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Looking at the World Idealistically

by Robert A. Friedlander

One of my favorite graduate school instructors, and a very knowledgeable historian, claimed on occasion that "history is history and law is law." My own belief is that Justice Holmes was correct when he described both as being inextricably intertwined, but my former academic mentor was not totally off the mark. Professor Kittrie's excellent historical survey of political criminality provides a much-needed background for understanding the nature of the problem, but it also demonstrates that trying to broaden the traditional standard of political crimes is at present as open-ended and wooly-minded as the contemporary scholarly debate concerning the social origins of international terrorism. Just as with the latter, there is no commonly accepted definition of political crimes, nor is there a legally agreed-upon delineation. And for good reason.

Referring to the definitional aspects of political crimes, Dr. Kittrie declared at the beginning of the last decade, that "the concepts remain confused and hazy not only in the public mind, but also in the mass media, among government officials and in the criminological literature."1 Professor Kittrie's new declaration that such alleged criminality only challenges the State, and not the rights or lives of "innocent parties,"2 is a helpful step forward, but the issue then becomes—as it does with terrorism—what constitutes innocence? The so-called freedom fighters of the PLO, the IRA, the ETA and FLAN, just to mention a few drops in the ocean of political dissidence, have been unable or unwilling to distinguish between the legitimate and the innocent, but the immediate terrorist victim (and therefore the victim of so-called political criminality) is not the ultimate target. Randomly perpetrated violence, whether discriminate or indiscriminate, and the threat of same, makes terrorism and its progeny outrageous and unacceptable to any civilized community.

The main rationale for the international prescription of interference

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with air transport is based less on the need to safeguard transportation and communication routes, and more upon the necessity to protect the sanctity of human life. A need for such prohibition is self-evident when one recalls the loss of 93 lives aboard a hijacked Malaysian airliner or the unintended consequence of 580 deaths in a collision at Tenerife Airport between two planes diverted from Las Palmas because of the explosion of a terrorist bomb. There may be "uncertainty and ambivalence" in some areas of the international community over bank robberies committed under claim of political objectives, but the courts of England, Canada, and the United States have been unambiguously clear on this point. Bank robbery is bank robbery, ideological motivations notwithstanding.

What Professor Kittrie in effect has asked us to do, despite the historic norms of Anglo-American common law, is to focus on motive rather than upon conduct. But motive in English, Canadian, and American criminal law is largely irrelevant to the consequences of a criminal act, aside from establishing the degree of murder in U.S. jurisdictions. When dealing with either terrorists or political criminals, placing the primary emphasis on the causes of violence may result in exculpation, whereas focusing upon the consequences of violence will inevitably lead to punishment (subject to post-conviction mitigation by the sentencing authority). The implications of Professor Kittrie's approach are both obvious and ominous.

To my understanding, the main thrust of *Terrorists and Patriots* is to clothe politically motivated acts of violence with an international political privilege, so long as the actor in question has escaped the clutches of the national jurisdiction where the incident took place. But that is not the way the political offense exception works, for that principle, where honored, relies upon a much narrower definition. The prevailing Anglo-American rule has been derived from *In Re Castioni*, wherein (a) the act at issue must have occurred during a political revolt or disturbance, and (b) the act at issue must have been incidental to and have formed part of that same revolt or disturbance. A generation ago *Ex Parte Kolczynski* held that the nature of a political offense must take into consideration the surrounding circumstances at the time of its occurrence. Or to quote a recent American extradition case, "[a]n offense is not of a political character simply because it was politically motivated."

Compounding the difficulty, the November, 1976 European Convention on the Suppression of Terrorism, which entered into force on Au-

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* [1891] 1 Q.B. 149.
* [1955] 2 Q.B. 540.
* Escabedo v. United States 623 F2d. 1098, 1104 (5th Cir. 1980).
August 4, 1978, fails to define either terrorism or political offenses. Moreover, due to fuzzy and ambiguous terminology, common criminality—such as the crime of extortion—may be construed as a terrorist offense, while the political offense exception can be denied by a contracting State if the offense is "a serious . . . act of violence." Thus, the European Convention has purposefully limited the parameters of the political offense exception in Western Europe, a development overlooked by Professor Kittrie.

Most American commentators are either ignorant of or prefer not to recall Thomas Jefferson's exhortation that "[t]he tree of liberty must be refreshed from time to time with the blood of patriots and tyrants," although they are as mistaken in their understanding of Jefferson's intent as Nicholas Kittrie is in his own interpretation. One cannot view 18th century rhetoric through 20th century lenses. Jefferson was not propounding a Trotskyite call for permanent revolution. Nor was he asserting that liberty could only thrive in a martyrs' soil. Jefferson, the politician did not especially like the word democratic (his party was called Republican), and his misunderstood aphorism must be viewed in the milieu of late 18th century rising expectations associated with the bourgeoisie. In the words of the often-cited historian, R.R. Palmer, "[t]he modern conception of a revolutionary movement is the result, not the cause, of the [eighteenth-century] revolutionary era . . . ." All Jefferson meant was that absolute monarchy and privileged aristocracy had to be transformed, whether by peaceable means or by popular sacrifice.

Absent treaty or convention, there is no general duty for receiving states to extradite accused offenders to requesting governments. Commentators are almost unanimously agreed that extradition is a political concept shaped by political realities. Likewise, there is no universally recognized political exception, since application of that doctrine largely depends upon interpretation and precedent laid down by municipal courts. The question of political abuse is not always clear and not often persuasive. Terrorism is the last refuge of the hopeless cause, and legal systems—particularly those based upon due process—are the very antithesis of nihilistic violence.

I fully agree with Professor Kittrie that human rights, and the egregious violations of same, by states as well as by individuals, should be the focal point of any political exception inquiry. The unarticulated issue in the Kittrie analysis is how to identify legally permissible rebellion and revolution from the illegal resort to terrorism in the name of self-determi-

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7 Id. art. 2.
nation. The latter principle is not a per se vindication of violence, and it can become, if unrestrained, a reckless propagator of bodily harm. A so-called political criminal is not automatically absolved of his criminality by prevailing human rights standards and may, in fact, be internationally culpable as well as domestically proscribed. The end does not, and cannot, justify the means. To seek to remedy alleged acts of injustice with still greater acts of injustice solves nothing and excuses nothing. Human atrocity is not an excusing condition, but rather a moral wrong which affects all humankind. In the words of philosopher Ted Honderich, “[i]f some bombs are like votes, they also maim and kill.”

Political criminality is at best a double-edged sword. Like any other lethal weapon, its utility and its necessity depend upon the one who is wielding it. My learned colleague suggests that those who manifest a political claim of right can thereby act out the roles of judge, jury, and executioner. But trial by combat disappeared with the Middle Ages. To revert to the doctrine of might makes right in an age of mass destruction is a condition humanity could not long endure. While I admire Professor Kittrie’s idealism, I vigorously dissent from his societal vision.