

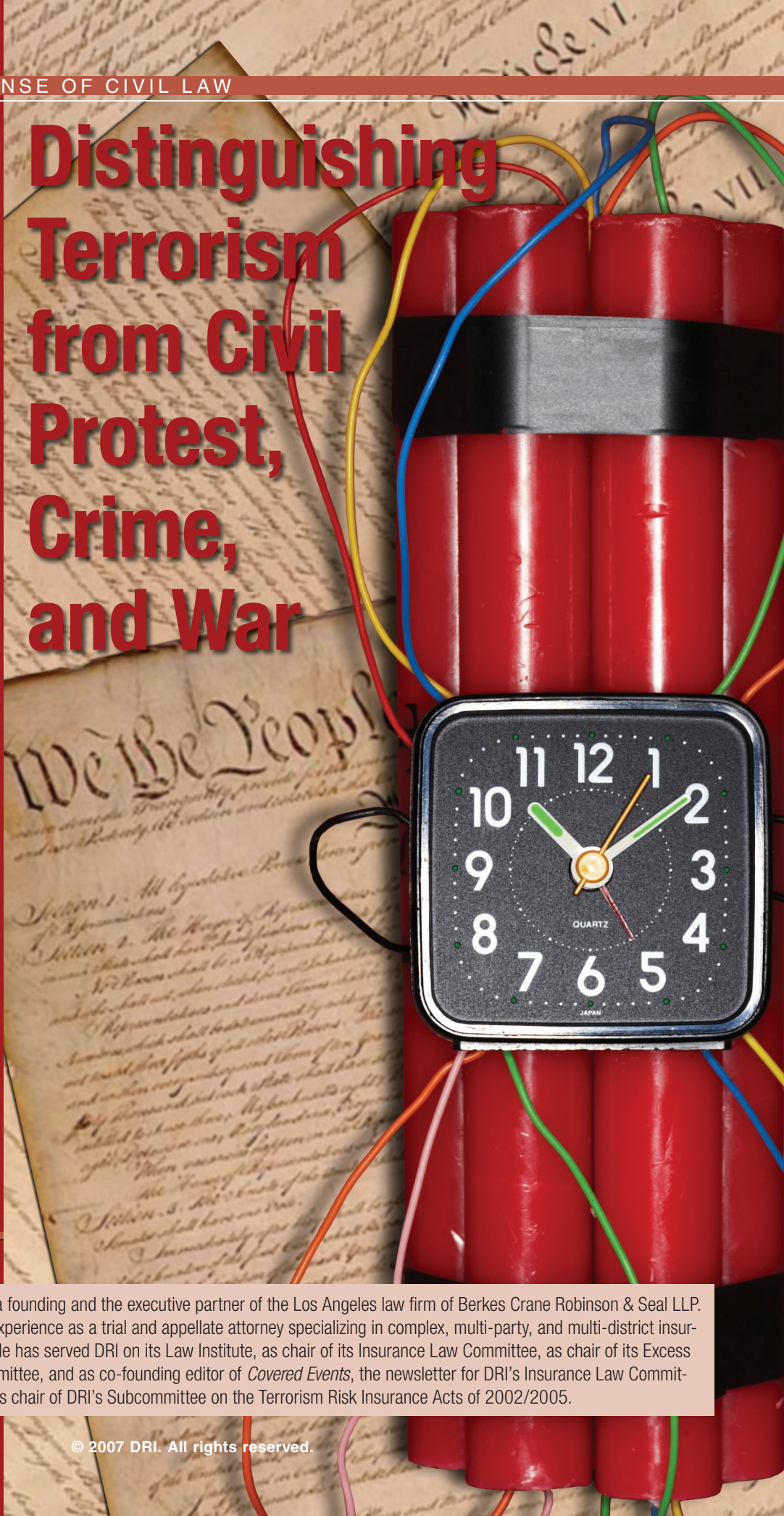


A Defining Moment

By Ronald R. Robinson

**F**raming the debate  
under the Rule of Law.

# Distinguishing Terrorism from Civil Protest, Crime, and War



■ Ronald R. Robinson is a founding and the executive partner of the Los Angeles law firm of Berkes Crane Robinson & Seal LLP. He has over 20 years of experience as a trial and appellate attorney specializing in complex, multi-party, and multi-district insurance coverage litigation. He has served DRI on its Law Institute, as chair of its Insurance Law Committee, as chair of its Excess and Reinsurance Subcommittee, and as co-founding editor of *Covered Events*, the newsletter for DRI's Insurance Law Committee. He presently serves as chair of DRI's Subcommittee on the Terrorism Risk Insurance Acts of 2002/2005.





## Defining Terrorism in a Free Society

Terrorism's absolutist and intolerant agenda is often advanced in the rhetoric of liberation, but in fact it seeks nothing less than the destruction every free society's

exercise of its rights of speech, association, press, privacy and religion. How should democracies defend against this assault on the ideals which are precepts of the "Rule of Law" that govern them? We are being exhorted to both sanction a "war on terrorism" and to treat terrorists as a new class of enemy. We are being told only a sea change in our Rule of Law can make possible the *swift, unfettered and unbounded preemptive action* required to prevent terrorist acts and to secure justice for the casualties of any attack that succeeds. Thus are we being asked nothing less than to redefine the rules of war, our criminal and civil law and the guarantees of personal freedom that have evolved in democratic societies over the course of the last millennium. Yet, if we ourselves abridge our inalienable rights in order to defeat terrorism, we become our enemy and fall by our own hand, without another blow being struck. We are in the midst of such a defining moment.

At the end of the day, our inalienable rights are ultimately challenged and redefined in our civil, criminal and military courts and tribunals. These historically diverse and mutually exclusive forums, while governed by their own bodies of law, are all bound together under a Rule of Law whose precepts are defined by our Constitution's Bill of Rights. Historically, a given act, event or circumstance is rarely addressed in more than one of these forums at a time. Today, however, we are witnessing a unique moment in legal history, the simultaneous evolution of the separate bodies of law in all of these forums to meet one circumstance—the immediate and pervasive threats and realities of a global terrorism risk of unprecedented magnitude. This multi-jurisdictional phenomenon arises from the fact that terrorist acts can simultaneously mirror and mimic aspects of civil protest, crime and war. Although different in scale, context, means, intent and goal, acts of terrorism, war, crime and civil protest can and do, at any given moment, intentionally em-

ploy or devolve unintentionally into circumstances that inflict personal injury, result in death or take or destroy property by force. Therefore such conduct, in and of itself, cannot serve to define who is the "protestor," the "criminal," the "warrior" or the "terrorist." Instead, it is in the confrontation between Terrorism's ideals of absolutism and intolerance and freedom's ideals of a plural society and its inalienable rights that terrorism will be distinguished from these other violent acts. Because our forums of justice define the exercise of our inalienable rights and protect the pluralism that distinguishes free societies from all others, it is they that will perforce largely shape the evolution of our Rule of Law as it will in the future apply to civil protest, crime, war and terrorism. Ought we to not consider, therefore, whether the rhetoric of and the proposals on how to wage a "war on terrorism" might also pose a threat to the Rule of Law? Terrorism has set us on a new course for the preservation of freedom. Yet, our professed objective will not be achieved by mere promises of protection of liberty, but by the rules with which we navigate this perilous journey. The promises of freedom alone do not guarantee inalienable rights. Inalienable rights alone guarantee the promises of freedom.

### Framing the Terrorism Definition Debate under the Rule of Law

Is the Rule of Law in peril if a free society fails to specifically distinguish acts of terror from acts of crime, civil protest and war? Many argue definitions of terrorism on one hand, and civil protest, crime and war on the other, are intuitive and obvious; therefore, attention to new precise legal definitions is not required. Their position is that, in a war on terrorism, the Rule of Law is already fully equipped to address: (i) the differences and the similarities in the conduct of civil protest, crime, war and terrorism; (ii) who is a criminal, a protestor, a patriot or a terrorist; and (iii) whether con-



duct is a civil protest, a criminal act, an act of war or a terrorist act. Thus, they assert, the Rule of Law is not at risk in the current confrontation with terrorism.

The response to this argument is found in the lessons taught by the enduring definitional debate over the term “obscenity.” Many have asserted that we intuitively “know it when we see it” and that the law

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addressing it needs no refinement. Yet, free societies have grappled with this very question for centuries. It has been the subject of an almost constant and bitter confrontation arising from the tension between social, moral, and religious views of sexual ethics on one hand and individual rights of free speech, association, press, privacy and religion in the exercise of sexual conduct on the other. Far too often obscenity has been “intuitively” defined by the use of subjective or parochial ethical perspectives that ignore the precepts of inalienable rights that protect a plural society. One person’s art has thus often been another’s pornography or obscenity. Under the Rule of Law, decades of independent analysis and deliberation have addressed this tension in the law through the evolution and application of strict definitions of “obscenity” that seek to preserve our inalienable rights, the hallmark of pluralism. Thus, art and pornography are legal in free societies, while obscenity is not; all as is defined under the Rule of Law.

So to do many now assert that we can intuitively and subjectively determine whether a given act is civil protest, crime, war or terrorism because “we know it when we see it.” History teaches that such “definitions” are devoid of the objective analysis

and independent deliberation that serves to protect inalienable rights. Under the Rule of Law, ideas—even those that underpin *terrorism*—cannot be punishable *per se* until those thoughts become acts. In other words, to be illegal, the conduct that follows thought must be in direct and imminent aid or in furtherance of an actual terrorist act. Otherwise, such advocacy is potentially free speech, exercised in the context of free association, furthered by a free press, in service of a private thought that may have a religious aspect. These precursors to conduct are protected by the Rule of Law. Similarly, an individual or State that protects the right to think of ideas or ideals shared by terrorists ought not be defined as a *terrorist state, per se*, in the absence of support or comfort for terrorists or terrorist acts. Definitions that are drawn to protect inalienable rights in every context create the risk that illegal conduct may well follow protected thought and conduct. This risk is inherent in free societies governed by the Rule of Law. It is a risk terrorism will not abide.

When thought does become conduct, the magnitude and scope of any given terrorist act can require redress and imposition of the remedies available from all tribunals of justice, as well as the use of military force. Thus, all public and private institutions charged with our security and defense are engaged in the process of redefining the Rule of Law as they confront terrorism. For example, each forum is being asked to consider and approve radical strategies of protection for civil society not unlike tactics used by military forces, which will, at the same time amend the rules of war. These strategies, if endorsed, will move us toward living as combatants and not as a civil society. Civil rights are the first casualties of combatant based law.

We are in the midst of what is, in essence, an across the board implementation and an ever increasing adaptation of the procedural, evidentiary, and substantive components of the law in separate jurisdictions to engage and confront all aspects of terrorism. This process is, at its core, one of distinguishing conduct under the Rule of Law. Most importantly, the definitions fashioned and employed in all forums must be consistent with and serve to protect our inalienable rights. It is of serious concern,

therefore, that this process is driven in significant part, not by our traditional legislative and judicial checks and balances, but by the rhetoric of those with great political and economic power in a context of extreme exigent circumstances. Will this rhetoric or the traditional process of independent legal analysis and deliberation redefine the law that responds to terrorism? Ought and can terrorist acts be distinguished under the Rule of Law from circumstances of traditional civil protest, criminal acts and acts of war? The answer in a free society must be “yes,” because it is in the search for such definitions that democracies preserve their inalienable rights.

### The Antecedents of Terrorism

Want, need, powerlessness, disenfranchisement, intolerance, inequality, injustice and misuse of power can incite thoughts of crime, civil protest, war *and* terrorism. Whether these unacceptable circumstances are (i) in fact real, (ii) fairly subject to debate, or (iii) cynically or irrationally manipulated distortions to create a political “cause,” they serve to empower the forces of change. When appeals for help, broad based enlightened understanding or political advocacy fail too rectify these circumstances, civil protest, crime or war will follow. Terrorists can and do co-opt such circumstances by redefining and manipulating them to become the “cause” that serves to justify and thus advance their agenda.

Today, most Sovereign States, and other entities that proclaim themselves *a de jure, de facto*, or provisional government (“State”), *profess to act to protect* inalienable rights under the moral authority of natural law of the secular and religious ethics of their peoples. Vigilant free peoples constantly question whether the exercise of private and public power in a State serves to protect the liberty of all or to abridge the rights of the powerless. The Rule of Law protects inalienable rights because it proceeds from, for and with the consent of all of the people it governs. Thus, in democracies, the Rule of law is administered by tribunals independent of and not subject to the control of the State or powerful public or private interests. The Rule of Law, so applied, provides for equality of treatment for every individual governed. This precept is the cornerstone of protection for inalienable rights.

Terrorists adamantly define themselves as patriots rightfully employing the strategies of warfare, crime and civil disobedience to redress by any means the “moral wrongs” they assert as their “cause.” They wrap their “cause,” not in a flag, but in the cynical manipulation of ideals of justice and freedom. To reduce, marginalize, or, perhaps, completely defeat terrorism, we must unmask the terrorist’s “cause” as being nothing other than the triumph of absolutism, dictatorial power and intolerance of an individual’s rights. This effort will fail, however, unless we first directly address, oppose, and seek to end both *real and perceived* acts of intolerance, inequality, injustice, and misuse of power *from any quarter or by any State or peoples, including our own, that feed terrorism*. In doing so, however, we cannot deny even our adversary the inalienable rights that we profess to protect.

#### The Antecedents of the Rule of Law

The Rule of Law is premised on the ideal that each of us is pledged, in our private and public conduct, to preserve and protect the inalienable rights of those whose causes, ethics, beliefs, religions, politics, ideologies, doctrines, strategies, intent, conduct (hereinafter referred to as “Attributes”) we cannot abide and that they likewise are pledged to protect our Attributes. The Rule of Law respects and tolerates a vast array of diverse private and public codes of ethical conduct inherent in a plural society. These private codes, and the Rule of Law that both arises from and protects them, act in concert to create equality in the adjudication of private and public conduct. This “balance” serves to define and protect an individual’s right to freely think, speak, write, associate, act privately and worship.

One oft cited example of the protection of equality under a Rule of Law that serves to balance the exercise of inalienable rights and illegal conduct is the act of yelling fire in a crowded theater. The mere *advocating* of the yelling of the term “fire” in a crowded theater, at some undefined *future time*, in order to *disrupt* an objectionable play will be *distinguished* in law from the *act of planning to or doing so*. Generally, it is the act that is subject to civil or criminal penalty, not the thought of it. Likewise, merely *advocating* rebellion or war, at some unde-

finied *future time* to further a “cause” will be *distinguished* in law from any *act in direct furtherance of that idea*. Again, it is the act that is subject to civil, criminal, or military response, not the exercise of inalienable

rights short of conduct. There are myriad distinctions in and iterations to the foregoing two circumstances that affect and alter the imposition of legal penalties and military force, but each is an instance that illu-

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minates the balance in the Rule of Law that distinguishes and defines one's exercise of a right from the timing, means, and consequence of one's resulting conduct. The Rule of Law imposes differing penalties or none at all in these circumstances based on the means used, motive, degrees of involvement, intent, and the immediacy of loss, as well as a host of other mitigating factors.

**The promises of freedom alone do not guarantee inalienable rights. Inalienable rights alone guarantee the promises of freedom.**

Each of these factors are points in the balance between protection of rights and the imposition of consequences for illegal conduct under the Rule of Law.

**Distinguishing Terrorism from Civil Protest, Crime and War**

This article proposes the creation of a series of definitions that distinguish terrorism from civil protest, crime and war, and which are consistent with and serve the mandate of the Rule of Law. Thus, if properly conceived and rendered, these definitions ought and can control the application of law as it confronts terrorism in civil, criminal and military jurisdictions. Our thesis is proffered as the starting point for a debate on the application of the Rule of Law to terrorism in all legal forums. We propose one approach to those definitions below simply to frame the questions in that debate, not to dictate their answer.

The specific intent behind one's degree of involvement in, motive for, strategy to accomplish and means of direct and overt conduct has served the law well in its quest to distinguish between legal and illegal conduct. Thus, the Rule of Law is well equipped, if given the proper definitions, to preserve the individual rights of those accused of civil protest, crime, misconduct in war, or terrorism based on a careful discernment of intent as well as conduct.

Traditionally, and in very broad brush, civil protest is defined as opposition to anything by word or conduct that does not in itself physically injure, impair or destroy life or property, although by definition it seeks to disrupt, change or end the *status quo*. Allegations of criminal conduct or act of war can be made against individuals, groups of individuals, and private and public entities, including local, regional or national governments that expand their civil protest negligently or intentionally and thus change their conduct to acts that injure or destroy. Likewise, civil protests are illegal where they serve to deny the inalienable rights of others. Thus, one can oppose or decry another's religion and protest its very existence, but burning its religious structures, attacking or killing its parishioners or simply disrupting its religious services are illegal conduct. Intentional acts by alleged terrorists may well meet the traditional definitions of civil protest, because this is one aspect of their conduct. Ought the conduct of terrorists be illegal when it manifests itself solely as civil protest? The Rule of Law answers: "No."

Traditionally, and in very broad brush, a criminal act is defined as a taking of property without consent. It can also constitute injury to or destruction of person or property by violence or stealth for any reason. The illegality of the criminal conduct encompasses negligent acts, intentional acts or prohibited acts that might endanger or harm life or property. Allegations of criminal conduct can be made against individuals, groups of individuals, and private and public entities, including local, regional or national governments. The redress for such grievances can be both civil awards and criminal penalties. The death and destruction caused by the intentional acts of alleged terrorists may also meet the traditional definitions of crime, because this is often a direct consequence of their conduct. Ought the status of "terrorist" or of "criminal" be alleged when one intentionally takes that which does not belong to them, without consent, or destroys person or property by violence or stealth for a "cause" or no rational reason at all? When a State harbors or employs one to engage in such conduct, ought such a State itself be viewed as a "criminal" or "terrorist" government? The Rule of Law answers: "It is a question of intent not conduct."

Traditionally, and in very broad brush, an act of war is defined as conduct by a State, or a *de jure, de facto*, or provisional government, using its own and/or another's armed military forces, to engage in insurrection, revolt, rebellion and/or civil or military hostilities, *intended* to usurp another State's inherent powers in order to govern, depose or conquer the latter. Acts of war are not usually the result of innocent, negligent, or careless conduct, although such conduct has sometimes been construed as an act of war by a State and precipitated a war in response. Self proclaimed provisional, *de jure*, or *de facto* governments, as well as individuals, can each commit acts of war. Ought the status of "terrorist" or "warrior" be alleged when one is engaged in or fomenting insurrection, revolt, rebellion, civil hostilities, or war, the result of which may well be the usurpation or control of another State's inherent powers to govern? When a State harbors or employs one to engage in such conduct, ought it to be viewed as a "terrorist" or a government at "war"? The Rule of Law answers: "It is a question of intent not conduct."

The element in terrorism that distinguishes it from crime, civil protest and war does not arise from (i) any Attribute ascribed to the individual that commits an act, (ii) his or her cause, ideal, or position, (iii) the strategy and means employed, or (iv) the resulting loss. Civil protest, criminal acts, acts of war and terrorism (i) can be performed by anyone or any entity, (ii) are each often justified by "causes" or ideals, (iii) often employ the same means, and (iv) often result in the same forms of loss. Rather, it is terrorism's fundamental and overriding *intent* that distinguishes its acts from civil protest, crime and war. The terrorist's *intent is not* to engage in civil legal protest to win a contest of ideas through peaceful persuasion or in criminal conduct merely in order to take life or property; although such acts may be employed to advance its agenda. The terrorist's *intent is not* to depose or conquer a State or directly usurp the exercise of its inherent powers. Instead, terrorists *intend* to (i) coerce or intimidate a State, or a cognizable group of individuals, to change its social, economic, moral, religious, political or ideological beliefs, doctrines, policies, positions or ideals, and (ii) thus alter or affect the course or

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conduct of such State or peoples in order to advance or impose upon them the various mandates that flow from blind obedience to the terrorist's "cause." Their intent, simply put, is the destruction of their adversary's inalienable rights as a free people.

Consequently, if a terrorist's conduct is solely defined by this specific *intent*, it follows that *conduct by the same individual(s)* occurring without that intent, whether before, after, or during a terrorist act, may be defined as an act of civil protest, crime or war, depending on the means *and* intent at play. It is *means and intent when viewed together* that distinguishes a terrorist act from all other conduct. Strict definitions of *means and intent*, when applied to civil protest, criminal acts or acts of war, can serve to distinguish these circumstances from those wherein a terrorist advances his or her "cause" by engaging in terrorist acts. History teaches that the preservation of inalienable rights is possible only if and when these distinctions are made.

## Who Is a "Terrorist," What Is a "Terrorist Act" and When Is It "Terrorism"?

As any lawyer will tell you, the way one frames a legal question will shape, if not determine, the answer received. This paper seeks to initiate and to frame a vigilant, ongoing and diligent debate that considers how best to define this newly dangerous circumstance in law. Agreed upon defini-

tions of the terms that distinguish terrorist acts from criminal acts and acts of war can serve to ensure consistent application of the Rule of Law in all bodies of law in each free State. Such a consensus will require an unprecedented mobilization of social, economic, legal, and political debate on the part of all individuals and States. Under agreed definitions of terrorism that preserve inalienable rights, free peoples and States may form alliances, under the Rule of Law, to more effectively employ their courts and their military forces in a coordinated and pervasive confrontation against terrorism. Thus, will the Rule of Law serve to punish terrorists justly and marginalize terrorism, because it will at the same time prevent the very intolerance, inequity, injustice, and misuse of power that, real or imagined, empowers terrorism.

The below proposed definitions of civil protest, crime, war and terrorism are not designed to replace the myriad of specific definitions of these acts already in place or to dictate those to come. They are intended, instead, to be a yardstick by which to measure how well any forum of justice or body of law is equipped to protect inalienable rights as it addresses terrorism. The definitions here proceed from a context in which terrorists and terrorism are defined solely with reference to a terrorist act. Thus, we begin by defining a "Terrorist Act" by recognizing that such conduct is *intended* to impact our social, economic, moral, reli-

gious, political, or ideological choices by force and violence. With that act as the controlling definitional factor, we differentiate "Terrorism" and "Terrorists" from and so define an "Act of War" and its "Warriors" a "Criminal act" and "Criminals" and a "Civil Protest" and "Civil Protestors." The thesis is as follows:

A "Terrorist Act" is the infliction of bodily injury, death, damage to tangible or intangible property, or a violent and dangerous act, that interferes with the conduct of private or public affairs and results in a loss to an individual, a cognizable group of individuals, or a Sovereign State. Such a loss must be directly planned, caused, or carried out by an individual, a group of individuals, and/or a Sovereign State, with the intent to interrupt, disable, or destroy social, economic, legal, or political operations, and/or infrastructures of another individual, a cognizable group of individuals or a State, in order to, or to attempt to, coerce or intimidate such individuals, groups, or State to change a social, economic, moral, religious, political, or ideological belief, doctrine, policy, position, or ideal or to alter or affect the private or public course or conduct of such individuals or groups or the government of such State in the exercise of their inalienable rights.

"Terrorism" is a strategy that is strictly defined by and limited to the intent employed to plan or carry out a "Terrorist Act." The advocacy by a person or State of a strategy or a component of a strategy, that might otherwise be used in an overt act in furtherance or in aid of a "Terrorist Act," does not render such stratagem actionable under civil or criminal law or the rules of war, *per se*, when advocated or employed outside of the defined and limited scope of a "Terrorist Act." Thus, to meet the definition of "Terrorism," the strategy must be employed by a "Terrorist" engaged in an overt act in actual furtherance of or aid to a "Terrorist Act."

A "Terrorist" is an individual person or Sovereign State that employs the strategy of "Terrorism" to engage in a "Terrorist Act." The advocacy by a person or State for change in a social, economic, **Terrorism**, continued on page 80

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## Preserving Error, from page 25

tual or legal conclusions of the arbitrators. However, just like the limitations placed on statutory remedies, the courts will not allow a common law basis for objection to the award to be used as a vehicle to retry the claim.

## Conclusion

Arbitration can provide a quick and efficient means to settle or resolve disputes, but errors resulting in an imperfect award may result in appeals to the district court or beyond. A party's best protection from error comes from the exercise of diligence prior to, during, and following the award.

Before a dispute ever arises, a party should consider the form of its arbitration provisions and determine whether it wants to delineate the procedure for choosing arbitrators, establish venue for the arbitration and subsequent judicial proceedings, and remove common law or public policy arguments as grounds for challenging an award. Additionally, if the parties intend to limit a right to pursue and recover certain types of remedies such as indirect, con-

sequential, or punitive damages, the parties ought to include a limitation in their arbitration agreement specifically stating that the arbitrators possess no authority to consider such damages and that requests for such damages will not be submitted to the arbitrators for consideration. Finally, a party should remember that an arbitration provision may incorporate any industry group or association's procedures as a means to govern the arbitration proceeding and arbitrators' conduct.

Prior to beginning an arbitration hearing, a party should research its arbitrators to determine commonly known connections or relationships to the parties and witnesses, as well as work experience and positions held in the industry. The party should also follow up with a letter to the arbitrators requesting the disclosure of any basis for conflict or bias that might not be readily ascertained through investigation, and requesting continued disclosure if circumstances change.

A party should consider what kind of record will be created to preserve error, and if possible, confirm with the arbitrators

the form an award will take and whether the arbitrators will issue findings of fact in addition to identifying their calculations when reciting their rulings granting or denying relief.

Following receipt of an award, if venue has not already been determined by agreement or fixed by earlier proceedings, a party should quickly move to confirm or challenge the award in a proper venue of its own choosing. A successful party should diligently seek confirmation of the award, while a party who desires to challenge the award should make haste to file its motion to vacate, modify, or correct the award before a confirmation hearing. A confirming party should file a straightforward motion to confirm and should avoid utilizing typical pleading practice. A challenging party should file as complete a record as possible, taking care to highlight the evidence supporting its position.

As errors and irregularities may be corrected through a knowledgeable application of the Federal Arbitration Act, a final award does not have to be the final word.



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## Terrorism, from page 11

moral, religious, political, or ideological belief, doctrine, policy, position, or ideal or an alteration of a private or public course or conduct that might otherwise be used to justify or conduct a "Terrorist Act," does not render their status actionable under civil or criminal law or the rules of war, *per se*, when advocated or employed outside of the defined and limited scope of a "Terrorist Act." Thus, to meet the definition of a "Terrorist," the individual or State must be engaged in an overt act in actual furtherance of or aid to a "Terrorist Act."

An "Act of War" is a course of conduct, whether declared or undeclared, that results in the infliction of bodily injury, death, or damage to tangible or intangible property ("Hostilities"), when carried out by a Sovereign State, or an entity that constitutes a provisional or *de jure*, or *de facto* government ("State"), using its own or other armed military forces, for the purpose of "Deposing" and/or "Conquering" another State by insur-

rection, revolt, rebellion, or other usurpation of a State's inherent powers, or to otherwise support a political faction engaged in domestic or civil Hostilities against another political faction, with the intent to "Depose" or "Conquer" a given State. "Deposing" and/or "Conquering" another State means to engage in "Hostilities" specifically intended to overthrow the constituted government thereof or to take control of its inherent powers. A State's defense against such attacks by means of like conduct, as aforesaid, is also an "Act of War." A State or person(s) whose conduct meets this definition of an "Act of War," has not committed a "Terrorist Act" or a "Criminal Act," *per se* and is engaged in "War," as opposed to "Terrorism" or "Crime," *per se*, as defined here. An individual who engages in an "Act of War" is a "Warrior," not a "Criminal" or "Terrorist," *per se*, as defined here.

A "Criminal Act" is a course of conduct, whether intended, negligent or prohibited by law, that results in the

infliction of bodily injury, death or damage to tangible or intangible property, or the taking of the same without consent, by an individual, group of individuals or private and public entities, including local, regional or national governments. One whose conduct meets this definition of a "Criminal Act," has not committed a "Terrorist Act" or an "Act of War," *per se*, and is engaged in "Crime," as opposed to "Terrorism" or "War," *per se*. One who engages in a "Criminal Act" is a "Criminal," not a "Terrorist" or "Warrior," *per se*, as defined here.

"Civil Protest" is a course of conduct that manifests one's displeasure in or opposition to any condition or aspect of society by word or act that seeks to disrupt, alter, change or end such condition or aspect, but that does not in and of itself physically injure, impair or destroy life or property or the inalienable rights of others. It thus does not meet the definition of a "Criminal Act," an "Act of War" or a "Terrorist Act" *per se*. One who engages in Civil Protest,"



as opposed to “Crime,” “War” or “Terrorism,” is a “Civil Protestor,” and not a “Criminal,” “Warrior” or “Terrorist” *per se*, as defined here.

Conduct at any given moment in time by a State, or any tier of government, a group of individuals or an individual that occurs in the course of or as a part of one event or circumstance, may be held to meet only one of the above definitions at such moment. Thus, none of the above definitions apply simultaneously or have any precedence over the other at any given moment in time during such event or circumstance and each form of conduct is to be considered separate and apart from and as not redefining or controlling the other.


### Beyond Definitions

The real “cause” of terrorism is the triumph of absolutism, the imposition of dictatorial fiat and the institution of intolerance of those whose Attributes terrorists will not endure or abide. When one is engaged

in terrorism, a very different, fundamental *intent* is at play driving the *means* of conduct. If one *intends only* to control the prerogatives of free peoples or State by *means* of violent and destructive *conduct*, one engages in terrorism. Thus, depending on *the specifics of intent*, one’s conduct, under the Rule of Law, may render him or her a civil protestor, a criminal, a patriotic warrior or a terrorist. These distinctions drive the debate, proposed here, on how best to preserve the Rule of Law as it is increasingly and pervasively applied to terrorists and terrorist acts. There are, however, questions to answer in confronting terrorism beyond mere definitions.

Ought free peoples and States to rely on the rhetoric of a “war” to defeat terrorism? To the extent that military forces, as well as courts, are needed to protect us from terrorist acts, both must act in furtherance of the Rule of Law and not in contradiction of the inalienable rights it protects. Are we not, therefore, better served by rely-

ing instead on the rhetoric of “inalienable rights” as embodied in our Rule of Law to guarantee the freedom we seek to protect? Terrorism is at its core an idea. Ought we be at “war” with an idea or ought we marginalize it through the triumph of a better idea—the Rule of Law? As our bodies of civil, criminal and military law evolve to confront terrorism, the Rule of Law is best preserved and protected by using agreed upon and specific definitions of the terms “Terrorist Act” “Terrorist” and “Terrorism.” If properly drawn, these definitions will guarantee our inalienable rights.

Our Rule of Law serves to define who we are, what we value and protect, and how much liberty we preserve for ourselves. However, it also reveals and portends who we may be willing to become, what we may no longer value or protect, and how much liberty we are willing to relinquish to defend ourselves. The confrontation between terrorism and freedom is, at its core, a defining moment in the Rule of Law. 



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