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Michael P. Malloy

University of the Pacific, McGeorge School of Law

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Was Bedeutet "Terrorismus?"

*Michael P. Malloy***

My talk today is entitled *Was bedeutet "Terrorismus?"* as my colleague Thomas Eilmansberger¹ might say. What do we mean by terrorism? This is no longer just a descriptive term; it has already become a conceptual term of art. Some of you might wonder why such an issue would be raised halfway through the second day of this thoughtful and provocative two-day conference. Taking inspiration from Plato's *Symposium*, I can only say that some concepts are so important that they can only be properly contemplated over a good meal among friends and colleagues. Of course, to the extent that Plato is ever really talking about anything, he was considering what we mean by love, or *ἀγάπη*. We, on the other hand, are considering the contours of a hate so virulent, that we feel compelled to distinguish it from other forms of human perfidy that might otherwise appear to be related to it.

This phenomenon is not simply intimidation; it is terrorism. It is not simply extortion; it is terrorism. It is not simply murder—not even mass murder; it is terrorism. Of course, it may be all of those things, in some grim combination, and yet the contemptible whole is much more repugnant and unnerving than the sum of these parts. Why do we need to go further? Intuitively, is not terrorism something that we know when we see it? That may be enough for some. It would be enough for my dog, Alexander Magnus. He has a keen sense of who needs to be barked at and who needs to be nuzzled. Surely, we are capable of much more than this mere intuition.

The question is not only a matter of full-bodied conceptualization. The common understanding that we seek as to the meaning of this term will influence what kinds of behavior we can agree, as an international community, to condemn and repulse. Hence, even at a technical lawyerly level, we seek definition.

In federal law, it turns out that there is almost too much definition, and too many competing definitions. I took a brief survey of over 330 provisions in the U.S. Code touching upon terrorism. Confining myself just to those provisions that expressly purport to define the term, I discovered the following confusing and disparate results.

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** Distinguished Professor and Scholar, University of the Pacific, McGeorge School of Law. J.D., University of Pennsylvania (1976); Ph.D., Georgetown University (1983).

1. Professor Eilmansberger had originally been scheduled to deliver a luncheon address, but flight schedules compelled him to cancel at the last moment. Dr. Malloy agreed to deliver a talk in lieu of the scheduled address.

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The Homeland Security Act contains the following general definition of terrorism:

The term "terrorism" means any activity that—

(A) involves an act that—

(i) is dangerous to human life or potentially destructive of critical infrastructure or key resources; and

(ii) is a violation of the criminal laws of the United States or any State . . . ; and

(B) *appears to be intended*—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination or kidnaping.²

In a later section of the very same act, there is another definition of terrorism. It says that the term "act of terrorism" means "any act that the Secretary determines meets the requirements of subparagraph (B), as such requirements are further defined and specified by the Secretary."³ Subparagraph (B) in turn says that

[a]n act meets the requirements . . . if the act—

(i) is unlawful;

(ii) causes harm to persons, property or entity, in the United States, or in the case of a domestic United States air carrier or a United States-flag vessel . . . , in or outside of the United States; and

(iii) uses or attempts to use instrumentalities, weapons or other methods *designed or intended* to cause mass destruction, injury or other loss to citizens or institutions of the United States.⁴

Close, but not exactly coincident definitions within the same statute. Are we willing to sweep into the net anything that *appears* to be "intended to intimidate?" Or just those things that, in fact, *are* "designed or intended" to cause harm or loss?

If the relevant principle is "appears to intend," then I would argue we probably could have arrested Courtney Love for terrorism, because she "appeared to be intending" to intimidate all those passengers on her flight to

2. 6 U.S.C. § 101 (2003) (emphasis added).

3. *Id.* § 444(2)(A).

4. *Id.* § 444(2)(B) (emphasis added).

London earlier this month. News reports indicate that she verbally abused the cabin crew of a transatlantic flight with 200 passengers on board.⁵ (No one was injured.)

In U.S. immigration and naturalization law, there are some definitions as well that, I am sure, will clear up all this confusion. In what may be the broadest formulation in U.S. law, we are told that, as used in immigration law,

the term “terrorist activity” means any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would have been unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The hijacking or sabotage of any conveyance (including an aircraft, vessel or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person . . . or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with the intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to any of the foregoing.⁶

This is a very different definition, with some overlap but not an appreciable amount. This particular definition is then cross-referenced at several points in the immigration and naturalization laws. You could look, for example, at the provision in 8 U.S.C. Section 1189 dealing with the designation of foreign

5. See *Love Arrested After Flight*, L.A. TIMES, Feb. 5, 2003, at E3 (reporting arrest of Courtney Love at London Heathrow Airport by British police for “disruptive behavior and endangering an aircraft.”)

6. 8 U.S.C. § 1182(a)(3)(B)(iii)(I)-(VI) (2003).

terrorist organizations.⁷ This is in the immigration and naturalization laws, not the financial regulatory laws that Professor Gurulé was discussing earlier today. Here, the Secretary is given the authority to designate an organization as a foreign terrorist organization if the Secretary finds that the organization is a foreign organization and that it engages in terrorist activities as defined in the other sections, and the terrorist activities of the organization threaten U.S. national security or the security of U.S. nationals.⁸ Thus, the designation procedure rests on a concept of terrorism imbedded in an alternate definition—a little more streamlined, a little more useful—which is, according to the Central District of California, unconstitutional. In *United States v. Rahmani*⁹ the court held that the procedure denied due process to individuals charged with materially supporting a designated foreign terrorist organization, because the process for the designation by the Secretary of State established a procedure that did not provide for notice and an opportunity to be heard. This is a controversial issue, and we may expect further litigation of these issues as other cases proceed through the courts.¹⁰

In federal criminal law, to which reference was made yesterday during roundtable discussion, there are several general definitions of terrorism. For example, with respect to firearms offenses, federal statutes provide that

the term "terrorism" means activity against United States persons which—

(A) is committed by an individual who is not a national or a permanent resident alien of the United States;

(B) involves violent acts or acts dangerous to human life which would be a criminal violation if committed within the jurisdiction of the United States; and

(C) is intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by assassination or kidnapping.¹¹

7. See *id.* § 1189(a)(1)(B) (authorizing designation of foreign terrorist organizations; cross-referencing § 1182(a)(3)(B)).

8. 8 U.S.C. § 1189(a)(1).

9. *United States v. Rahmani*, 209 F. Supp. 2d 1045, 1054-55 (C.D. Cal. 2002).

10. In fact, the Southern District of New York has since declined to follow the reasoning of *Rahmani*. *United States v. Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003). The Northern District of Illinois declined to extend the *Sattar* approach. *United States v. Caputo*, 298 F. Supp. 2d 912 (N.D. Ill. 2003). *But see* *United States v. Al Arian*, 308 F. Supp. 2d 1322 (M.D. Fla. 2004) (disagreeing with *Rahman*). The D.C. Circuit has recently held that any due process violation in the designation process was harmless. *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238 (2003).

11. 18 U.S.C. § 921(a)(22)(A)-(C) (2003) (emphasis added).

Notice here that the statute speaks in terms of “is intended to”—not “appears to be intended.”

Elsewhere in federal criminal law there are provisions specifically directed at crimes of terrorism. In this context “international terrorism” is defined to mean:

activities that—

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) *appear to be intended*—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they *appear intended to* intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.¹²

This particular provision, which reverts to the “appears to be intended” approach, is itself then cross-referenced as the basic concept in several other provisions in federal criminal law. For example, in the provisions dealing with rewards for information concerning terrorist acts and espionage, the definition of “act of terrorism” (for which rewards would be pertinent) simply refers to this earlier “appears to be intended” definition of terrorism.¹³ The same reference-over is used in provisions having to do with compensation for victims of international terrorism.¹⁴ Two sections after the “international terrorism” definition in the federal criminal code there is a section on “acts of terrorism transcending national borders,” which defines the term “federal crime of terrorism.”¹⁵ You might think that this had already been covered, but this term is defined to mean any offense that “is calculated to influence or affect the conduct of a government by intimidation or coercion, or to retaliate against government conduct”¹⁶—which is the first time we have seen this “retaliation” feature—and that is a violation of one of a very long laundry list of substantive predicate criminal acts.¹⁷

12. *Id.* § 2331(1)(A)-(C) (emphasis added).

13. *Id.* § 3077.

14. 42 U.S.C. § 10603(c) (2003).

15. 18 U.S.C. § 2332b(g)(5) (2003).

16. *Id.* § 2332b(g)(5)(A).

17. *See id.* § 2332b(g)(5)(B)(i) (listing predicate violations).

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In the foreign affairs provisions of the U.S. Code, there is a provision requiring annual country reports on terrorism, which itself defines the term "international terrorism" to mean "terrorism involving citizens or the territory of more than one country."¹⁸ In turn, the term "terrorism" is defined to mean "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."¹⁹ This is an entirely different construct and does little to clarify the meaning of "terrorism" for U.S. law and policy. This series of provisions is particularly important, of course, since the annual country reports are keyed to it, but it is not the exclusive definition of terrorism in the foreign affairs provisions of the U.S. Code. The provision dealing with required reports on terrorist assets in the United States²⁰ has its own definition, parts of which refer to this previous definition,²¹ other parts of which do not.²²

Finally, when we reach the war and national defense provisions of the U.S. Code, the term "international terrorism" is defined to mean

activities that—

(1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;

(2) *appear to be intended*—

(A) to intimidate or coerce a civilian population;

(B) to influence the policy of a government by intimidation or coercion; or

(C) to affect the conduct of a government by assassination or kidnapping; and

(3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they *appear intended to* coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.²³

Notice that this provision shifts back to the "appears to be intended" formulation. The provision is then picked up and cross-referenced in other sections of the war and national defense provisions,²⁴ so that we can continue to enjoy the splendor of variation.

18. 22 U.S.C. § 2656f(d)(1) (2003).

19. *Id.* § 2656f(d)(2). For these purposes, the term "terrorist group" is defined to mean "any group practicing, or which has significant subgroups which practice, international terrorism." *Id.* § 2656f(d)(3).

20. *Id.* § 2656g.

21. *See id.* § 2656g(b)(2) (referring to § 2656f(d) in defining "international terrorism").

22. *See, e.g., id.* § 2656g(1) (defining "terrorist" countries by reference to designations under 22 U.S.C. § 2780(d)).

23. 50 U.S.C. § 1801(c)(1)-(3) (2003) (emphasis added).

24. *See, e.g., id.* §§ 1821(1), 1841 (defining term "international terrorism" by reference to § 1801).

Of course, it is not remarkable that alternative competing definitions of a term should exist within the U.S. Code, for various specialized purposes. As a professor of banking law, I have the considerable personal satisfaction of leading students twice a year into the thicket of competing definitions of the term “bank.”²⁵ The formulaic preamble that we see so often in federal statutes—“[f]or purposes of this section [or “this part,” or “this act”], the term such-and-such is defined to mean thus-and-so”—allows for needed variation at a technical level. However, for the interrelated series of statutory provisions concerning terrorism, these techniques of variation can, I fear, be dangerously dissonant and confusing. We should strive, as practitioners, scholars and policy makers to create some conceptual harmony in the interest of due process—according to the *Rahmani* case;²⁶ in the interest of programmatic effectiveness; and, in the interest of conceptual clarity. There is much to recommend the tighter, objectively based definition of terrorism contained in the firearms provision.²⁷

Of course, ultimately, we would hope to align domestic concepts of terrorism with international legal concepts, since broad cooperation and consensus at the international level is essential if the fight against terrorism is to be effective. Here, however, the matter is not so simple. I shall take as my example, the relevant provisions of the International Convention for the Suppression of the Financing of Terrorism,²⁸ since that convention is specifically referenced in the U.N. Security Council Resolution No. 1373.²⁹ Strictly speaking, this convention has no definition of terrorism. Article 1, which purports to provide definitional provisions, defines “funds,” “state or government facility,” and “proceeds.” It does not define “terrorism.” We can, however, derive a definitional concept from article 2, paragraph 1 of the convention, which does talk about the elements of the offense that is the focus of the convention. First, the convention states that

Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

- (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex [of the convention].³⁰

25. See generally 1 MICHAEL P. MALLOY, *BANKING LAW AND REGULATION* § 1.2.1, n. 22 (discussing various statutory definitions of term “bank”).

26. Cf. *supra* notes 9-10 and accompanying text (discussing *Rahmani*).

27. See *supra* notes 11 and accompanying text (discussing and quoting firearms provision).

28. International Convention for the Suppression of the Financing of Terrorism, 39 INT’L LEGAL MAT. 270 (2000) [hereinafter “ICSFT”].

29. S/RES/1373 (2001), reprinted in 40 INT’L LEGAL MAT. 1278 (2001).

30. ICSFT, *supra* note 28, art. 2, para. 1(a).

In the Annex, we have a long laundry list of treaties targeted at specific predicate acts, such as seizing an aircraft, unlawful acts against safety of civil aviation; crimes against internationally protected persons; taking of hostages; nuclear material; violence at airports; unlawful acts against safety of maritime navigation; unlawful acts against safety of fixed platforms on the continental shelf; and, terrorist bombings. This approach mimics one—but only one—of the definitional techniques that we saw in our own federal law.³¹ The idea is that one defines "terrorism" in terms of some degree of intentional behavior involving a specified predicate act from an agreed list of offenses, and that is the end of the analysis. This is very straightforward, but of course—as with all lists—it leaves open the possibility that next time, the human mind will invent something else to do that is off the list.

However, the convention goes on to offer an alternative approach to the problem. A person commits an offense within the convention if they carry out

[a]ny other act *intended* to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from any act.³²

Notice that the convention endorses the concept of "is intended", not "appears to be intended", by its nature or context to involve the described reprehensible behavior. This is an entirely different approach that matches some, but by no means any appreciable number, of the definitional concepts in the federal statutes as they stand.

The conceptual question of the meaning of "terrorism" is not only a matter of lawyerly precision. Failure to resolve this issue, I believe, can lead to other dangers and other perverse terrors. I am reminded of that famous scene from Beckett's *Waiting for Godot*, in which Didi and Gogo begin insulting each other:

Vladimir:	Ceremonious ape!
Estragon:	Punctilious pig! . . .
Vladimir:	Sewer-rat!
Estragon:	Curate!
Vladimir:	Cretin!
Estragon:	(<i>with finality</i>). Critic! ³³

31. See *supra* note 17 and accompanying text (discussing 18 U.S.C. § 2332b(g)(5)(B)(i)).

32. ICSFT, *supra* note 29, art. 2, para. 1(b) (emphasis added).

33. SAMUEL BECKETT, *WAITING FOR GODOT* 48 (Grove Press 1954).

With apologies to Beckett, in today's international environment, this insult crescendo would probably sound like this:

Vladimir: Multinational!
Estragon: Environmentalist!
Vladimir: Lawyer!
Estragon: Diplomat!
Vladimir: Frenchman!
Estragon: (*with finality*). Terrorist!

If "terrorist" becomes a mere epithet, drained of precise meaning, we are lost. Consider the following news accounts. From THE NEW YORK TIMES, Friday, September 13, 2002:

Moscow—In words echoing the language of the Bush antiterrorist campaign, President Vladimir V. Putin appealed today to the United Nations to support Russia's threat of military strikes against the former Soviet republic of Georgia.

In a letter to the United Nations secretary general, Kofi Annan, and the four other permanent members of the Security Council, he accused the Georgians of a "grievous failure" to comply with a resolution to combat international terrorism. He also reiterated his warning that Russia would attack unless Georgia did more to root out what he called terrorists on Georgian territory.

Mr. Putin said bluntly that Georgia's harboring of Chechen fighters gave Russia the right to act in self-defense under Article 51 of the United Nations Charter and the antiterrorism resolution passed last year after September 11.³⁴

Here is another one. From Nicholas D. Kristof's Op-Ed column in THE NEW YORK TIMES, Friday, December 27, 2002:

In crude military terms, terrorism often works. New methods of killing people initially provoke outrage but eventually are often accepted. Henry V used longbows at Agincourt, outraging the French. British redcoats marching in neat columns were appalled by sneaky Yankees hiding behind trees. After Guernica, aerial bombing was condemned as barbaric, and in World War II the West condemned Germany's V-1 and V-2 missiles as terror weapons.³⁵

34. Steven Lee Myers, *Echoing Bush, Putin Asks U.N. to Back Georgia Attack*, N.Y. TIMES, Sept. 13, 2002, at A8.

35. Nicholas D. Kristof, *A Toast To Moral Clarity*, N.Y. TIMES, Dec. 27, 2002, at A21.

Think about this last quotation for a moment. None of those acts would fit any of the definitions of "terrorism" that we just talked about. So what is Kristof talking about? Terrorism. He points out later that

[a]ll these problems reflect what the British scholar Adam Roberts refers to as "genuine doubts" about the term terrorism. The Reuters news service normally refuses to describe people as terrorists—outraging those all over the globe who are sure that's what their enemies are.³⁶

One last new report, which I find to be very disturbing. From THE NEW YORK TIMES, Tuesday, February 11, 2003:

Beijing—International human rights groups expressed outrage today at the life sentence handed down to a dissident based in the United States as the Chinese government released further details of what it said were his crimes.

Wang Bingzhang, a permanent resident in the United States who lives in New York, was sentenced today to life in prison in the southern Chinese city of Shenzhen, after being found guilty of espionage and terrorist activities under China's state secrets laws. Mr. Wang was the first political dissident to be charged under China's new antiterrorism laws, leading in part to his harsh sentence.

According to the court verdict, Mr. Wang had been gathering military intelligence for Taiwan from 1982 to 1990. . . .

. . . [S]ince 1996 he had organized "terrorist activities" in connection with an underground political party he wanted to form, including procuring guns and planning explosions and assassinations. He also plotted to bomb the Chinese embassy in Thailand, the verdict said. . . .

But the report provided little evidence to support the charges. . . .³⁷

Terrorist you are if they say you are! There seems to be no objective way to assess the legitimacy of the measures against terrorism.

Law resolves disputes and orders relations. But it does so by creating a conceptual reality as palpable and present as the physical world around us. As participants in this process of continuous creation, we have the responsibility to make the legal reality one that supports and preserves human dignity and furthers international peace and security. I pray that we are worthy of the task.

36. *Id.*

37. Elizabeth Rosenthal, *Rights Advocates Denounce China's Sentence of Dissident*, N.Y. TIMES, Feb. 11, 2003, at A14.

QUESTION AND ANSWER SESSION

Question: Could you define terrorism for me?

Prof. Malloy: I think that terrorism is an act of violence which is motivated by an intention to intimidate a government, to force it to change a policy through non-legal means.

Question: What does Al Qaeda anticipate to accomplish? What would be the goal?

Prof. Malloy: Of course, this is the difficult factual predicate, and we saw in the Ambassador's speech yesterday that there can be a great deal of discussion and disagreement about that. This is not to say that there isn't an answer, but that we have not particularly determined it yet. One obvious response would be that they wish to rearrange the fabric of society, at least on a regional basis and possibly broader than that, depending on which pronouncements you listen to. Alternatively, they wish to negate, eliminate or change U.S. policy with respect to the third and fourth worlds. The question is, if that is an appropriate description of what they in fact are doing, are they going about it in a way that is without legal means?

Question: If your various definitions of terrorism . . .

Prof. Malloy: . . . I do not take credit for all of those . . .

Question continued: . . . are accurate, apparently terrorism must involve a violent act. In other words, if somebody goes and throws a switch somewhere in the state of New York and casts the entire Eastern United States into darkness, that's not terrorism? Or a computer hacker that terrifically disrupts society, that's not terrorism? I would say it is.

Prof. Malloy: Under many definitions, it would not be. There are some more specialized provisions that probably, one could infer, would include that as terrorism. I confine myself, just to be fair to the text, only to provisions that were purporting to give you a definition, but there are other provisions—for example, not only the national security area, but in terms of infrastructural security—from which you probably could reconstruct the kind of definition that you are suggesting. So the concept may be broader than what I would endorse.

The problem is, that doesn't make the conceptual difficulty simpler, it makes it even worse. We have an even wider variety of possible definitions, many of which are not consistent with each other and some of which do not even declare themselves. My concern, as a former government lawyer and as someone who continues to think about this, is that we are at the early stages of this problem of delimiting a "universal crime" of terrorism. There is not a great deal of case law on this issue, but we are going to go down a path where various administrative agencies and operatives will be pursuing the policy objectives embodied in these various statutes; developing independently their own administrative law and lore about the circumstances under which something is terrorism; defending it in court under disparate statutes; and putting themselves in a position where the

courts are not going to be able, cumulatively, to give us a progressive definition and move on from there.

In some of these extremes, I could see defense counsel trying to cite to a case from one of these other areas, perhaps *Rahmani*, and being told by a judge, "Well, that's a different definition altogether. Terrorism's doesn't mean that in this context. We are not going to get the benefit—as we have in so many regulatory areas—of an enriched body of case law, carefully and dispassionately thinking through these problems. That is disturbing to me, both from a point of view purely of craftsmanship, and also in terms of the broader consequences. I think that we are putting the progressive development of this area of the law at risk.

Question: In the broader international scene, somebody is a terrorist depending on what his or her objectives are. For example, are the *Zapatistas* in Mexico considered terrorists? They seem to have a legitimate grievance as far as they do things that resemble terrorism.

Prof. Malloy: Of course, it depends on which alternative of the International Convention's definition you use, because it presents genuinely distinct alternatives. If they hold out against the *federales*, who are coming to serve warrants and shoot it up, arguably under that definition, they are probably not terrorists under the convention. If in order to escape the *federales*, they grab a plane, they are terrorists. Now, some of this is situational and maybe it has to be. Sometimes we are something, sometimes we are not, but the problem is that it is very hard to resolve issues that inherently require international consensus and collaboration if we are working with such disparate regimes. I'm looking at a very narrow cut of one domestic system of statutory law. When you look into some of the other jurisdictions—for example, in light of the documentation that Security Council's anti-terrorism committee is developing—we are not alone in this problem.

There is another resonance to this. Yesterday, the round table discussion raised the question whether this definitional problem is a kind of empty exercise; maybe we should simply proceed, rather than getting caught up in these technicalities. Perhaps we need more of a "feel" for the subtleties of antiterrorism policy. Subtlety can sometimes be a deceptive and faithless guide. It seems to me that you can tolerate only so much subtlety, and then you have to make a decision about the extent to which you are willing to bend the law to suit the exigencies.

This is troubling to me, because law professors are very much at fault for this fascination with subtlety. As an institution, we really value the clever answer. For instance, if a student can come up with something that really sounds clever, it often does not seem to matter what it corresponds to in reality. We all value that. We do not want to feel confined by the reduction of this concept to a statutory term; we want to be alive to the nuances. That is very dangerous sometimes, particularly to the inherent sense of fairness in a complex society.