Effective Death Penalty Act (AEDPA) regarding assistance to terrorist organizations.[13]

All of these amendments have been, despite their legitimate aims, attacked on constitutional grounds,[14] and some of these attacks have succeeded.[15] The Ohio General Assembly (Ohio legislature) nevertheless followed Congress's lead and enacted the Ohio Patriot Act in 2005.[16]

9. *See infra* Part II.C–D.

10. *See, e.g.*, *Robel*, 389 U.S. at 260, 268 (rejecting the Subversive Activities Control Act, which forbade members of designated communist-action groups from working in federal defense facilities, because it swept indiscriminately across all types of association with Communist-action groups, without distinguishing between the defendant's degree of membership); Whitehill v. Elkins, 389 U.S. 54, 56, 61 (1967) (invalidating a Maryland statute that required all public school teachers to sign an oath declaring that they were not engaged in the attempt to overthrow the government, and were not members of a subversive group); Shelton v. Tucker, 364 U.S. 479, 480 (1960) (declaring that an Arkansas statute, which compelled every teacher to file an annual affidavit listing every organization to which the teacher belonged or had regularly contributed to within the preceding five years, was overbroad because it interfered with teachers' First Amendment right of association).

11. *See infra* Part II.B.

12. Additionally, the President authorized the National Security Agency to conduct warrantless surveillance of millions of telephone calls and e-mails originating from the United States. Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 431 (2009).

13. *See* 18 U.S.C. §§ 2339A, 2339B (2006) (criminalizing material support to terrorist organizations); Humanitarian Law Project v. Mukasey, 552 F.3d 916, 922 (9th Cir. 2009) (discussing the legislative history of the AEDPA).

14. *See, e.g.*, *Humanitarian Law Project*, 552 F.3d at 921–24 (discussing the district court's analysis of the provision of the AEDPA that prohibits persons from providing material support to foreign terrorist organizations (FTOs), which the plaintiffs claimed was unconstitutional on grounds of vagueness, mens rea, and the overbreadth doctrine); United States v. Amawi, 545 F. Supp. 2d 681, 684 (N.D. Ohio 2008) (arguing that § 2339B is unconstitutionally vague); United States v. Warsame, 537 F. Supp. 2d 1005, 1013, 1016 (D. Minn. 2008) (arguing that § 2339B of the AEDPA violates the First Amendment right of association because it is vague, overbroad, and lacks the requisite intent to further the FTO's illegal aims).

15. *Humanitarian Law Project*, 552 F.3d at 924–32 (rejecting the plaintiff's mens rea and overbreadth claims, but declaring the terms "training," "expert advice," and "service" are impermissibly vague because persons of ordinary intelligence could not know their meaning).

16. State *ex rel.* Triplett v. Ross, 855 N.E.2d 1174, 1176 (Ohio 2006).

The controversial Act[17] shares similar text with the IRTPA,[18] and in regards to public employment, Ohio's version of the Patriot Act closely resembles the anti-communist statutes that the Supreme Court invalidated decades ago by conditioning employment upon disaffirming membership and support to terrorist organizations.[19]

Admittedly, a material difference exists between the communist threat of the first half of the twentieth century and the terrorist threat we face today, which arguably legitimizes Ohio's recent measures. No communist organization has ever executed an attack that compares with the terrorist attacks that took place on September 11, 2001, thus terrorism poses a more legitimate threat that weighs heavier when balancing citizens' constitutional rights. Courts must nevertheless scrutinize all statutes that may unnecessarily violate citizens' civil liberties; and because the Ohio Patriot Act shares a similar purpose and text with the anti-communist statutes and the AEDPA, a genuine question exists as to whether the Ohio Patriot Act passes constitutional scrutiny.

This Note explores the constitutionality of the Ohio Patriot Act and examines whether the efficacy of the Act outweighs its potential encroachment upon public employees' civil liberties. Because no one has challenged the Ohio Patriot Act on constitutional grounds,[20] this Note applies the cases that invalidated anti-communist oaths as a backdrop, as well as recent terror cases. Part II elaborates on the Ohio Patriot Act, the federal terror laws, and the legal theories that should be used to scrutinize the Ohio Patriot Act. Part III applies an overbreadth and due process analysis to the Ohio Patriot Act and concludes that the language in the Act is unconstitutional under both doctrines. Finally, Part IV recommends that a court invalidate the Ohio Patriot Act, suggests that the Ohio legislature amend the statute, and offers an example of how the legislature should rewrite the statute.

17. When the Ohio legislature enacted the statute, civil rights, public advocacy, and community groups heavily criticized the Act, based on concerns that it would lead to "racial and ethnic profiling, increased bureaucracy and ineffective practices to prevent terrorist attacks in Ohio." Press Release, ACLU, ACLU Victorious in First Challenge to Ohio Patriot Act (Sept. 13, 2006), *available at* http://www.aclu.org/safefree/patriot/26725prs20060913.html.

18. *Compare* 18 U.S.C. § 2339B (punishing persons who provide material support to terrorist organizations, even if the defendant lacked the intent to further the organization's aims), *with* OHIO REV. CODE ANN. § 2909.34(A)(1) (LexisNexis 2006) (punishing membership in a terrorist organization and material support to terrorist organizations, even if the defendant lacked the intent to further the organization's aims).

19. *See* OHIO REV. CODE ANN. § 2909.34(C) (requiring all applicants to complete a declaration of material assistance to foreign terrorist organizations). *Compare Triplett*, 855 N.E.2d at 1176 (explaining the Ohio Patriot Act), *with* Wieman v. Updegraff, 344 U.S. 183, 184–85 (1952) (describing an Oklahoma anti-Communist statute).

20. *See Triplett*, 855 N.E.2d at 1184 (challenging the Ohio Patriot Act, but failing to raise the constitutional claims the Supreme Court used to invalidate the anti-communist statutes, nor raising the recent claims used to challenge recent federal terror laws, including privacy rights).

II. BACKGROUND

The Ohio legislature enacted the Ohio Patriot Act, like the federal terror laws, in hopes of thwarting terrorism.[21] Many similarities exist between the two laws, thus this Part provides an overview of the Ohio Patriot Act and the federal terror statutes. This Part also summarizes the history and development of the constitutional doctrines that courts use to invalidate statutes that encroach upon the First Amendment—the overbreadth and due process doctrines. It uses the anti-communist cases as a backdrop, as well as the recent body of case law that developed in response to terror legislation.

A. Ohio Patriot Act

The Ohio legislature enacted the Ohio Patriot Act on December 14, 2005.[22] The Assembly passed the statute to "establish requirements for state and local compliance with federal homeland security authorities and laws pertaining to terrorism," as well as to "limit licensing, employing, and doing business with persons who have provided material assistance to an organization on the United States Department of State Terrorist Exclusion List" (Exclusion List).[23] In furtherance of these purposes, the Act requires the Director of Public Safety to prepare a Declaration of Material Assistance to Terrorist Organizations (Declaration Form), which the director must provide to the State of Ohio and all of its political subdivisions,[24] along with a copy of the current Exclusion List.[25]

In compliance with the Ohio Patriot Act, the employment departments of Ohio's political subdivisions must present the Declaration Form and Exclusion List to all persons under final consideration for employment.[26] The department must deny employment to any applicant who admits to providing material assistance to any organization on the Exclusion List.[27] Additionally, an applicant's failure to answer "no" to any question constitutes an admission of material assistance.[28] Such an admission, as well as knowingly providing false information, amounts to a fifth degree felony.[29]

21. *See* Ted Wendling, *Controversial New Ohio Patriot Act Proves More Red Tape Than Red Alert*, PLAIN DEALER (Cleveland), June 30, 2006, at B4.
22. *See Triplett*, 855 N.E.2d at 1176.
23. *Id.* (citation omitted) (internal quotation marks omitted).
24. OHIO REV. CODE ANN. § 2909.34(A)(1).
25. *Id.*
26. *Id.* § 2909.34(C)(1).
27. *Id.*
28. *Id.* § 2909.34(B).
29. *Id.* § 2909.34(E).

The Ohio Patriot Act lists the questions the director must include in the Declaration Form.[30] Accordingly, Ohio public employees (and applicants) must answer the following six questions:

> (1) Are you a member of an organization on the U.S. Department of State Terrorist Exclusion List? . . .
>
> (2) Have you used any position of prominence you have within any country to persuade others to support an organization on the U.S. Department of State Terrorist Exclusion List? . . .
>
> (3) Have you knowingly solicited funds or other things of value for an organization on the U.S. Department of State Terrorist Exclusion List? . . .
>
> (4) Have you solicited any individual for membership in an organization on the U.S. Department of State Terrorist Exclusion List? . . .
>
> (5) Have you committed an act that you know, or reasonably should have known, affords "material support or resources" (see below) to an organization on the U.S. Department of State Terrorist Exclusion List? . . .
>
> (6) Have you hired or compensated a person you knew to be a member of an organization on the U.S. Department of State Terrorist Exclusion List or a person you knew to be engaged in planning, assisting, or carrying out an act of terrorism? . . . .[31]

The Ohio Patriot Act and the Declaration Form define the phrase "material support or resources" as, among other things, "currency, payment instruments, other financial securities funds, transfer of funds, financial services, communications, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets."[32] It is this definition and these six questions that potentially violate Ohio public employees' First Amendment right to associate freely and which should have served as the basis of a recent challenge to a similar provision in the Ohio Patriot Act.

1. Recent Challenge to the Ohio Patriot Act

Thus far, only one employee has challenged the Ohio Patriot Act, but he failed to do so on constitutional grounds and thus the challenge

30. *See id.* § 2909.34(A)(1) (requiring the director to draft the declaration in "substantially" the "same format and of the same content as set forth in division (A)(2)(b) of section 2909.32 of the Revised Code"); *see also id.* § 2909.32(A)(2)(b) (listing the six questions).

31. *Id.* § 2909.32(A)(2)(b).

32. Ohio Department of Public Safety, Division of Homeland Security, Declaration Regarding Material Assistance/Nonassistance to a Terrorist Organization, http://www.publicsafety.ohio.gov/links/HLS0037.pdf [hereinafter Declaration Form]. The statute, however, expressly excludes medicine and religious materials from its definition. *Id.*

yielded very little success.[33] In *Triplett v. Ross*, a public defender challenged section 2909.33 of the Ohio Patriot Act, which requires Ohio's political subdivisions to provide the Declaration Form to persons or entities they are considering entering into a contract with, conducting business with, or allocating state funds to.[34] The plaintiff sought an action for a writ of prohibition to prevent a municipal court from ordering court-appointed attorneys to complete and return the Declaration Form.[35] The plaintiff refused to sign the Declaration Form, so the court appointed him to represent an indigent person without pay.[36]

The court granted the plaintiff's writ to prohibit municipal courts from requiring attorneys to complete the Declaration Form,[37] holding that the statute authorizes Ohio's political subdivisions to require attorneys to sign the Declaration Form only if they earn over $100,000 annually from said appointments.[38] The court, however, denied the plaintiff's attempt to prohibit municipal courts from declaring that an attorney's failure to complete the declaration results in disqualification from future court appointments.[39] The court denied the writ because the plaintiff had failed to provide evidence that the municipal court officials intended to deny him future appointments—indeed, the attorney remained on the court appointed counsel list and continued to receive appointments (albeit, without pay).[40]

In its decision, the court discussed but did not rule on the First Amendment right of association issue because the plaintiff failed to raise any constitutional claims in his complaint.[41] Moreover, the court reasoned that it was unnecessary to address the constitutional issue because the court had granted the plaintiff's first writ.[42] Accordingly, the effect of *Triplett*, if any, is still unclear. It therefore seems likely that a plaintiff may attempt to challenge the Ohio Patriot Act's constitutionality in the near future.[43] In such a challenge, the court may compare the Ohio Pa-

33. State *ex rel.* Triplett v. Ross, 855 N.E.2d 1174, 1184 (Ohio 2006).

34. *Id.* at 1176–77; *see also* § 2909.33(A)(1).

35. *Triplett*, 855 N.E.2d at 1177. Triplett requested a "peremptory writ to order respondents (1) to cease efforts to have attorneys who seek court appointments . . . to represent the indigent . . . complete and return the Form, (2) to cease declaring that failure of an otherwise licensed, willing, and eligible attorney to complete and return the Form will be a disqualification from obtaining court appointments . . . and (3) not to remove [Triplett's] name from the list of those who are eligible to receive and do receive court appointments . . . ." *Id.* (quotations omitted).

36. *Id.*

37. *Id.* at 1185.

38. *Id.* at 1183–84.

39. *Id.* at 1185 (explaining Triplett did not establish his entitlement to such a writ of prohibition because there was no evidence that court officials disqualified, or intended to disqualify, eligible attorneys that failed to complete the declaration from obtaining court appointments).

40. *Id.* at 1179, 1185.

41. *Id.* at 1184.

42. *Id.* ("[W]e need not resolve this issue because Triplett is entitled to the writ based on his claim that R.C. 2909.33 did not authorize the municipal court respondents to require that he complete and return the declaration when seeking court appointments.").

43. *Cf.* Press Release, ACLU, *supra* note 17 (explaining that the *Triplett* decision may serve as a stepping stone "reining" in the statute).

triot Act to the AEDPA and the anti-communist statutes. The remaining Sections provide relevant background on these laws and the cases that scrutinized them.

B. Federal Terror Laws

Congress has passed several pieces of legislation in hopes of curbing terrorist acts, as well as the support to terrorist groups, some of which have been held unconstitutional. In 1996, Congress enacted the AEDPA.[44] The AEDPA makes it a crime for anyone to provide material support or resources to a foreign terrorist organization (FTO).[45] In 2001, Congress enacted the USA PATRIOT Act, which amended the AEDPA's definition of "material support or resources" to include providing "service" and "expert advice or assistance."[46] The Act also added definitions for "training" and "personnel."[47] In 2003, however, the U.S. Court of Appeals for the Ninth Circuit held that the terms "training" and "personnel" were unconstitutionally vague.[48]

In response to the Ninth Circuit's decision, Congress passed the IRTPA in 2004.[49] The IRTPA once again amended the definition of "material support or resources" to include a ban on providing "service," defined the terms "training" and "expert advice or assistance," and "clarified the prohibition against providing 'personnel' to designated organizations."[50] As a result, the AEDPA now contains two controversial sections, 2339A and 2339B. The former punishes support to an FTO with the intent to further a criminal act,[51] providing that whoever offers "material support or resources . . . *knowing or intending* that they are to be used in preparation for, or in carrying out, a violation of [several enumerated criminal offenses]" is subject to criminal penalty.[52] Section 2339B, on the other hand, punishes a person who "knowingly provides material support or resources" to an FTO.[53] The pertinent difference between these two sections is that § 2339A requires the specific intent to aid a terrorist attack, whereas § 2339B punishes persons who simply provide material support to an FTO, regardless of whether the person knows of or

44. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

45. *Id.* § 303, 110 Stat. at 1250–53 (codified as amended at 18 U.S.C. § 2239B (2006)). The AEDPA charges the U.S. Secretary of State with the duty of designating a group as an FTO. *See* Humanitarian Law Project v. Mukasey, 552 F.3d 916, 920 (9th Cir. 2009); U.S. Dep't of State, Terrorist Exclusion List, http://www.state.gov/s/ct/rls/other/des/123086.htm (last visited May 20, 2010) [hereinafter Exclusion List].

46. *Humanitarian Law Project*, 552 F.3d at 922–23; *see also* 18 U.S.C. §§ 2339A(b), 2339B(g)(4).

47. *Humanitarian Law Project*, 552 F.3d at 922; *see also* 18 U.S.C. §§ 2339A(b)(2), 2339B(h).

48. *Humanitarian Law Project*, 552 F.3d at 922 (citing Humanitarian Law Project v. U.S. Dep't of Justice, 352 F.3d 382 (9th Cir. 2003), *vacated*, 393 F.3d 902 (9th Cir. 2004)).

49. *Id.* at 923.

50. *Id.* at 923 (quoting 18 U.S.C. § 2339B(h)); *see also* 18 U.S.C. §§ 2339A(b), 2339B(h).

51. 18 U.S.C. § 2339A(a).

52. *Id.* (emphasis added); United States v. Amawi, 545 F. Supp. 2d 681, 682 (N.D. Ohio 2008).

53. 18 U.S.C. § 2339B(a)(1).

intends to further the illegal acts. Because § 2339A requires a stricter level of mens rea, courts have consistently upheld its constitutionality.[54] The Ninth Circuit, however, declared § 2339B unconstitutional.[55]

The Ninth Circuit's holding suggests that a statute may punish membership in, or support to, an FTO, so long as the defendant possesses the intent to further the FTO's unlawful conduct.[56] The Ohio Patriot Act and § 2339B of the AEDPA share similar language. Both punish knowing material support to an FTO without requiring the intent to further the FTO's criminal activity.[57] Moreover, the Ohio Patriot Act's definition for "material support or resource" parallels the definition provided by § 2339B.[58] Courts invalidated § 2339B under the due process doctrine.[59] The subsequent Sections examine these doctrines, as well as the courts' analyses.

C. Overbreadth Doctrine

Under the overbreadth doctrine, courts must invalidate laws that unduly infringe upon citizens' constitutional rights.[60] A statute is considered overbroad if it is designed to burden or punish activities that are *not* constitutionally protected but, as drafted, also punishes activities that *are* constitutionally protected.[61] The Supreme Court used the overbreadth doctrine to invalidate several anti-communist statutes that infringed upon public employees' First Amendment right to associate freely.[62]

54. *See, e.g.*, *Amawi*, 545 F. Supp. 2d at 682 (holding that § 2339A provided sufficient mens rea to pass constitutional scrutiny).

55. *See Humanitarian Law Project*, 552 F.3d at 924–30 (rendering terms in § 2339B unconstitutionally vague and holding that it lacked the requisite mens rea); *Amawi*, 545 F. Supp. 2d at 684 (applying *Humanitarian Law Project*'s analysis).

56. *See Humanitarian Law Project*, 552 F.3d at 924–27.

57. *Compare* 18 U.S.C. § 2339B (punishing persons who provide material support to terrorist organizations, even if the defendant lacked the intent to further the organization's aims), *with* OHIO REV. CODE ANN. § 2909.34(A)(1) (LexisNexis 2006) (punishing membership in a terrorist organization and material support to terrorist organizations, even if the defendant lacked the intent to further the organization's aims).

58. *Compare* 18 U.S.C. § 2339B(g)(4), *with* OHIO REV. CODE ANN. § 2909.21(I).

59. *See, e.g.*, *Humanitarian Law Project*, 552 F.3d at 925–31.

60. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.8 (8th ed. 2010).

61. *Id.*

62. *See, e.g.*, United States v. Robel, 389 U.S. 258, 259–60, 262 (1967) (rejecting the Subversive Activities Control Act, which forbade members of designated communist-action groups from working in federal defense facilities, because it swept "indiscriminately across all types of association with Communist-action groups," without distinguishing between the defendant's degree of membership); Whitehill v. Elkins, 389 U.S. 54, 56, 62 (1967) (invalidating a Maryland statute that required all public school teachers to sign an oath declaring that they were not engaged in the attempt to overthrow the government, and were not members of a subversive group); Shelton v. Tucker, 364 U.S. 479, 488 (1960) (declaring that an Arkansas statute, which compelled every teacher to file an annual affidavit listing every organization to which the teacher belonged or had regularly contributed to within the preceding five years, was overbroad because it interfered with teachers' First Amendment right of association).

One of the first anti-communist statutes to come before the Supreme Court dealt with public school teachers.[63] In *Shelton v. Tucker*, the Court invalidated an Arkansas statute that compelled every teacher to file an annual affidavit listing every organization to which he or she belonged or had regularly contributed to within the preceding five years.[64] The Court held that the statute provided an *unlimited* and *indiscriminate* sweep and thus interfered with the teachers' First Amendment right of association.[65] The Court outlined the level of scrutiny applied to statutes that encroach upon the First Amendment—if a statute interferes with associational freedom, the state must justify the intrusion with a legitimate reason.[66] And even if the purpose is legitimate and substantial, the government may not pursue said purpose by "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[67] Under this test, the State had a legitimate interest in investigating the loyalty of its teachers, however this interest failed to justify compelling teachers to disclose every associational tie because less restrictive alternatives were available.[68] Accordingly, the statute was unconstitutionally overbroad.[69]

In 1967, the Court encountered a statute that provided a narrower sweep than the one at issue in *Shelton*, yet the Court determined that the statute was unconstitutionally overbroad.[70] *Whitehill v. Elkins* involved a Maryland statute that required all public school teachers to sign an oath that they were not engaged in an attempt to overthrow the government and were not members of a subversive group.[71] The statute defined "subversive" as any "person who commits, attempts to commit, aids in the commission, or advocates [the overthrow of the government] . . . by revolution, force, or violence."[72] The Court invalidated the statute because the lines between permissible and impermissible conduct were too indistinct.[73] Accordingly, the statute created an overbreadthness that

63. *Shelton*, 364 U.S. at 480.

64. *Id.* at 490.

65. *Id.*

66. *Id.* (ruling in favor of the public employees because the statute's "interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers").

67. *Id.* at 488.

68. *See* NOWAK & ROTUNDA, *supra* note 60, § 16.8.

69. *Shelton*, 364 U.S. at 490.

70. Whitehill v. Elkins, 389 U.S. 54, 56, 61 (1967).

71. *Id.* at 55–56. Under the statute, an employee could also be subject to a perjury charge. *Id.*

72. The full statutory definition of a subversive was:

> any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization, as more fully defined in this article.

Id. at 56 (emphasis omitted) (quoting MD. ANN. CODE art. 85A, §§ 1, 13 (1957)).

73. *Id.* at 61–62.

could potentially allow for "oppressive or capricious application as regimes change."[74]

Within a month of deciding *Whitehill*, the Court invalidated a federal statute that specifically targeted communists.[75] In *United States v. Robel*, a shipyard employee challenged the Subversive Activities Control Act, which forbade members of designated communist-action groups from working in federal defense facilities.[76] The Court invalidated the federal law because it swept indiscriminately across all types of association with communist-action groups, without distinguishing the defendant's degree of membership.[77] Moreover, the statute punished a broad range of associational activities, indiscriminately trapping constitutionally-protected membership.[78]

In the federal terror cases, courts also emphasized the need for a statute to distinguish degree of membership, holding that § 2339 was not overbroad because it sufficiently distinguished membership.[79] In *United States v. Warsame*, for example, the defendant claimed that § 2339B prohibits persons from making contributions that have an expressive component, thus sweeping too broadly.[80] The court rejected the defendant's claim, reasoning that the AEDPA did not impede on Warsame's freedom of association because § 2339B does not criminalize membership or association with an FTO, but instead punishes the conduct of providing material support and resources.[81] The AEDPA thus differs from laws that impose liability on membership.[82] Moreover, § 2339B does not punish membership in Al Qaeda, nor does the statute prohibit persons from advocating or sympathizing with their views.[83] The Fourth,[84] Seventh,[85] Ninth,[86] and D.C.[87] Circuits also hold this view.

To survive overbreadth scrutiny, therefore, a statute must be clear, concise, and narrow in scope.[88] In making an overbreadth analysis, courts will ask: (1) does the statute provide an unlimited and indiscriminate sweep that encroaches upon employees' First Amendment right of asso-

74. *Id.* at 62.
75. United States v. Robel, 389 U.S. 258, 259–61 (1967).
76. *Id.* at 259–60.
77. *Id.* at 265–66.
78. *Id.* A member could only be punished, however, if "(1) he is an active member of a subversive organization; (2) such membership is with knowledge of the illegal aims of the organization; and (3) the individual has a specific intent to further those illegal ends, as opposed to general support of the objectives of an organization." NOWAK & ROTUNDA, *supra* note 60, § 16.42(a)(iii).
79. *See, e.g.*, United States v. Warsame, 537 F. Supp. 2d 1005, 1014–16 (D. Minn. 2008).
80. *Id.* at 1016.
81. *Id.*
82. *Id.* at 1014.
83. *Id.*
84. United States v. Hammoud, 381 F.3d 316, 329 (4th Cir. 2004).
85. Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1026 (7th Cir. 2002).
86. Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135–36 (9th Cir. 2000).
87. People's Mojahedin Org. of Iran v. Dep't of State, 327 F.3d 1238, 1244–45 (D.C. Cir. 2003).
88. *See* NOWAK & ROTUNDA, *supra* note 60, § 16.42(a) (discussing the current law on loyalty oaths after *Elfbrandt* and *Cole*).

ciation; (2) if so, is the government's purpose legitimate and substantial; and (3) even if its purpose is legitimate and substantial, can its purpose be achieved more narrowly?[89]

D. Due Process

In addition to the overbreadth doctrine, courts also applied a due process analysis to the anti-communist statutes.[90] The courts first rejected statutes on vagueness grounds, and eventually on the basis of insufficient mens rea.[91]

1. Vagueness Doctrine

Under the vagueness doctrine, laws that regulate constitutional rights must provide fair notice to persons before making such conduct criminal.[92] Any criminal statute that contains vague language is unconstitutional regardless of whether the law regulates a fundamental right such as the right of free speech.[93] Courts have emphasized, however, that the requirement for clarity is enhanced when a statute "abut[s] upon sensitive areas of basic First Amendment freedoms."[94] The vagueness doctrine is based on two rationales.[95] First, a vague law may have an *in terrorem* effect and thereby deter persons from engaging in protected activities.[96] In other words, an unclear law that fails to draw bright lines may regulate more than is necessary and thus deter persons from engaging in protected speech.[97] Second, the vagueness doctrine incentivizes legislators to provide clear guidelines to govern law enforcement.[98]

89. *See* Shelton v. Tucker, 364 U.S. 479, 485–90 (1960).

90. *See, e.g.*, Baggett v. Bullitt, 377 U.S. 360, 362–67 (1964) (applying a due process analysis to a statute that required teachers to sign an oath declaring that they would promote and teach respect for the flag, U.S. institutions, and the State of Washington, and another statute that required all public employees to sign an oath declaring that they were not members of the Communist Party or *any* subversive organization); Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 286–88 (1961) (rejecting, on due process grounds, a Florida statute that required all public employees to execute a written oath in which affiants swore they had not lent "aid, support, advice, counsel or influence to the communist party"); *see also* NOWAK & ROTUNDA, *supra* note 60, § 16.42 (providing examples of cases in which the Court invalidated statutes on due process grounds).

91. *Compare Cramp*, 368 U.S. at 287–88 (holding that a statute that is vague and indefinite, so as to permit the punishment of the fair use of political discussion, is repugnant to the constitutional guaranty of due process), *with* Keyishian v. Bd. of Regents, 385 U.S. 589, 609–10 (1967) (invalidating a New York civil service law because it proscribed mere knowing membership without requiring a specific intent to further the unlawful aims of the Communist Party).

92. NOWAK & ROTUNDA, *supra* note 60, § 16.9(b). "The reasons for striking laws for vagueness apply whenever the lack of notice in a law might deter the exercise of a fundamental constitutional right, including rights that are not protected by the First Amendment." *Id.* § 16.9, at 1280 n.2.

93. *Id.* § 16.9.

94. Humanitarian Law Project v. Mukasey, 552 F.3d 916, 928 (9th Cir. 2009).

95. *See* NOWAK & ROTUNDA, *supra* note 60, § 16.9.

96. *Id.* § 16.9(b).

97. *Id.*

98. *Id.*

Without such clarity, a law may provide law enforcement officers with too much discretion to enforce the statute.[99]

In 1961, the Supreme Court used the vagueness doctrine to invalidate a statute aimed at communist sympathizers.[100] In *Cramp v. Board of Public Instruction*, a school teacher challenged a Florida statute that required all public employees to execute a written oath in which affiants swore they had not lent "aid, support, advice, counsel or influence to the Communist Party."[101] The statute called for immediate discharge[102] and prosecution for perjury.[103] The Court ruled in favor of the public school teacher[104] and held that a statute that is vague and indefinite, so as to punish the fair use of political discussion, is repugnant to the constitutional guaranty of due process.[105] The oath said nothing regarding advocacy of the violent overthrow of the state or federal government, nor membership or affiliation with the Communist Party, and it failed to provide any terms that could be construed objectively.[106] On the contrary, those who took the oath swore that they had not in the unending past ever knowingly lent their *aid*, *support*, *advice*, *counsel*, or *influence* to the Party—all overly vague phrases[107] that potentially opened the door to oppression at the hands of overzealous anti-communists.[108]

The Court relied on this reasoning in *Baggett v. Bullitt*,[109] which dealt with two Washington statutes that required public employees to

99. *Id.* (explaining that guidelines prevent police officers from enforcing statutes on a selective basis). "This discretion is most dangerous when the law regulates a fundamental right, such as speech, so that the officers might be subjecting persons to arrest and prosecution because they disagree with the message that the person wishes to convey, or for some other constitutionally suspect reason." *Id.* § 16.9(b), at 1281.

100. Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 287–88 (1961).

101. *Id.* at 279.

102. *Id.* at 280. The statute provided that if any person required to take the oath fails to do so, the person's employer "shall cause said person to be immediately discharged, and his name removed from the payroll, and such person shall not be permitted to receive any payment as an employee or as an officer where he or she was serving." *Id.* at 280 n.2.

103. *Id.* at 285.

104. *Id.* at 288.

105. *See id.* at 287 ("Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula.") (alteration in original) (internal quotation marks omitted).

106. *Id.* at 286.

107. *Id.* The Court stated:

> In the not too distant past Communist Party candidates appeared regularly and legally on the ballot in many state and local elections. Elsewhere the Communist Party has on occasion endorsed or supported candidates nominated by others. Could one who had ever cast his vote for such a candidate safely subscribe to this legislative oath? Could a lawyer who had ever represented the Communist Party or its members swear with either confidence or honesty that he had never knowingly lent his "counsel" to the Party? Could a journalist who had ever defended the constitutional rights of the Communist Party conscientiously take an oath that he had never lent the Party his "support"? Indeed, could anyone honestly subscribe to this oath who had ever supported any cause with contemporaneous knowledge that the Communist Party also supported it?

Id.

108. *See id.* at 286–87 ("It would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose. And experience teaches that prosecutors too are human.").

109. 377 U.S. 360 (1964).

sign oaths as a condition of employment.[110] The first statute required teachers to sign an oath declaring that they would promote and teach respect for the U.S. flag, U.S. institutions, and the State of Washington.[111] The second statute required all public employees to sign an oath declaring that they were not members of the Communist Party or any subversive organization.[112] Consequently, professors were forced to sign an oath that incorporated the declarations required by both statutes,[113] subject to penalties of perjury.[114] Relying on *Cramp v. Board*, the Court held that the Communist-geared oath was unconstitutionally vague because it failed to clearly identify "guiltless knowing behavior."[115]

Not all oaths are unconstitutional, though, and in some circumstances, courts owe deference to loyalty oaths.[116] In *Cole v. Richardson*, the Court upheld a Massachusetts statute that required all public employees to take an oath to uphold and defend the Constitution and to oppose the overthrow of the government by force, violence, or by any illegal or unconstitutional manner.[117] The Court held that oaths that require individuals to swear to the appropriateness of their past conduct (negative oaths) differ from oaths that merely require the individual to swear support in the future to the constitutional processes of government (affirmative oaths).[118] Courts view the latter as constitutionally permissible, despite the inherent vagueness of the terms employed.[119]

The Southern District of Florida reached the same conclusion when it upheld a similar oath.[120] In *Dalack v. Village of Tequesta*, the plaintiff was elected to the village council and required to take an oath affirming that he would support, protect, and defend the U.S. Constitution and would protect the United States from its enemies.[121] The court concluded that an oath that requires employees to renounce their beliefs, or prosecutes the affiant for disagreeing with federal, state, or local policies, is constitutionally impermissible.[122] The Village's oath was permissible, however, because it did not compel such a political agreement, nor did the oath require individuals to renounce their beliefs.[123]

110. *Id.* at 361.

111. *Id.* at 361–62.

112. *Id.* at 362–63; NOWAK & ROTUNDA, *supra* note 60, § 16.42(a)(i). The oath defined "subversive" as any person who "commits, attempts to commit, or aids in the commission . . . or teaches" the attempt to alter or overthrow the government through the use of violence or revolution. *Baggett*, 377 U.S. at 362.

113. *Baggett*, 377 U.S. at 364 n.3.

114. *Id.*

115. *Id.* at 366–68.

116. *See* Cole v. Richardson, 405 U.S. 676, 679–80 (1972) (upholding an inaugural oath).

117. *See id.* at 678 n.1.

118. *Id.* at 682.

119. *Id.*

120. *See* Dalack v. Village of Tequesta, 434 F. Supp. 2d 1336, 1350 (2006) (upholding a statute that required elected officials to take a loyalty oath to the United States).

121. *Id.* at 1337.

122. *Id.* at 1350.

123. *Id.*

Parts of the AEDPA share similar language with the anti-communist statutes[124]—and as a result, plaintiffs have challenged these provisions. These challenges, however, have yielded varying results. In 2007, the Ninth Circuit and other courts declared § 2339B unconstitutional but upheld § 2339A.[125] In *Humanitarian Law Project v. Mukasey*, the plaintiffs sought to train two FTOs on how to (1) use humanitarian and international law to peacefully resolve disputes, (2) engage in political advocacy, and (3) petition various representative bodies for relief, such as the United Nations.[126] The plaintiffs claimed that the provision of the AEDPA that prohibits persons from providing material support to FTOs was unconstitutionally overbroad, vague, and lacked the requisite mens rea.[127] With regard to § 2339A, the court rejected the plaintiff's mens rea and overbreadth claims.[128] The terms "training,"[129] "expert advice,"[130] and "service" in § 2339B, however, were impermissibly vague.[131] Persons of ordinary intelligence could not know their meaning,[132] and therefore the statute failed to define prohibited conduct for ordinary people to understand.[133]

In 2008, a federal district court in Minnesota reached a different conclusion and instead upheld § 2339B.[134] In *United States v. Warsame*, the government charged the defendant with providing material support and resources to an FTO, in violation of § 2339B of the AEDPA.[135] The defendant allegedly traveled to Afghanistan and Pakistan to attend Al Qaeda training camps, sent money to an Al Qaeda associate, and maintained communications with said associate.[136] The defendant challenged § 2339B, arguing that it violated his First Amendment right, was unconstitutionally vague, overbroad, and lacked the requisite intent to further the FTO's illegal aims.[137] The court held that § 2339B was not *facially*

124. *See supra* Part II.B.

125. *See* Humanitarian Law Project v. Mukasey, 509 F.3d 1122, 1127–30 (9th Cir. 2007), *reh'g denied*, *amended by* 552 F.3d 916 (9th Cir. 2009).

126. *Humanitarian Law Project*, 552 F.3d at 921 n.1. The plaintiffs were six organizations, a retired federal judge, and a surgeon. *Id.* at 921. The organizations they sought to train were the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE). *Id.* The plaintiffs sought to provide support only to nonviolent and lawful activities of PKK and LTTE. *Id.* The support aimed to help Kurds living in Turkey and Tamils. *Id.*

127. *Id.*

128. *Id.* at 924–27, 931–32.

129. The statute defined the term as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. § 2339A(b)(2) (2006); *see also Humanitarian Law Project*, 552 F.3d at 928.

130. The statute defined the term "expert advice or assistance" as "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. § 2339A(b)(3); *see also Humanitarian Law Project*, 552 F.3d at 929.

131. *Humanitarian Law Project*, 552 F.3d at 928–31.

132. *Id.*

133. *Id.*

134. United States v. Warsame, 537 F. Supp. 2d 1005, 1017–19 (D. Minn. 2008).

135. *Id.* at 1009.

136. *Id.*

137. *Id.* at 1013, 1016.

vague.[138] Further, the terms "currency," "personnel," and "training" were not unconstitutionally vague as applied to Warsame because his conduct blatantly fell under the statute.[139]

Two weeks after *Warsame* was decided, the U.S. District Court for the Northern District of Ohio nevertheless adopted the *Humanitarian Law Project* decision upholding § 2339A and invalidating § 2339B.[140] In *United States v. Amawi*, the defendant was charged with violating § 2339A of the AEDPA for conspiring to provide material support for commission of terrorist crimes.[141] Relying on *Humanitarian Law Project*, the court rejected the defendant's vagueness argument[142] and upheld § 2339A because it punishes assistance only if the defendant provides support with the knowledge and intent to carry out a criminal offense discussed below.[143] The court recognized, on the other hand, that the terms "training," "other specialized knowledge," "expert advice or assistance," and "service" in § 2339B were unconstitutionally vague.[144]

Therefore, notwithstanding the *Warsame* decision, the AEDPA cases support the body of case law that developed in response to the anti-communist statutes, which held that states must clearly define prohibited conduct, particularly with regard to "membership," "support," and "training."[145]

2. Mens Rea: Specific Intent vs. General Intent

In addition to vagueness, the due process inquiry focuses on the issue of intent, requiring a heightened level of mens rea for certain crimes. Under the due process doctrine, a law may punish a person for engaging in subversive activities or joining a subversive group with the intent to further the group's unlawful activities.[146] A law that punishes membership or financial support alone, however, violates due process.[147]

Throughout the 1960s, courts rejected anti-communist laws that punished membership in, or support to, subversive groups without the intent to further the organization's criminal aims. In *Wieman v. Updegraff*,[148] for example, the Court rejected an Oklahoma statute that required all public employees to take an oath swearing that they did not advocate for, nor were members of, any organization (as designated by the Attorney General) that advocated the overthrow of the government

138. *Id.* at 1020.
139. *Id.*
140. United States v. Amawi, 545 F. Supp. 2d 681, 684 (N.D. Ohio 2008).
141. *Id.* at 682.
142. *Id.* at 684.
143. *Id.*
144. *Id.*
145. *See infra* Part II.D.2
146. NOWAK & ROTUNDA, *supra* note 60, § 16.42.
147. *Id.*
148. 344 U.S. 183 (1952).

by force, violence, or other unlawful means;[149] and that he or she had never joined the Communist Party.[150] The Court held that the indiscriminate classification of innocent with knowing activity is an assertion of arbitrary power.[151] The statute was therefore unconstitutional because it failed to differentiate between innocent and knowing association.[152]

In 1966, the Court heightened the specific intent requirement when it invalidated an anti-communist statute.[153] In *Elfbrandt v. Russell*, an Arizona statute required employees to swear that they would support the Arizona and U.S. Constitutions,[154] and that they had not *knowingly* and *willfully* become a member of the Communist Party or any organization dedicated to the violent or forceful overthrow of the government.[155] Therefore, this statute made the employee subject to discharge and prosecution only if he knew it was a subversive group and joined with the intent to further its illegal aims.[156] Despite the heightened mens rea requirement, the Court invalidated the law because prohibiting membership without the specific intent to further the illegal aims of the organization infringes unnecessarily on protected freedoms.[157] The statute was therefore unconstitutionally vague[158] because the employer could punish the applicant even if the applicant refrained from participating in, or subscribing to, unlawful activities.[159]

Shortly thereafter, the Court emphasized this holding in yet another state statute aimed at the Communist Party.[160] In *Keyishian v. Board of Regents*, professors from the State University of New York challenged a statute that required public employees to sign a certificate affirming they had never advised, taught, or become a member of the Communist Party of the United States,[161] nor any group who taught or advocated the overthrow of the U.S. government or any of its political subdivisions by force, violence, or any unlawful means.[162] The Court invalidated the statute, holding that "mere Party membership, even with knowledge of the Party's unlawful goals, cannot suffice to justify criminal punishment, nor may it warrant a finding of moral unfitness justifying disbarment."[163] The civil service laws were invalid because they proscribed mere knowing

149. *Id.* at 186.
150. *Id.* at 184 n.1.
151. *Id.* at 191.
152. *Id.*
153. Elfbrandt v. Russell, 384 U.S. 11, 19 (1966).
154. *Id.* at 12.
155. *Id.* at 13; *see also* NOWAK & ROTUNDA, *supra* note 60, § 16.42(a)(ii).
156. *Elfbrandt*, 384 U.S. at 13.
157. *Id.* at 19.
158. *See id.* at 16–17.
159. *See id.*; NOWAK & ROTUNDA, *supra* note 60, § 16.42(a)(ii).
160. Keyishian v. Bd. of Regents, 385 U.S. 589, 606–07 (1967).
161. *Id.* at 592.
162. *Id.*
163. *Id.* at 607 (citations omitted).

membership without requiring the specific intent to further the unlawful aims of the Communist Party.[164]

Within a year, the Court invalidated yet another overbroad statute and reiterated the specific intent holding it reached in *Keyishian*.[165] In *United States v. Robel*, the Court struck down the Subversive Activities Control Act, which forbade members of designated communist-action groups from working in federal defense facilities.[166] The statute subjected defendants to a possible $10,000 fine and a five-year jail sentence.[167] The Court's ruling suggested that an individual may not be punished or deprived of public employment for political association unless: "(1) he is an active member of a subversive organization; (2) such membership is with knowledge of the illegal aims of the organization; and (3) the individual has the specific intent to further those illegal ends, as opposed to general support of the objectives of an organization."[168] The Subversive Activities Control Act, on the other hand, made irrelevant the active or passive status of the organization, the degree of the employee's agreement with those aims, and the sensitive nature of the employee's position of employment as it affected national security.[169]

Based on these principals and the textual similarity between the anti-communist statutes and terror laws, plaintiffs challenged §§ 2339A and 2339B of the AEDPA. Unlike § 2339A of the AEDPA, § 2339B punishes persons who provide material support to terrorist organizations, even if the person lacked the intent to further the organization's criminal conduct.[170] As previously discussed, plaintiffs successfully challenged § 2339B of the AEDPA on vagueness grounds.[171] The plaintiffs' mens rea challenges, however, fell short. In *Humanitarian Law Project v. Mukasey*, the plaintiffs challenged, among other things, the IRTPA's mens rea requirement in § 2339B of the AEDPA.[172] The added mens rea requirement to § 2339B states that, to be liable, a defendant who "provides material support or resources . . . must know that (1) the organization is a designated terrorist organization; (2) the organization has engaged or engages in terrorist activity; or that (3) the organization has engaged or engages in terrorism."[173] The plaintiffs argued that to meet the sufficient mens rea requirement, the statute could only punish those who intended to further the organization's illegal aims.[174] The court nevertheless

164. *Id.* at 609–10.
165. United States v. Robel, 389 U.S. 258, 265–66 (1967).
166. *Id.* at 259–61; *see also* NOWAK & ROTUNDA, *supra* note 60, § 16.42(2)(iii).
167. *Robel*, 389 U.S. at 265; *see also* NOWAK & ROTUNDA, *supra* note 60, § 16.42(2)(iii).
168. *Robel*, 389 U.S. at 265–66; *see also* NOWAK & ROTUNDA, *supra* note 60, § 16.42(a)(iii), at 1430.
169. *Robel*, 389 U.S. at 266; *see also* NOWAK & ROTUNDA, *supra* note 60, § 16.42(a)(iii).
170. *See* 18 U.S.C. § 2339B (2006).
171. *See supra* notes 124–45 and accompanying text.
172. Humanitarian Law Project v. Mukasey, 552 F.3d 916, 924–27 (9th Cir. 2009).
173. *Id.* at 923 (internal quotation marks omitted).
174. *Id.* at 925.

upheld the intent requirement because the statute does not punish membership, but instead punishes assistance to an FTO (so long as the defendant knew the organization was an FTO).[175]

Under *Wieman* and its progeny, therefore, statutes may punish only active membership in a subversive group—i.e., the members must intend to further the group's unlawful activities.[176] A law that punishes membership or financial support alone, however, violates due process, even if the member (or supporter) knows of the group's unlawful activities.[177] Similarly, the terror cases support the theory that a statute may not punish membership alone.[178] These cases suggest, however, that a statute may punish assistance without the intent to further the FTO's unlawful aims.[179]

III. ANALYSIS

The Supreme Court initially invalidated the anti-communist statutes under the overbreadth and due process doctrines.[180] Plaintiffs have recently relied on these doctrines when challenging the AEDPA.[181] This Part applies the aforementioned doctrines to the Ohio Patriot Act and concludes that the Act violates Ohio public employees' First Amendment right of association under the overbreadth and due process doctrines.

A. Overbreadth Analysis

Like the anti-communist loyalty oaths that public employees challenged in the 1960s, the Ohio Patriot Act should be scrutinized under the overbreadth doctrine. Taking these cases into consideration, it follows that even if Ohio has the power to regulate a body of law, Ohio must exercise that power in a manner that does not unduly infringe upon its employees' freedom of speech.[182] A court must invalidate the statute if it is substantially overbroad, even if the statute reaches the proposed conduct.[183] To survive overbreadth scrutiny, a statute must be clear, concise, and narrow in scope.[184] If the Ohio Patriot Act is challenged on overbreadth grounds, the court will ask: (1) does the Ohio Patriot Act provide an unlimited and indiscriminate sweep that encroaches upon Ohio public employees' First Amendment right of association; (2) if so, is

175. *Id.* at 927.
176. *See* NOWAK & ROTUNDA, *supra* note 60, § 16.42(a).
177. *See id.*
178. *See, e.g.*, United States v. Amawi, 545 F. Supp. 2d 681 (N.D. Ohio 2008).
179. *Id.*
180. *See* NOWAK & ROTUNDA, *supra* note 60, § 16.42.
181. *See supra* Part II.C–D.
182. *See* NOWAK & ROTUNDA, *supra* note 60, § 16.42 (discussing the doctrine of overbreadth as it relates to public employees).
183. *See id.* § 16.8.
184. *See id.* § 16.42 (discussing the current law on loyalty oaths after *Elfbrandt* and *Cole*).

Ohio's purpose legitimate and substantial; and (3) even if Ohio's purpose is legitimate and substantial, can that purpose be achieved more narrowly?[185]

1. Unlimited and Indiscriminate Sweep

A statute is overbroad if it punishes criminal activities but, in the process, inadvertently punishes activities protected by the First Amendment.[186] On its face, the Ohio Patriot Act seems to be more limiting in its scope than the anti-communist statutes. Although narrower in scope, the Ohio Patriot Act provides an unconstitutionally indiscriminate sweep because it fails to distinguish between different degrees of membership.[187]

The Ohio Patriot Act provides a narrower scope in that it punishes membership in specifically named organizations.[188] The Ohio Patriot Act requires the State to provide the employee with the current list of FTOs,[189] which as of today includes fifty-nine organizations.[190] The anti-communist statutes, on the other hand, were broader with regard to prohibited organizations. The Washington statute in *Baggett v. Bullitt*, for example, required the affiant to swear he was not a member of the Communist Party or any other "subversive organization," which the statute defined vaguely.[191] Similarly, the statute in question in *Whitehill v. Elkins*, defined "subversive," among other things, as a group that teaches any person to *alter the constitutional form* of the federal or state government by revolution.[192] Even more indiscriminate was the statute in *Shelton v. Tucker*, which required teachers to file an annual affidavit listing every organization to which the teacher belonged or regularly contributed.[193]

These anti-communist statutes were broader in scope for two reasons. First, they punished membership in a lawful organization (Communist Party) that was prevalent in American society.[194] Members of the Communist Party ran for political offices, held open meetings, and distributed literature.[195] Second, the anti-communist statutes failed to limit which organizations were unlawful, as they also punished membership in

185. *See* Shelton v. Tucker, 364 U.S. 479, 485–90 (1960).

186. NOWAK & ROTUNDA, *supra* note 60, § 16.8.

187. *See* OHIO REV. CODE ANN. §§ 2909.32(A), 2909.34 (LexisNexis 2006) (criminalizing all forms of "material assistance" equally).

188. *See id.* § 2909.34(A)(2) (requiring the employer to provide a copy of the Terrorist Exclusion List); *see also* Exclusion List, *supra* note 45 (listing fifty-nine organizations).

189. § 2909.34(A)(2).

190. *See* Exclusion List, *supra* note 45.

191. Baggett v. Bullitt, 377 U.S. 360, 362–63 (1964). The oath defined "subversive person" as any person who commits, attempts to commit, aids in the commission, or teaches the attempt to alter or overthrow the government by way of violence or revolution. *Id.*

192. Whitehill v. Elkins, 389 U.S. 54, 56, 61 (1967).

193. Shelton v. Tucker, 364 U.S. 479, 480 (1960).

194. *Baggett*, 377 U.S. at 362–63.

195. *Cf.* Fisher, *supra* note 1, at 630 (discussing the FBI's investigation into Communist activities which included "[p]olitical activities, [l]egislative activities, [and] [d]omestic administration issues").

"subversive" groups.[196] The term "subversive" is so vague that public employees could be punished for associating with groups that engaged in lawful activities but were perceived to pose a threat to the status quo.[197] Indeed, these statutes were enforced at a time when lawful groups, which many citizens supported or partly agreed with, were erroneously believed to be subversive.[198] Accordingly, a public employee could have been put in a precarious situation for simply attending a demonstration at which the NAACP was present.[199] These organizations' active participation in various demonstrations made it much likelier that law enforcement agencies could erroneously associate an employee with such leftist political groups or even illegal ones.[200] Such was particularly the case where offshoots of legitimate organizations became subversive.[201] It may have been difficult, for example, for a law enforcer to distinguish a member of the Students for a Democratic Society[202] from a member of the Weather Underground.[203] Accordingly, employees were subject to punishment for associating with an unending list of organizations or political parties and thus these statutes were open to interpretation and subject to an abuse of power.

In contrast, the Ohio Patriot Act is narrower in that most of the FTOs on the Exclusion List are nationalist groups from specific, identifiable regions of the world, and they are much less prevalent in American society.[204] The Exclusion List, for example, identifies the Libyan Islamic Fighting Group as an FTO.[205] Few can say they have ever heard of such an organization, let alone encountered it in a political setting. Accordingly, it is less likely that someone would incorrectly associate another person with this, or any other, FTO.

The fact that the Ohio Patriot Act is narrower in scope, however, is not dispositive, as the statute nevertheless provides an unconstitutionally broad sweep. The Supreme Court held that the anti-communist statutes

196. *Whitehill*, 389 U.S. at 56; *Baggett*, 377 U.S. at 362.

197. *See* Fisher, *supra* note 1, at 631 (discussing the FBI's surveillance of the NAACP).

198. *See id.* (discussing the FBI's surveillance of several not-for-profit organizations, which committed no illegal acts).

199. *Id.* at 630–31.

200. *Id.*

201. *Id.*

202. The Students for a Democratic Society (SDS) was a left-wing student organization known for its protests against the Vietnam War. Stephen M. Feldman, *Free Expression and Education: Between Two Democracies*, 16 WM. & MARY BILL RTS. J. 999, 1004 (2008). The organization allied itself with unions, left-wing religious organizations, and other social activist groups. *Id.*

203. SDS eventually splintered into a subversive organization called the Weathermen or Weather Underground. Anthony P. Merza, *Hospital Charity Care and the Corporate Campaign: Labor Union Exploitation of Dysfunctional Tax Exemption Laws*, 11 DEPAUL J. HEALTH CARE L. 203, 232 (2008). Two of the organization's most prominent members include Bernardine Dohrn, who now teaches at the Northwestern University School of Law, and her husband, Bill Ayers, a professor of education at the University of Illinois at Chicago. *Id.* at 233 n.185.

204. *See* Exclusion List, *supra* note 45 (listing organizations such as the Libyan Islamic Fighting Group and the Jerusalem Warriors, among others).

205. *Id.*

were unconstitutionally overbroad because they punished mere membership without distinguishing degree of membership.[206] Similarly, when the *Warsame* court rejected an overbreadth challenge to § 2339B of the AEDPA, it emphasized that the statute passed overbreadth scrutiny because the statute does not criminalize membership or association with an FTO, but instead punishes the conduct of providing material support and resources.[207] The Fourth,[208] Seventh,[209] Ninth,[210] and D.C.[211] Circuits also hold this view.

According to these decisions, the Ohio Patriot Act is unconstitutionally overbroad. The first question on the Declaration Form asks, "Are you an active member of an organization on the U.S. Department of State Terrorist Exclusion List?"—but the Ohio Patriot Act fails to define "membership."[212] The statute's failure to distinguish membership poses a problem because the Exclusion List identifies FTOs that have strong religious and geographical ties, particularly Islam and the Middle East.[213] One can easily imagine a situation in which a Muslim or a person of Middle Eastern descent who subscribes to a "radical" ideology, or is simply vocal against the war in Iraq, is wrongly deemed a member of an FTO. Conversely, an employee of Muslim or Middle Eastern descent could easily choose not to attend a protest rally that is organized by a Muslim organization out of fear that she will be labeled a member of an organization on the Exclusion List, thus chilling that employee's First Amendment right of association. Consequently, persons may be deterred from donating money to, or associating with, legitimate political organizations out of fear that they will violate the statute. Therefore, the statute provides an unlimited indiscriminate sweep that encroaches upon Ohio public employees' First Amendment right to freely associate.

2. Legitimate and Substantial Purpose

Because the Ohio Patriot Act provides an indiscriminate sweep, Ohio must prove its purpose is legitimate and substantial.[214] In all of the previously mentioned cases, the courts invalidated statutes because their purposes failed to outweigh the freedoms that they encroached.[215]

The legitimate and substantial purpose analysis weighs in favor of upholding the Ohio Patriot Act. First, several cases indicate that the

206. *See* Whitehill v. Elkins, 389 U.S. 54, 55–56 (1967); Baggett v. Bullitt, 377 U.S. 360, 362 (1964).
207. United States v. Warsame, 537 F. Supp. 2d 1005, 1022 (D. Minn. 2008).
208. United States v. Hammoud, 381 F.3d 316, 329 (4th Cir. 2004).
209. Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1026 (7th Cir. 2002).
210. Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135–36 (9th Cir. 2000).
211. People's Mojahedin Org. of Iran v. Dep't of State, 327 F.3d 1238, 1244 (D.C. Cir. 2003).
212. OHIO REV. CODE ANN. § 2909.32(B) (LexisNexis 2006).
213. *See* Exclusion List, *supra* note 45 (listing, among others, Islamic International Brigade, Moroccan Islamic Cobatant Group, and International Sikh Youth Federation, Eastern Turkistan Islamic Movement).
214. *See* Shelton v. Tucker, 364 U.S. 479, 490 (1960).
215. *See supra* Part II.B.

threat of terrorism should take precedence over public employees' right to associate.[216] In *United States v. Robel*, for example, the court held that the government's interest in national security may occasionally supersede employees' right of association.[217] And in *Humanitarian Law Project v. Mukasey*, the court emphasized that a ban on "material support or resources" could curb terrorism by depriving FTOs of the means with which to carry out their illegal acts.[218] Moreover, if the court were to restrain the government from enforcing § 2339B of the AEDPA, the nation could likely face an increase in terrorist attacks.[219] Similarly, the Ohio Patriot Act seeks to ensure the State's security by deterring support to, and participation in, terrorism.[220] Because such activities result in innocent deaths, such association is legitimately labeled criminal activity and thus the State's attempt to punish it is indisputably reasonable. The government can therefore arguably deny employment, even if it cannot prove more than active membership.[221]

Although the Supreme Court struck down several statutes that shared the same national security purpose as the Ohio Patriot Act, those statutes differ because they encroached upon the freedom of political expression in academic settings—which requires a more stringent analysis.[222] In *Shelton v. Tucker*, for example, the State's purpose was the inquiry into the fitness and competency of its teachers.[223] The Court invalidated the statute because many of the political relationships could have no possible bearing upon the teacher's competence.[224] The State's interference, although legitimate, was overbroad.[225] The Court stressed that the protection of constitutional freedom is "nowhere more vital than in the community of American schools," and it emphasized that "[s]cholarship cannot flourish in an atmosphere of suspicion and distrust."[226] Exploring and interchanging ideas is the very foundation of education; thus, freedom of speech must be highly protected in academia.[227] Accordingly, one can argue that the encroachment that results from the Ohio Patriot Act is constitutional because political expression is not as important as academic freedom.

216. *See, e.g.*, United States v. Robel, 389 U.S. 258, 265–67 (1967).
217. *Id.*; *see also* NOWAK & ROTUNDA, *supra* note 60, § 16.42(a)(iii).
218. Humanitarian Law Project v. Mukasey, 552 F.3d 916, 931 (9th Cir. 2009).
219. *Id.*
220. *See* State *ex rel.* Triplett v. Ross, 855 N.E.2d 1174, 1176 (Ohio 2006).
221. *See* NOWAK & ROTUNDA, *supra* note 60, § 16.42.
222. *See supra* Part II.C.
223. Shelton v. Tucker, 364 U.S. 479, 485 (1960).
224. *Id.* at 488.
225. *Id.* at 490.
226. *Id.* at 487 (internal quotation marks omitted).
227. *See id.*

3. Purpose More Narrowly Achieved?

The last element of the overbreadth analysis is whether Ohio can more narrowly achieve the Act's purpose.[228] The threat of terrorism undoubtedly creates a legitimate interest; however, this threat in the public employment context does not always take precedence over the First Amendment.[229] Even if the Act's purpose is legitimate and substantial, the government cannot pursue this purpose by means that broadly stifle fundamental personal liberties if the end can be more narrowly achieved.[230] *Robel* suggests that the government's interest in national security may occasionally supersede employees' right of association.[231] But the government can deny such employment only if the position sought possesses a "*demonstrable relationship* to important national security interests."[232] The government must show that the targeted employees can "potentially adopt illegal means to achieve the organization's political objectives," and that circumstances exist in which the government cannot effectively thwart those illegal means.[233]

Ohio's purpose to ensure homeland security is undoubtedly legitimate. But forcing every public employee to sign the Declaration Form is ineffective because a real terrorist will simply lie, and it is unreasonable because most public employees do not pose a threat. Rank-and-file janitors, administrators, and educators share no relationship to national security interests, and they lack access to sensitive information/resources. Yet the Ohio Patriot Act speaks to these and many other public employees who pose no threat to the State or to the country's national security.[234] Ohio can easily narrow its encroachment and increase its effectiveness by imposing a stricter rule upon public employees in sensitive positions only. Alternatively, Ohio can simply abandon the Act altogether and leave these matters to the intelligence gathering agencies of the federal government, as opposed to addressing such a serious crime with a weak deterrent: conditioning employment on the basis of signing an oath.[235]

The Ohio Patriot Act provides an indiscriminate sweep and lacks a demonstrable relationship to its national security interest. Moreover, the Act fails to serve as an effective means of halting terrorist acts and subversive infiltration. The Act's weak benefits fail to outweigh the degree of encroachment upon employees' First Amendment rights and thus the Act is unconstitutionally overbroad.

228. *See id.* at 487–90.
229. *See* United States v. Robel, 389 U.S. 258, 264–65 (1967).
230. *Id.* at 265–66.
231. *Id.* at 266–67; NOWAK & ROTUNDA, *supra* note 60, § 16.42(a)(iii).
232. NOWAK & ROTUNDA, *supra* note 60, § 16.42(a)(iii) (emphasis added).
233. *Id.*
234. *See* OHIO REV. CODE ANN. §§ 2909.32, 2929.34 (LexisNexis 2006) (requiring all public employees to sign the Declaration Form).
235. *See id.*

B. Due Process

In addition to the overbreadth doctrine, courts struck down the anti-communist statutes that restricted public employees' First Amendment right of association on due process grounds.[236] Under the due process analysis, courts initially invalidated statutes that were overly vague.[237] Eventually, the Supreme Court rejected statutes that lacked the requisite mens rea.[238]

1. Vagueness

The vagueness doctrine is similar to the overbreadth doctrine in that both share the same rationale—ensuring that laws do not unnecessarily chill protected First Amendment activities.[239] The question that courts must ask when analyzing a statute under the vagueness doctrine is whether a blurry line exists between permissible and impermissible conduct, in other words, whether the terms of the Ohio Patriot Act are clear enough for the average person to understand.[240] Because the Act provides criminal penalties, it must draw a distinguishable line to ensure that citizens understand what constitutes impermissible conduct, and to ensure that its enforcers cannot easily abuse their authority.[241] In determining whether the Ohio Patriot Act is unconstitutionally vague, two aspects of the Act come into question: (a) the definition of "material assistance or support," and (b) the language used in the Declaration Form's six questions.

a. Defining "Material Assistance or Support"

The Ohio Patriot Act, like the anti-communist statutes the Court invalidated several decades ago, fails to provide a clear definition of "material assistance or support." The statute in *Cramp v. Board of Public Instruction*[242] required employees to execute a written oath swearing that the affiant had not lent, among other things, "aid, support, advice, counsel or influence to the Communist Party."[243] The Court declared the statute vague,[244] because those who took the oath swore that they had not in the unending past ever knowingly lent their "aid," "support," "advice," "counsel," or "influence" to the Party—all phrases that are unconstitutionally vague.[245]

236. *See supra* Part II.D.
237. *See supra* Part II.D.1.
238. *See supra* Part II.D.2.
239. NOWAK & ROTUNDA, *supra* note 60, §§ 16.8, 16.9.
240. *See* NOWAK & ROTUNDA, *supra* note 60, § 16.9.
241. *See id.*
242. 368 U.S. 278 (1961).
243. *Id.* at 279 (internal quotation marks omitted).
244. *Id.* at 288.
245. *Id.* at 286.

Similarly, the statute in *Baggett v. Bullitt* required all public employees declare that they were not members of the Communist Party or any subversive organization, and that they did not engage in any subversive activities.[246] In its definition of "subversive," the statute included aiding, advising, or teaching.[247] The Court reasoned that the language was unclear as to whether the statute punished legal representation of a Communist Party member or journalists that defended the members' rights[248] or any members that support a cause that is likewise supported by communists or the Communist Party.[249]

The terror cases, however, are not as clear as the anti-communist cases. In *Humanitarian Law Project v. Mukasey*, the Ninth Circuit invalidated § 2339B of the AEDPA,[250] which prohibited persons from providing material support to an FTO.[251] The statute defined the term "training" as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge."[252] The court held that the definition was vague because it could be read to encompass speech or advocacy that was protected by the First Amendment.[253] A person of ordinary intelligence would not know whether teaching someone how to petition for international aid would impart a specific skill or general knowledge.[254] Similarly, the court invalidated the term "service," which the statute failed to define, because an ordinary person could also construe the other challenged provisions as service.[255] The court did uphold, however, the AEDPA's definition of "personnel."[256] The statute defined the phrase to include one or more individuals who work under the organization's direction or who "organize, manage, supervise, or otherwise direct the operation of that organization."[257] Further, the Northern District of Ohio agreed with the *Humanitarian Law Project* vagueness ruling that the terms "training," "other specialized knowledge," and "expert advice or assistance" in § 2339B were unconstitutionally vague.[258]

In contrast, the court in *United States v. Warsame* concluded that the terms "currency," "personnel," and "training" were not unconstitutional-

246. 377 U.S. 360, 362, 267 (1964).
247. *Id.* at 362.
248. *Id.* at 368.
249. *Id.*
250. 552 F.3d 916, 927–31 (9th Cir. 2009) (finding terms in the statute unconstitutionally vague).
251. *Id.* at 920–24.
252. 18 U.S.C. § 2339A(b)(2) (2006); *Humanitarian Law Project*, 552 F.3d at 923.
253. *Humanitarian Law Project*, 552 F.3d at 929.
254. *Id.* Similarly, the court rejected the definition for "expert advice or assistance." *Id.* at 929–30. The AEDPA defined the phrase as "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. § 2339A(b)(3); *Humanitarian Law Project*, 552 F.3d at 929. The court reasoned the phrase was overly vague because an ordinary person would not know what "other specialized knowledge" means. *Humanitarian Law Project*, 552 F.3d at 930.
255. *Humanitarian Law Project*, 552 F.3d at 930.
256. *Id.* at 931.
257. 18 U.S.C. § 2339B(h); *Humanitarian Law Project*, 552 F.3d at 931.
258. United States v. Amawi, 545 F. Supp. 2d 681, 684 (N.D. Ohio 2008).

ly vague *as applied to* Warsame's conduct.[259] The court reasoned that persons who provide blatant, unlawful support, such as training in aid of an FTO's military activities, are likely to understand the conduct considered criminal under the statute.[260] In contrast, a person whose objective is to provide training for United Nations petitioning is likely to be uncertain.[261] Accordingly, "currency," "training," and "personnel" applied to Warsame's conduct.[262] The court held that Warsame could not, however, be charged for communicating with Al Qaeda and for teaching English in an Al Qaeda clinic without any evidence that these acts were tied to terrorist activity.[263] Therefore the court essentially acknowledged *Humanitarian Law Project's* ruling—the terms were unconstitutionally vague, but the government can nevertheless use these terms to prosecute defendants under the right circumstances.

The Ohio Declaration Form provides a definition of "material support or resources,"[264] and that definition contains the same vague language that the Supreme Court invalidated in *Cramp* and *Baggett*, as well as the AEDPA.[265] Further, like the AEDPA, the Ohio Patriot Act includes "training" and "personnel" in its definition of "material support."[266] But unlike the AEDPA, the Ohio Patriot Act does not provide a definition for either term.[267] Moreover, the Ohio Patriot Act fails to clarify whether Ohio can hold defendants liable for advocating lawful causes.[268] Based on the anti-communist cases and the AEDPA cases, it logically follows that the same terms in the Ohio Patriot Act are unconstitutionally vague.

b. Ohio Patriot Act's Questions

Questions one and six in the Declaration Form contain unconstitutionally vague language. The first question asks whether the applicant is a member of an FTO.[269] The question is unconstitutionally vague because the statute and the Declaration Form fail to provide a definition for "member."[270] Because no definition exists, it is unclear how those charged with the authority to enforce the Act are to decide whether an

259. United States v. Warsame, 537 F. Supp. 2d 1005, 1020 (D. Minn. 2008).
260. *Id.* at 1019.
261. *Id.* at 1018–19.
262. *Id.* at 1020.
263. *Id.*
264. *See* Declaration Form, *supra* note 32 ("'[M}aterial support or resources' means currency, payment instruments, other financial securities, funds, transfer of funds, financial services, communications, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.").
265. *Id.*; *see supra* notes 100–15 and accompanying text.
266. OHIO REV. CODE ANN. § 2909.21(I) (LexisNexis 2006).
267. *See id.* § 2909.21
268. *See id.* § 2909.21–.34.
269. Declaration Form, *supra* note 32.
270. *See id.*; *see also* § 2909.21.

employee is a member. Does an employee become a member by simply attending a meeting? Because there is no concrete way to measure membership in such an organization, even the most attenuated association can be deemed membership. For example, a person who attends a conference at which such an organization is present may be labeled a member of that organization, regardless of whether that person knew the organization would be present.

Question six also contains unconstitutionally vague language, as it asks: "Have you hired or compensated a person you knew to be a member of an organization on the [list], or a person you knew to be engaged in planning, assisting, or carrying out an act of terrorism?"[271] The Declaration Form fails to define the terms "hired" and "compensated,"[272] and these terms do not exist anywhere else in the statute.[273] Thus State enforcers can limitlessly interpret the statute. Because the Ohio Patriot Act attaches felony penalties, the Declaration Form must be clear.[274]

In addition, the second clause of question six indicates that Ohio may punish an employee for hiring or compensating someone who is planning, assisting, or carrying out an act of terrorism, even if that person is *not* on the Exclusion List.[275] There is no clear explanation in the declaration as to the definition of "terrorism."[276] The Ohio Patriot Act's Definitions section defines terrorism as "an act that is committed within or outside the territorial jurisdiction of [Ohio] or the United States" to intimidate or coerce a civilian population or influence the policy of any government by intimidation or coercion.[277] Such a definition is too open to interpretation. Under this language, a person can be punished for compensating a member of an organization that has engaged in any aggressive conduct for the purpose of political change in any country. Such an organization need not even be on any terrorist list.

2. Mens Rea: General vs. Specific Intent

The body of law that developed in response to anti-communist statutes provides that states may not punish mere membership in a subversive organization.[278] Therefore, a state may punish a public employee for political association only if: "(1) he is an active member of a subversive organization; (2) such membership is with knowledge of illegal aims of the organization; and (3) the individual has a specific intent to further those illegal ends, as opposed to general support" of the organization.[279]

271. Declaration Form, *supra* note 32.
272. *Id.*
273. *See* § 2909.21(I).
274. *See id.* § 2909.29(B)(2)–(4).
275. Declaration Form, *supra* note 32.
276. *Id.*
277. § 2909.21(A).
278. *See supra* Part II.C–D.
279. NOWAK & ROTUNDA, *supra* note 60, § 16.42(a)(iii).

An application of these cases to the Ohio Patriot Act proves the Act is unconstitutional. For example, in *Wieman v. Updegraff*, the Court invalidated an Oklahoma statute that required state employees to swear they were not members of the Communist Party or any organization that advocated the overthrow of the government.[280] The Oklahoma Supreme Court interpreted the statute to punish members regardless of whether they knew of the organization's illegal activities.[281] The Supreme Court declared, however, that the oath violated due process because an employee must know the group's illegal aims.[282] The Court reasoned that denial of public employment would stigmatize the individual and would promote injustice if the member is innocent of the group's aims.[283]

The Supreme Court eventually held, in *Elfbrandt v. Russell*, that mere knowledge of illegal aims is not enough to terminate employment.[284] In *Elfbrandt*, the Court struck down an Arizona statute that required employees to take an oath stating that they had not *knowingly* and *willfully* become a member of the Communist Party or of any organization dedicated to the violent or forceful overthrow of the state or federal government, with *knowledge* and *intent* to further its illegal aims.[285] The Court held that "a law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms."[286] Consequently, the Arizona statute failed vagueness scrutiny[287] because the oath punished individuals who did not subscribe to the unlawful activities.[288] The Court reasoned that "knowing membership" coupled with the intent to further the organization's legal aims is required because "quasi-political parties or other groups . . . may embrace both legal and illegal aims."[289]

Accordingly, under *Elfbrandt* and its progeny[290] the Ohio Patriot Act violates due process. The Ohio statute and the Declaration Form require the applicant to have specific intent as to *providing* material assistance.[291] Yet none of the questions ask whether the applicant joined the group or provided assistance with the aim of furthering the organization's subversive goals. The first question punishes applicants based merely on membership, but the question is silent with regard to specific intent.[292] The third question asks applicants if they knowingly solicited

280. 344 U.S. 183, 184–85 n.1 (1952).
281. *See* NOWAK & ROTUNDA, *supra* note 60, § 16.42(a)(1).
282. *See id.*
283. *See id.*
284. Elfbrandt v. Russell, 384 U.S. 11, 19 (1966).
285. *Id.* at 16–19; NOWAK & ROTUNDA, *supra* note 60, § 16.8.
286. *Elfbrandt*, 384 U.S. at 19.
287. *Id.*
288. *See* NOWAK & ROTUNDA, *supra* note 60, § 16.42(a)(ii).
289. *Elfbrandt*, 384 U.S. at 15.
290. *See supra* Part II.C–D.
291. OHIO REV. CODE ANN. § 2909.32(A)(2)(a)-(b) (LexisNexis 2006); Declaration Form, *supra* note 32.
292. *See* Declaration Form, *supra* note 32.

funds for an organization on the Exclusion List but fails to clarify whether applicants had to have known that the organization was on the Exclusion List.[293] The fourth question, which asks applicants whether they solicited any individual for membership in an organization on the Exclusion List, fails to ask whether the individual knew the organization was on the list at the time of solicitation.[294] An employee could have solicited an organization and then realized its aims after solicitation. Many terrorist organizations incorporate charitable organizations;[295] thus, a person could donate to an organization thinking the money is going to a charitable cause.[296] Moreover, many of the organizations named on the Exclusion List are likely unknown to the ordinary person, thus increasing the likelihood of such an error.

Supporters of the Ohio Patriot Act may argue, however, that the statute is valid because it allows the employer to void the denial of employment, if the applicant files for a review.[297] For this to occur, the department must determine that the applicant provided the material assistance more than ten years before applying; or that at the time of assistance, the organization was not on the list, would not have merited inclusion on the list, or the employee could not have reasonably known the organization's activities would have merited its inclusion on the Exclusion List.[298] Additionally, the department may void the denial if it finds that the applicant will unlikely provide material assistance to any organization on the list[299] or the applicant does not pose a risk to the residents of the state.[300]

A similar section existed in the statute at issue in *Keyishian v. Board of Regents*, yet the court invalidated the statute.[301] The statute stated that mere membership created prima facie evidence for disqualification, which the appellant could rebut only by denying membership, denying that the organization advocated overthrow, or denying that the employee knew of the organization's aims.[302] The Court nevertheless invalidated the provision under the overbreadth doctrine because the law did not allow the employee to rebut by denying specific intent to further the unlawful aims of the organization.[303]

293. *Id.*
294. *Id.*
295. *See* Kimberley L. Thachuk, *Terrorism's Financial Lifeline: Can it Be Served?*, 191 STRATEGIC FORUM 3 (2002). A number of terrorists organizations have formed charitable organizations "as fronts for distributing money to international networks. In both cases, it is likely that numerous innocent citizens have been contributing to what they think are charities for causes such as refugee resettlement and the nourishment of children in Palestine." *Id.*
296. *Id.*
297. *See* OHIO REV. CODE ANN. § 2909.34(D).
298. *Id.* § 2909.34(D)(1).
299. *Id.* § 2909.34(D)(2).
300. *Id.* § 2909.34(D)(3).
301. Keyishian v. Bd. of Regents, 385 U.S. 589, 593–96, 608–10 (1967).
302. *Id.* at 608; *see also* NOWAK & ROTUNDA, *supra* note 60, § 16.42(a)(iii).
303. *Keyishian*, 385 U.S. at 608–10; *see also* NOWAK & ROTUNDA, *supra* note 60, § 16.42(a)(iii).

Accordingly, *Keyishian* indicates that two problems exist with the rebuttal provision of the Ohio Patriot Act. First, the Declaration Form does not contain the rebuttal provision. Thus, the employee will not know the option to rebut exists. Second, the provision fails to address the specific intent issues for persons who may have provided some assistance within the preceding ten years, providing the State unfettered, discretionary power, which opens the door to abuse and chills employees' right to assemble freely.

a. Mens Rea and the AEDPA

To violate § 2339A of the AEDPA, a defendant must have the intent to further the organization's criminal activity, unlike § 2339B.[304] Accordingly, plaintiffs have challenged the constitutionality of § 2339B's mens rea requirement, which courts have rejected.[305] Section 2339B, however, requires some intent—unlike the Ohio Patriot Act.[306] Therefore, despite the holdings in the AEDPA cases, courts may still use their analyses to draw an inference that the Ohio Patriot Act fails to pass constitutional muster because it lacks a sufficient mens rea requirement.

In *Humanitarian Law Project v. Mukasey*, for example, the plaintiffs challenged the mens rea requirement for § 2339B of the AEDPA,[307] which required that the defendant know that "(1) the organization is a designated terrorist organization; (2) the organization has engaged or engages in terrorist activity; or that (3) the organization has engaged or engages in terrorism."[308] The plaintiffs argued that to meet the sufficient mens rea requirement, the statute could only punish conduct intended to further the organization's illegal aims.[309] The court nevertheless rejected the claims because the provision requires the intent to provide support to an FTO, thus, the provision does not need the intent to actually further the FTO's criminal activity.[310] Congress could have imposed the specific intent to further the FTO's aims but purposely chose not to.[311] The fact that Congress added such a requirement to §§ 2339A[312] and 2339C[313] is indicative of the fact that it did not want to add the specific intent requirement to further the FTO's illegal aims to § 2339B.[314]

304. *Compare* 18 U.S.C. § 2339A (2006), *with* 18 U.S.C. § 2339B (2006).

305. *See supra* Part II.C–D.

306. *Compare* 18 U.S.C. § 2339B, *with* OHIO REV. CODE ANN. § 2909.32(A)(2)(b) (LexisNexis 2006).

307. Humanitarian Law Project v. Mukasey, 552 F.3d 916, 924–27 (9th Cir. 2009).

308. *Id.* at 923 (quoting 18 U.S.C. § 2339B(a)(1)).

309. *Id.* at 925.

310. *Id.* at 926–27.

311. *Id.* at 927.

312. This statute punishes persons who provide material support or resources to *any* terrorist organization. 18 U.S.C. § 2339A (2006).

313. This statute punishes persons who finance terrorism in general. 18 U.S.C. § 2339C.

314. *Humanitarian Law Project*, 552 U.S. at 927.

In *United States v. Warsame*, the court applied the holding in *Humanitarian Law Project*.[315] The court rejected Warsame's defense that he could not be punished because he did not act with the specific intent to further the FTO's illegal aims[316] because the provision does not contain such a requirement.[317] The court also emphasized that Congress excluded such a requirement in this provision but included it in others, thus, strongly suggesting that Congress did not want to provide a specific intent requirement.[318]

It seems odd, however, that the district court simply brushed off the *Elfbrandt* line of cases because the Supreme Court has not overturned any of them. The court failed to provide a reason for brushing these cases aside—not even one based on a national security rationale. The court merely reasoned the provision's requirement was sufficient because it was what Congress wanted.[319] Though courts have rejected all challenges to § 2339B's intent requirement, the *Elfbrandt* line of cases still applies to the Ohio Patriot Act because of the difference between the Act and § 2339B.[320] Although the AEDPA has a weak mens rea requirement, it at least requires that defendants know they are supporting a terrorist organization, whereas the first, second, and fourth questions of the Ohio Patriot Act do not.[321] Finally, the Ninth Circuit emphasized that § 2339B does not punish membership, whereas § 2339A, which provides a stricter mens rea requirement, does.[322] Accordingly, to pass constitutional scrutiny, the Act may only punish defendants who intend to join and further the aims of terrorist organizations that are not on the Exclusion List.

IV. RESOLUTION

The Ohio Patriot Act provides for criminal sanctions, yet fails to define culpable activity, includes vague language, and lacks the requisite mens rea. Therefore, the Act violates the overbreadth and due process doctrines. The unconstitutionality of the Ohio Patriot Act can be resolved, however, through two means: the Supreme Court of the United States and the Ohio legislature. This Part offers two possible solutions for curing the deficiencies of the Act. This Part recommends that (1) the Supreme Court invalidate the Ohio Patriot Act, or (2) the Ohio Legislature amend the Ohio Patriot Act to ensure the Act meets constitutional standards. Additionally, this Part offers an example of the textual amendments that would ensure the Act passes constitutional muster.

315. United States v. Warsame, 537 F. Supp. 2d 1005, 1021–22 (D. Minn. 2008).
316. *Id.* at 1013.
317. *Id.* at 1014.
318. *Id.*
319. *Id.* at 1013.
320. *See, e.g.*, Elfbrandt v. Russell, 384 U.S. 11, 15–16 (1966).
321. *Compare* 18 U.S.C. § 2339B (2006), *with* OHIO REV. CODE ANN. § 2909.32(A)(2)(b) (LexisNexis 2006).
322. *See* Humanitarian Law Project v. Mukasey, 552 F.3d 916, 924–27 (9th Cir. 2009).

A. Supreme Court

It is only a matter of time before someone challenges the Ohio Patriot Act, thus providing an opportunity for the Supreme Court to strike down the Ohio Patriot Act. In doing so, the Court should declare the statute unconstitutionally overbroad because the statute encroaches upon Ohio public employees' freedom of association to a degree that outweighs the State's purpose.

The Court should also hold that the Act violates due process because the definition of "material assistance or support" is unconstitutionally vague.[323] Specifically, the Court should hold that the terms "training" and "personnel" fail to put potential defendants on notice as to what conduct violates the Act.[324] In doing so, the Court should apply the same reasoning set forth by the Northern District of Ohio in *Amawi*, as well as the analysis that the Ninth Circuit applied in *Humanitarian Law Project*. Additionally, the Court should hold that questions one, two, three, and six are unconstitutionally vague, and that the statute and Declaration Form must clarify the definition of "member" as it pertains to the first question.[325]

Finally, the Court should declare that cases pertaining to the AEDPA's specific intent requirement are inapplicable to the Ohio Patriot Act because the AEDPA, unlike the Ohio Patriot Act, does not punish membership. Additionally, the Court should uphold the *Elfbrandt* line of cases and apply them to the Ohio Patriot Act. In doing so, the Court should hold that the Ohio Patriot Act is unconstitutional because it fails to require that the defendant have the specific intent to further the FTO's unlawful aims.

B. Ohio Legislature

If plaintiffs fail to challenge the statute, the Ohio legislature should rewrite the statute so as to comport with the U.S. Constitution and case precedent. Specifically, the legislature should carefully rewrite the text of the Ohio Patriot Act in a manner that ensures it will survive overbreadth and due process scrutiny. Such drafting would help the State meet its purpose of preventing terrorist acts without violating public employees' associational freedoms.

The Ohio legislature can remedy the overbreadth issue by clarifying the definition of "member" or deleting the first question altogether. Similarly, the drafters can remedy the vagueness issues by defining and clearly distinguishing "training," "personnel," and "member." The legislature would be wise to kill two birds with one stone by including specific

323. *See* OHIO REV. CODE ANN. § 2909.21(H)–(I) (defining "material assistance" and "material support").

324. *See id.*

325. *See id.* § 2909.32(b)(1); Declaration Form, *supra* note 32.

intent in the definition of "member." For example, the Act could provide that: "The term 'member,' for the purposes of this statute, is defined as a person who knows of the organization's illegal and subversive activities; and furthers such aims." The Ohio legislature can also forego all of these definitions and clarifications, and still comport with constitutionality by simply addressing the mens rea gaps in the six questions provided in the Declaration Form. To accomplish this task, the Ohio legislature would have to rewrite every question in a manner that requires the defendants to have the specific intent to further the organization's terrorist aims. The Declaration Form should be drafted as follows (the amended text is italicized):

> (1) Are you *an active* member of an organization on the U.S. Department of State Terrorist Exclusion List? *If so, are you aware of their unlawful terrorist aims, and are you a member for the purpose of furthering those aims?* . . .
>
> (2) Have you *knowingly* used any position of prominence you have within any country to persuade others to support an organization *you knew was* on the U.S. Department of State Terrorist Exclusion List, *for the purpose of furthering that organization's unlawful terrorist aims*? . . .
>
> (3) Have you knowingly solicited funds or other things of value for an organization *you knew was* on the U.S. Department of State Terrorist Exclusion List *at the time of solicitation, for the purpose of furthering that organization's illegal terrorist aims*? . . .
>
> (4) Have you solicited any individual for membership in an organization *you knew was* on the U.S. Department of State Terrorist Exclusion List *at the time of solicitation, for the purpose of furthering that organization's illegal terrorist aims*? . . .
>
> (5) Have you committed an act that you kn*e*w, or reasonably should have known, afford*ed* "material support or resources" (see below) to an organization *you knew was* on the U.S. Department of State Terrorist Exclusion List *at the time of support, for the purpose of furthering that organization's illegal terrorist aims*? . . .
>
> (6) Have you hired or compensated a person you knew to be a member of an organization on the U.S. Department of State Terrorist Exclusion List or a person you knew to be engaged in planning, assisting, or carrying out an act of terrorism *at the time of hiring or compensation, and for the purpose of furthering that person or organization's illegal terrorist aims*? . . .

In summary, the Supreme Court or the Ohio legislature may resolve the unconstitutionality of the Ohio Patriot Act. The Supreme Court should declare the statute unconstitutionally overbroad and vague, as well as that it fails to require the defendant have the specific intent to further the FTO's aims. The Ohio legislature should amend the Ohio

Patriot Act in a manner that ensures it will survive overbreadth and due process scrutiny and protects employees' right to associate freely and partake in all legal forms of political activity.

V. CONCLUSION

The right to engage in political discourse is one of the fundamental concepts upon which this country was founded. Throughout the United States' history, however, we have seen instances in which the government, acting as an employer, has restrained its employees' right to partake in this fundamental right. The reason for such restraints has always been national security. It is important, however, to learn from past mistakes.

Like the anti-communist statutes that several governments enacted over half a century ago, the Ohio Patriot Act fails to provide benefits that sufficiently legitimize its intrusion on Ohio public employees' First Amendment rights. No one can argue that a country acts unreasonably when taking strict measures to protect itself from terrorist attacks. But adopting reactionist and overly restrictive measures at the behest of public hysteria is unreasonable. And adopting ineffective means to reach an end, thus making that end unreachable, is also unreasonable.

The Ohio Patriot Act is unconstitutionally overbroad and violates due process. Consequently, the Supreme Court should invalidate the Act, or the Ohio legislature should amend the statute or leave the goal of preventing terrorism to institutions that are more equipped to reach that goal. If the legislature should choose to do the former, it should do so in a manner that ensures the statute holds up in the face of constitutional scrutiny and, more importantly, puts all employees on notice as to what conduct is criminal. Such measures will ensure that employees can engage in the very same liberties we so emphatically allege to protect in the fight against terror.