Crimes Against the State

14

DID THE DEFENDANT DESERVE A SENTENCE OF TWENTY YEARS IN PRISON?

The global threat of terrorism, so fresh in everyone's mind, has come to this Court in the case of Shelton Thomas Bell. At age nineteen (he is now twenty-one), Bell came under the influence of Anwar al-Awlaki, an infamous American-born terrorist who, from his base in Yemen, not only sponsored terror, but also recruited young persons from all over the world to become terrorists, until he was killed in an American drone strike in 2011. Seduced by al-Awlaki's video teachings, Bell chose to answer his call and proceeded down the road to becoming a terrorist, offering to fight and die for the cause.

Bell trained to become a terrorist, lying, defrauding, and causing property damage in the process, made videos which emulated al-Awlaki's diatribes, and then traveled to the Middle East intending to join al-Awlaki's organization in Yemen. Fortunately, he was intercepted and returned to the United States before he could kill or injure anybody or be killed himself. Once back, though, he continued to espouse his extremist beliefs both before and after he was arrested. Now, in custody for nearly two years and having pleaded guilty to terrorism related charges, Bell says he made a grievous, immature mistake, and that he no longer subscribes to al-Awlaki's hate-filled agenda. He expresses remorse to his family, his friends, his fellow Muslims, and the Court, stating that his goal now is to be a productive citizen, raise a family, get an MBA, and even study terrorism and how to combat it.

The Government does not believe Bell's repentance and thinks him still a danger to the American people; thus, the Government asks the Court to impose the statutory maximum of thirty years in prison. Bell says his change of heart is real and a lesser sentence will suffice. The essential question before the Court is: "Who is the real Shelton Thomas Bell?" No court could answer that question with absolute certainty. Still, this Court must determine . . . what sentence is "sufficient, but not greater than necessary to comply with the purposes" of sentencing. Bell [is] sentenced to twenty years in prison. (*United States v. Bell*, 81 F. Supp. 3d 1301 [M.D. Fla. 2015])

In this chapter, you will learn about U.S. counterterrorism laws.

TEST YOUR KNOWLEDGE: TRUE OR FALSE?

1. Treason is the only crime defined in the U.S. Constitution.
2. Sedition punishes various acts including engaging in any rebellion or insurrection against the authority of the United States or giving "aid and comfort" to such an effort.
3. Sabotage requires a specific intent or purpose to damage the national defense of the United States.
4. The crime of espionage in wartime is defined differently than espionage that is committed in peacetime.
5. The major difference in the legal definitions of domestic terrorism and international terrorism is that domestic terrorism takes place within the United States and international terrorism takes place entirely or substantially outside the United States.
6. The criminal offenses of material support for terrorists and material support for terrorist organizations punish various acts including supplying military material and medical care to terrorists or to terrorist organizations.
7. Captured foreign terrorists have no rights under the law of war set forth in the Geneva Conventions.
8. Foreign terrorists only may be prosecuted by military tribunals and may not be prosecuted by American federal courts.
9. American courts have no jurisdiction over criminal acts of terrorism committed outside American borders.

Check your answers at the end of the chapter.

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INTRODUCTION

The American colonists adopted a constitutional system intended to guard against the excesses of governmental power. However, the colonists also appreciated the need to prevent and to punish domestic threats to the government.

A significant percentage of the Europeans who settled in the American colonies were fleeing religious or political persecution and understandably developed a suspicion of government. This distrust was enhanced by the colonists' unhappy experiences with the often-repressive policies of the British authorities. There was almost uniform agreement to build the new American democracy on a foundation of strong limits on official authority along with a commitment to individual freedom. The colonists were also reluctant to adopt the type of harsh legislation that had been used by English monarchs to stifle dissent and criticism. Nevertheless, there was the reality that the United States confronted a threat from European countries eager to acquire additional territory in North America. A number of Americans and most Canadians also continued to harbor deep loyalties to England. This dictated that the United States put various laws in place to protect the government and people from attack. In this chapter, we examine these **crimes against the state**:

- ***Treason.*** Involvement in an attack on the United States.
- ***Sedition.*** A written or verbal communication intended to create disaffection, hatred, or contempt toward the U.S. government.
- ***Sabotage.*** Destruction of national defense materials.
- ***Espionage.*** Conveying information to a foreign government with the intent of injuring the United States.

Recent events have also led to the development of various counterterrorism laws, including the punishment of materially assisting terrorism. In reading about these counterterrorism offenses, you will see that these statutes are modern and updated versions of laws against treason, sedition, sabotage, and espionage.

In the last portion of the chapter, we examine immigration and immigration crimes that challenge the ability of the United States to control its borders and to determine who lives and works in the country.

TREASON

English royalty prosecuted and convicted critics of the monarchy for **treason**. Monarchs intentionally avoided writing down the requirements of treason in a statute in order to permit the crime to be applied against all varieties of critics. Parliament was finally able to mobilize enough power in 1352 to limit the power of the king and to force Edward III to agree to a "Declaration what Offences shall be adjudged Treason."

British officials in the American colonies applied the law on treason against rebellious servants and government critics, who typically were punished by "drawing and hanging." The drafters of the U.S. Constitution harbored bitter memories of the abusive use of the law on treason against critics of the colonial regime. At the same time, the drafters of the U.S. Constitution were conscious of the need to protect the newly independent American states against the threat posed by individuals whose loyalty remained with England and against European states that desired to expand their territorial presence in North America.

How could these various concerns be balanced against one another? The decision was made for the Constitution to clearly set forth the definition of treason, the proof necessary to establish the offense, and the appropriate punishment. James Madison explained in the *Federalist Papers* No. 43 that as "new-fangled and artificial treasons have been the great engines by which violent factions . . . have usually wreaked their . . . malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime." Article III, Section 3 of the U.S. Constitution provides that treason against the United States "shall consist only in levying War against them, or in adhering to their Enemies giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act or on Confession in open Court." Congress is also constitutionally prohibited from adopting the policy practiced in England of extending penalties beyond the individual offender to members of his or her family.

In summary, the United States adopted a law against treason while clearly limiting the definition of the offense in the Constitution.

Criminal Act and Criminal Intent

Treason is the only crime defined in the U.S. Constitution. Treason against the United States is a federal crime and may not be prosecuted by the states. Various states, such as California, prohibit treason against the state government.

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The Constitution limits the *actus reus* of treason to individuals engaged in armed opposition to the government or in providing aid and comfort to the enemy:

- Levying war against the United States.
- Giving aid and comfort to the enemy.

Supreme Court justice Robert H. Jackson, in *Cramer v. United States*, clarified that levying war consists of taking up arms and that giving aid and comfort involves concrete and tangible assistance.[1] Justice Jackson stressed that a citizen may "intellectually or emotionally" favor the enemy or may "harbor sympathies or convictions disloyal" to the United States, but absent the required *actus reus*, there is no treason. He explained that an individual gives aid and comfort to the enemy by such acts as fomenting strikes in defense plants, charging exorbitant prices for essential armaments, providing arms to the enemy, or engaging in countless other acts that "impair our cohesion and diminish our strength." In a treason prosecution of sailors who seized, equipped, and armed a ship with the intent of attacking the federal government, Supreme Court justice Stephen J. Field observed that treason may be directed to the overthrow of the U.S. government throughout the country or only in certain states or in selected localities.[2] There is also no requirement that the enemy be shown to have benefited by the assistance provided by the accused.

The Constitution requires that treason be clearly established by the prosecution. This protects individuals against convictions based on passion, prejudice, or false testimony.

- Two witnesses must testify that the defendant committed the same overt act of treason, or
- the accused must make a confession in open court.

The *mens rea* of treason is an "intent to betray" the United States. Justice Jackson observed that "if there is no intent to betray there is no treason." Proof of the defendant's treasonous intent is not limited to the testimony of two witnesses. The required intent may be established by the testimony of a number of witnesses concerning the defendant's statements or behavior. Do not confuse motive with intent. An act that clearly assists and is intended to assist the enemy is treason, despite the fact that the defendant may be motivated by profit, anger, or personal opposition to war rather than by a belief in the justice of the enemy's cause.

In *Cramer*, Justice Jackson cautioned that treason is "one of the most intricate of crimes" and that the U.S. Constitution "gives a superficial appearance of clarity and simplicity which proves illusory when it is put to practical application. . . . The little clause is packed with controversy and difficulty."

Prosecuting Treason

The United States has brought only a handful of prosecutions for treason, and most offenders have had their death sentences modified or have received full pardons from the president. Courts have also been vigilant in ensuring that the rights of defendants are protected. Justice Jackson observed that the United States has "managed to do without treason prosecutions to a degree that probably would be impossible except [where] a people was singularly confident of external security and internal stability."

Cramer v. United States, in 1945, is the most important treason case decided by the U.S. Supreme Court. A team of eight German saboteurs was transported across the Atlantic in two submarines and secretly put ashore in New York and Florida with the intent of engaging in acts of sabotage designed to impede the U.S. war effort and to undermine morale. Saboteurs Werner Thiel and Edward Kerling contacted a former friend of Thiel's in New York, Anthony Cramer. Cramer was subsequently charged and convicted of treason. His conviction was based on the testimony of two FBI agents who alleged that the three suspects drank together and engaged in long and intense conversation. The U.S. Supreme Court reversed Cramer's conviction based on the government's failure to establish an overt act that provided aid and comfort to the enemy. There was no indication that Cramer provided aid and comfort to the enemy by providing information; by securing food, shelter, or supplies; or by offering encouragement or advice. In summary, "without the use of some imagination it is difficult to perceive any advantage which this meeting afforded to Thiel and Kerling as enemies or how it strengthened Germany or weakened the United States in any way whatever."

In *D'Aquino v. United States*, Iva D'Aquino, a U.S. citizen, was convicted of giving aid and comfort to the enemy during World War II by working as a radio broadcaster for the Japanese government. The Court of Appeals for the Ninth Circuit rejected her duress defense. The court held that an individual may not claim immunity from prosecution based on a claim of mental fear of possible future action and that "the citizen owing allegiance to the United States must manifest a determination to resist commands and orders until such time as he [or she] is faced with the alternative of immediate injury or death."[3]

Adam Gadahn, an American convert to Islam and spokesperson for al Qaeda, was the last person indicted in the United States for treason. Gadahn subsequently was killed in a drone strike in 2015. The indictment listed five instances

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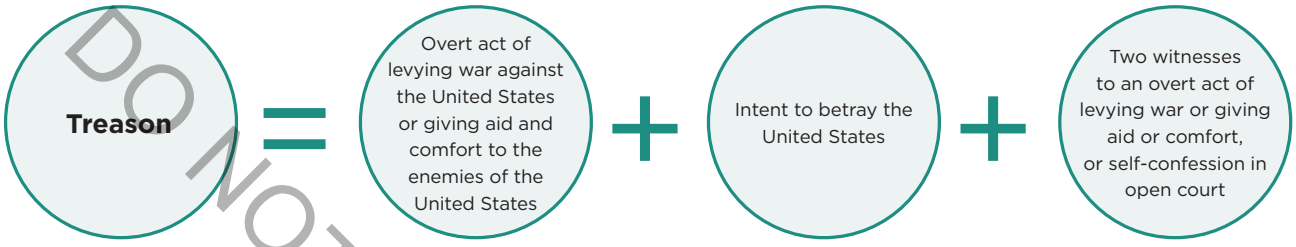
in which Gadahn was accused of giving "aid and comfort to Al Qaeda" by appearing in videos with the intent to "betray the United States."[4]

The Legal Equation 14.1: Treason



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SEDITION

Sedition at English common law was any communication intended or likely to bring about hatred, contempt, or disaffection with the king, the constitution, or the government. This agitation could be accomplished by **seditious speech** or **seditious libel** (writing). Sedition was punishable by imprisonment, fine, or pillory. In *The Case of the Seven Bishops* in 1688, English justice Richard Allibond pronounced that "[n]o man can take upon him to write against the actual exercise of the government . . . be what he writes true or false. . . . It is the business of the government to manage . . . the government; it is the business of subjects to mind their own properties and interests." Sedition was gradually expanded to include any and all criticism of the king or the government and the advocacy of reform of the government or church, as well as inciting discontent or promoting hostility between various economic and social classes.

During the debates over the U.S. Constitution, various speakers predicted that the effort to restrict the definition of treason would prove a "tempest in a teapot" because the government would merely resort to other laws to punish critics. This seemed borne out in 1798, when Congress passed the Alien and Sedition Acts. These laws punished any person writing or stating anything "false, scandalous and malicious" against the government, president, or Congress with the "intent to defame" or to bring any of these parties into "disrepute" or to "excite . . . the hatred of the . . . people of the United States, or to stir up sedition." The law differed from the common law in that the statute recognized truth as a defense. An individual convicted of sedition under the act was subject to a maximum punishment of two years in prison and by a fine of no more than $2,000. Although the law was defended as an effort to combat subversives who sought to sow the seeds of revolutionary violence, in fact it was used to persecute political opponents of the government. For instance, a member of Congress from Vermont was sentenced to four months in prison for writing that President John Adams should be committed to a mental institution.

The modern version of the Alien and Sedition Acts is Section 2383 in Title 18 of the U.S. Code. This statute punishes an individual who "incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof or gives aid or comfort thereto." This is punished by imprisonment for up to ten years, a fine, or both. An individual convicted of rebellion or insurrection under this law is prohibited from holding any federal office. Note that Section 2383 prohibits incitement to sedition or criminal action against the United States or against a particular law.

The U.S. Code, in Section 2384, punishes **seditious conspiracy**. This statute is directed at the use of force against the government, the use of force to prevent the execution of any law, or the use of force to interfere with governmental property and has been employed by prosecutors in recent years in terrorist prosecutions.

> If two or more persons in any state, territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall be fined . . . or imprisoned not more than twenty years or both.

In 1940, Congress adopted the Smith Act, which declared that it was a crime to conspire to teach or advocate the forcible overthrow of the U.S. government or to be a member of a group that advocated the overthrow of the government.

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In *Dennis v. United States* in 1951, the Supreme Court upheld the constitutionality of this statute and affirmed the convictions of twelve leaders of the Communist Party.[5] The Supreme Court reconsidered the wisdom of this ruling in *Yates v. United States*.[6] The Court held that the "Smith Act does not denounce advocacy in the sense of preaching abstractly the forcible overthrow of the Government. . . . [T]he Smith Act reaches only advocacy of action for the overthrow of government by force and violence. The essential distinction is that those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something."

In 1999, the Second Circuit Court of Appeals affirmed the conviction for seditious conspiracy of the late Egyptian sheikh Omar Ahmad Ali Abdel Rahman and a number of other defendants. The court noted that the "defendant and others joined in a seditious conspiracy to wage a war of urban terrorism against the United States and forcibly to oppose it." Among other acts, the conspirators assisted in the first bombing of the World Trade Center in February 1993 and in the attempted bombing of monuments and tunnels in New York City in the spring of 1993.[7]

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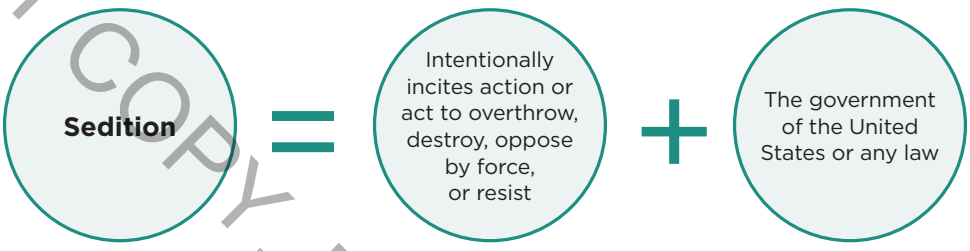
The Legal Equation 14.2: Sedition



SABOTAGE

Sabotage is the willful injury, destruction, contamination, or infection of any war material, war premises, or war utilities with the intent of injuring, interfering, or obstructing the United States or an allied country during a war or national emergency. Sabotage is punishable by imprisonment for not more than thirty years, a fine, or both.[8]

> Whoever, when the United States is at war, or in times of national emergency as declared by the President or by Congress, with the intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities, or with reason to believe that his act may injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities, willfully injures, destroys, contaminates or infects, or attempts to so injure, destroy, contaminate or infect any war material, war premises, or war utilities shall be fined under this title or imprisoned not more than thirty years, or both.

Sabotage may also be committed in peacetime against defense material, premises, or utilities.[9]

> Whoever, with intent to injure, interfere with, or obstruct the national defense of the United States, willfully injures, destroys, contaminates or infects, or attempts to so injure, destroy, contaminate or infect any national-defense material, national-defense premises, or national-defense utilities, shall be fined under this title or imprisoned not more than 20 years, or both, and, if death results to any person, shall be imprisoned for any term of years or for life.

Other provisions punish the injury or destruction of harbors, premises, or utilities (e.g., transportation, water, power, electricity) and the production of defective national defense materials.[10]

Courts have held that sabotage requires a specific intent or purpose to damage the national defense of the United States. A defendant injuring property that he or she does not realize is part of the military defense may rely on the defense that although he or she intentionally damaged the property, there was a lack of a specific intent to injure the national defense. Several courts have taken the position that a knowledge standard satisfies the *mens rea* for sabotage. These judges reason that a defendant should be assumed to know that the destruction of defense material is practically certain to interfere with the national defense.

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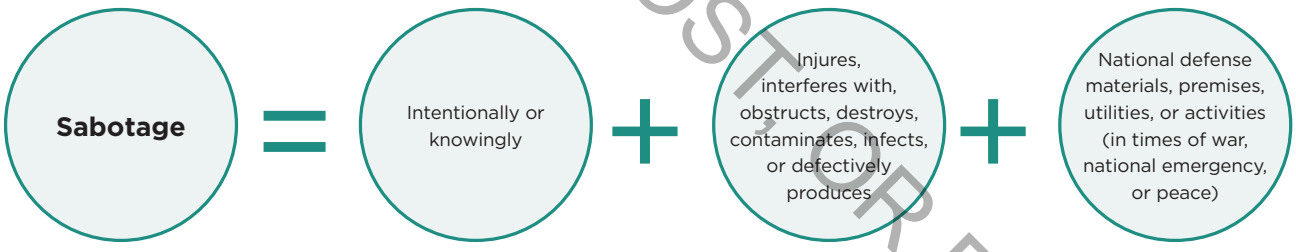
In *United States v. Kabat*, the defendants broke through a fence surrounding a missile silo in Missouri and used a jackhammer to slightly damage cables and chip a hundred-ton lid covering the silo.[11] The defendants were motivated by a desire to protest nuclear weapons and to educate the public concerning the mass destruction that would result from nuclear war. They hung banners and spray-painted slogans that called attention to the fact that these weapons made the world less rather than more safe and were contrary to biblical teachings. Did the high-minded defendants who were motivated by a desire to save the planet from nuclear destruction possess a specific intent to injure, interfere with, or damage the national defense? The Eighth Circuit Court of Appeals ruled that the defendants' "intent to injure, interfere with or obstruct the national defense" was clear from their antinuclear statements and travel to Missouri for the specific purpose of damaging the missile silo. The damage to the silo clearly "interfered" with the defense of the United States, and to "allow citizens who thought they could further U.S. security to act on their theories at will could make it impossible for this country to maintain a coherent defense system." The issue remains whether the defendants intended to damage the national defense.

In contrast, in *United States v. Walli*, the defendants cut through four layers of fencing in a facility in Oak Ridge, Tennessee, where the government stored enriched uranium for nuclear weapons. They spray-painted antiwar slogans, hung banners, splashed blood, sang hymns, and recited a message. The Sixth Circuit Court of Appeals reversed the defendants' conviction for sabotage. "The defendants' actions in this case had zero effect, at the time of their actions or anytime afterwards, on the nation's ability to wage war or defend against attack. Those actions were wrongful, to be sure, and the defendants have convictions for destruction of government property as a result of them. But the government did not prove the defendants guilty of sabotage. . . . That is not to say, of course, that there is nothing a defendant could do at Y-12 [National Security Complex] that would constitute sabotage. . . . If a defendant blew up a building used to manufacture components for nuclear weapons, for example, and thereby prevented the timely replacement of weapons in the nation's arsenal, the government surely could demonstrate an adverse effect on the nation's ability to attack or defend—and, more to the point, that the defendant knew that his actions were practically certain to have that effect."[12]

The Legal Equation 14.3: Sabotage



ESPIONAGE

The U.S. Code prohibits **espionage** or spying. The statute punishes espionage and espionage during war as separate offenses.[13]

> Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government . . . faction or party or military or naval force within a foreign country . . . or to any representative or citizen thereof either directly or indirectly any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life, except that the sentence of death shall not be imposed unless [the jury or judge determines that the offense resulted in] the death of an agent of the United States . . . or directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or element of defense strategy.

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Espionage in wartime is also defined in federal statutes.

> Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates, or attempts to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the Armed Forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for any term of years or for life.

One of the most active areas of criminal activity in the new global economy is the theft by foreign governments of trade secrets from U.S. corporations. This may range from the formula for a new anticancer drug to the code for a computer program. Individuals involved in "industrial espionage" are subject to prosecution under the Economic Espionage Act of 1996.

In *Gorin v. United States*, the U.S. Supreme Court ruled that espionage during peacetime requires that the government establish that an individual acted in "bad faith" with the intent to injure the United States or to advantage a foreign nation.[14] The foreign government that receives the information may be a friend or foe of the United States, because a country allied with the United States today may prove to be its enemy tomorrow. The majority in *Gorin* held that "evil which the statute punishes is the obtaining or furnishing of this guarded information, either to our hurt or another's gain." Material that is stolen from U.S. military files concerning British troop strength and armed preparedness may not directly harm the United States but may assist or advantage another country in protecting itself against the British and may constitute espionage.

Note that espionage during wartime is easier for the prosecution to prove and requires the establishment of an intent to communicate information to the enemy along with a clear act toward the accomplishment of this goal.

National defense information that has not yet been officially released to the public but that has been reported by the press or generally referred to in government publications may be the subject of espionage because the government has not made the decision to release the specific details. Stealing plans for the design of a nuclear bomb in U.S. defense files would be espionage, despite the fact that the broad outlines of the design are available on the internet.

Information subject to espionage is not limited to the specific types of materials listed in the statutes. Under the espionage law, national defense is broadly interpreted to mean any information relating to the military and naval establishments and national preparation for war.

There have been more than fourteen major indictments for violation of the Espionage Act under the Obama and Trump administrations. In a July 2013 prosecution, twenty-nine-year-old Chelsea Elizabeth Manning, a U.S. solider, was convicted of violating the Espionage Act and other criminal statutes after disclosing nearly three-quarters of a million classified or unclassified-but-sensitive military and diplomatic documents to the website WikiLeaks. This was the largest leak of classified records in American history. Manning was sentenced to thirty-five years in prison, with the possibility of parole after eight years, and dishonorable discharge from the military. She was granted clemency by President Obama after serving seven years of the thirty-five-year sentence. In 2017, Reality Winner, a contractor for the National Security Agency, pled guilty to "willful retention and transmission of national defense information" and was sentenced to five years and three months in prison for violation of the Espionage Act. Winner admitted to leaking classified information to a media outlet describing Russian attempts to interfere with the 2016 presidential election. She received the longest sentence ever imposed for the unauthorized release of information to the media. In June 2018, Joshua Adam Schulte, a former CIA software engineer, was charged with violating the Espionage Act and other acts based on accusations that he sent an archive of documents and electronic tools related to the agency's computer hacking operations to WikiLeaks. In April 2019, Julian Assange, the founder of Wikileaks, was arrested in Great Britain and was alleged to have conspired with Chelsea Manning to hack U.S. governmental computers and leak classified information. A month later, former CIA officer Jerry Lee pled guilty to conspiracy to collect or deliver defense information to aid a foreign government and unlawful retention of national defense information. Lee is the third former American intelligence officer in the past two years to plead guilty to spying for China.

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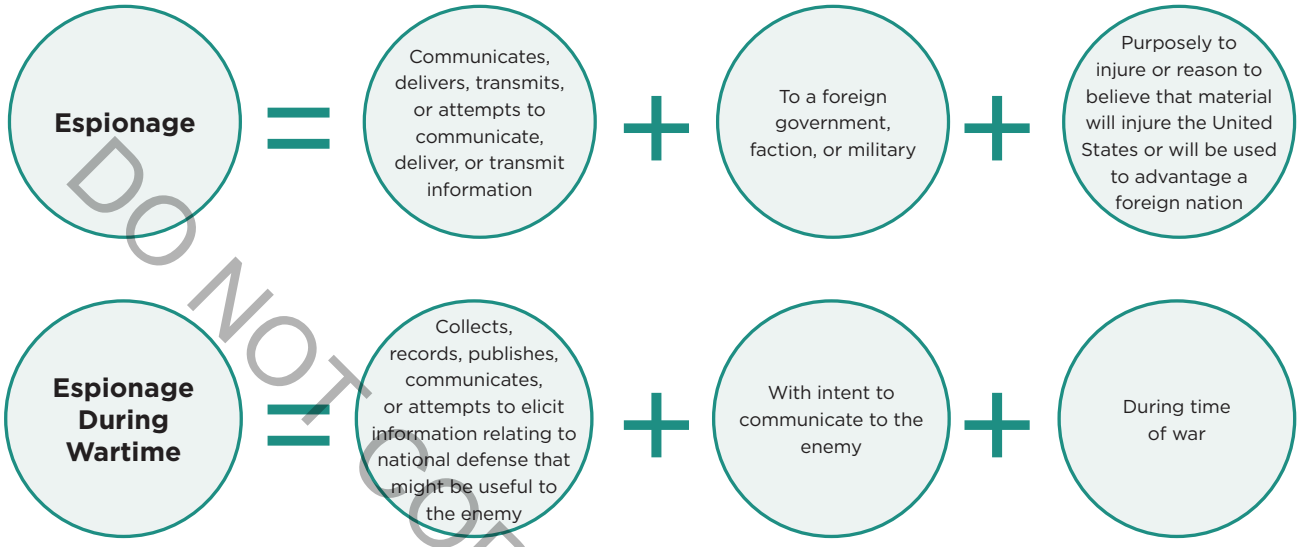
The Legal Equation 14.4: Espionage



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TERRORISM

The bombing of the Alfred P. Murrah Federal Building in Oklahoma City on April 19, 1995, and the attack on the United States on September 11, 2001, combined to push Congress to act to prohibit and to punish terrorism. Keep in mind that most acts of terrorism within the United States are prosecuted as ordinary murders, arson, kidnappings, and bombings rather than as acts of terrorism.

The central provisions of the U.S. law on terrorism are found in Title 18 of the U.S. Code, Chapter 113B, "Terrorism." These statutes have been amended and strengthened by the Antiterrorism and Effective Death Penalty Act (1996) and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (2001), better known as the USA PATRIOT Act.

Definition of Terrorism

Various federal statutes use the term *terrorism* or *terrorist*. For instance, it is a crime to materially aid a terrorist or foreign terrorist organization. What is terrorism? Federal law divides terrorism into **international terrorism** and **domestic terrorism**.

International terrorism is distinguished by the fact that it occurs outside the United States. Both international and domestic terrorism are intended to intimidate or coerce the American population or are intended to influence or affect the public policy of the United States. We have several tragic examples, including the August 7, 1998, bombing of the U.S. embassies in Kenya (killing 213 and injuring more than 4,500) and Tanzania (killing 11 and injuring 85) and the attack on a U.S. Navy warship, the USS *Cole*, in Yemen on October 12, 2000 (killing 17 U.S. sailors). Other clear examples are the acts of violence intended to force the United States to withdraw troops from Iraq. International terrorism is defined as

> violent acts or acts dangerous to human life that primarily occur outside the United States, would be criminal if committed in the United States, and appear to be intended to either intimidate or coerce a civilian population; or influence the policy of a government by intimidation or coercion; or affect the conduct of a government through mass destruction, assassination, or kidnapping.

Domestic terrorism is defined in the same fashion with the exception that it occurs "primarily within the territorial jurisdiction of the United States" rather than "outside the United States." Note that terrorism is defined in terms of the intent of the offender rather than by the target of the attack.

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The U.S. Code defines the **federal crime of terrorism** as an offense "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct" that involves a violation of a long list of violent and dangerous federal offenses.[15] Chapter 113B of the U.S. Code provides for several specific terrorist crimes that are discussed in the following sections.

Terrorism Outside the United States

Section 2332 of the U.S. Code punishes various crimes against nationals of the United States that occur outside the United States. The killing of a U.S. national outside the United States is punishable by imprisonment for a term of years or death as well as a fine. Voluntary manslaughter is subject to ten years' imprisonment along with a fine, and involuntary manslaughter is punished by a fine or imprisonment of not more than three years, or both. A conspiracy to kill a U.S. national is punished by up to life imprisonment as well as a fine, and a conspiracy leading to an attempt is subject to imprisonment for up to twenty years in prison as well as a fine. Physical violence with the intent to cause serious bodily injury to a U.S. national and physical violence that results in serious bodily injury are both subject to a fine as well as to imprisonment by up to ten years. The U.S. assertion of the right to prosecute and punish criminal acts that occur outside U.S. territory is termed **extraterritorial jurisdiction**.[16]

Terrorism Transcending National Boundaries

U.S. law punishes as a felony acts of terrorism that occur within the United States but that are connected to foreign countries. Offenses involving conduct occurring both outside and within the United States are termed **terrorism transcending national boundaries**. In other words, the fact that conspirators meet in another country and plan to attack a U.S. city would not remove the crime from the jurisdiction of the United States. Prime examples are the September 11, 2001, attacks on the World Trade Center and Pentagon, which were planned, directed, and funded from outside the United States. This statute permits the United States to prosecute individuals living in Afghanistan, England, Germany, Spain, and other countries who were involved in the 9/11 conspiracy. Federal law also provides that criminal attacks against U.S. agencies, embassies, or property abroad or in the air or at sea, or against property owned by the U.S. government or by a U.S. citizen, are considered to have taken place within U.S. territory and are punishable by the United States.

Three crimes of violence are included within the statute on terrorism that transcends national boundaries:

1. ***Crimes Against the Person.*** Killing, kidnapping, maiming, or committing an assault resulting in serious bodily injury or assault with a dangerous weapon against an individual within the United States.
2. ***Crimes Against Property Harming the Person.*** Acts that create a substantial risk of serious bodily injury by destroying or damaging any structure, real estate, or object within the United States.
3. ***Inchoate Offenses.*** Threats, attempts, and conspiracies to commit either of these two offenses and accessories after the fact.

The offenses under this provision must meet one of several conditions. These include the following:

- ***Federal Official.*** The victim or intended victim is the U.S. government, a member of the uniformed services, or any official, officer, employee, or agent of the legislative, executive, or judicial branches or of any department or agency of the United States.
- ***Property.*** The building, vehicle, real estate, or object is owned or leased by the United States or a U.S. citizen.
- ***Territory.*** The offense is committed within the territorial sea or U.S. airspace.
- ***Interstate Commerce.*** The offense makes use of the mail or any facility in interstate or foreign commerce.

Penalties include capital punishment for a crime resulting in death, life imprisonment for the crime of kidnapping, thirty-five years for maiming, thirty years for aggravated assault, and twenty-five years for damaging property.[17]

Weapons of Mass Destruction

The use, threat, attempt, or conspiracy to use a weapon of mass destruction is punishable by imprisonment for a term of years or life and, in the event of death, by life imprisonment.

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The statute on weapons of mass destruction, 18 U.S.C. § 2332a, declares that it is a crime when such a weapon is used outside the United States against a U.S. resident or citizen, within the United States against any person so as to affect commerce, or within or outside the United States against property that is owned, leased, or used by the federal government. It is also an offense to threaten, attempt, or conspire to use a weapon of mass destruction. **Weapons of mass destruction** are defined as follows:

- Toxic or poisonous chemical weapons that are designed or intended to cause death or serious bodily injury (poison gas).
- Weapons involving biological agents (smallpox).
- Weapons releasing radiation or radioactivity at a level dangerous to human life (nuclear material).
- Explosive bombs, grenades, rockets, missiles, and mines.

Possession of a biological or toxic weapon or delivery system that cannot be justified by a peaceful purpose is subject to imprisonment for up to ten years, a fine, or both.[18] In April 2005, Zacarias Moussaoui, while denying involvement in the September 11, 2001, attacks against the Pentagon and World Trade Center, pled guilty to conspiring to use an airplane as a "weapon of mass destruction" to attack the White House.

In 2014, in *United States v. Bond*, the U.S. Supreme Court overturned the federal conviction of Carol Anne Bond for spreading toxic chemicals on the doorknob, car doors, and mailbox of a romantic rival. Bond's intent was to cause the victim to suffer a severe rash although the chemical caused only a minor burn on her thumb. The Court noted that the Chemical Weapons Convention Implementation Act was a response to the use of chemicals in warfare and in terrorist attacks. The spreading of chemicals by Bonds was not the "sort an ordinary person would associate with instruments of chemical warfare."[19]

Mass Transportation Systems

Subways, buses, and trains are some of the most vulnerable and potentially damaging terrorist targets. In 1995, a chemical gas attack on a subway train in Tokyo resulted in twelve deaths and more than five thousand injuries. Federal law provides that it is a crime to willfully wreck, derail, set fire to, or disable a mass transportation vehicle or ferry or to damage or impair the operation of a signal or control system. It is also a federal crime to cause the death or serious bodily injury of an employee or passenger on a mass transportation vehicle. Other provisions prohibit using a weapon of mass destruction against a mass transportation system. These offenses are punishable by a fine and as much as twenty years in prison. An aggravated offense punishable by up to life in prison results when the mass transportation vehicle or ferry is carrying one or more passengers or the offense results in the death of any person. The destruction of aircraft and air piracy are subject to punishment under separate provisions of the U.S. Code. Air piracy is defined in Title 49, Section 46502, as "seizing or exercising control" over an aircraft by force, violence, threat of force or violence, or any form of intimidation with a wrongful intent.[20]

Harboring or Concealing Terrorists

It is a crime to harbor or conceal a person who an individual knows or has reasonable grounds to believe has committed or is about to commit various terrorist offenses or crimes posing a serious and widespread danger. Harboring a terrorist is subject to ten years in prison and to a fine.[21]

Material Support for Terrorism

The offense of providing **material support to a terrorist** is defined in the U.S. Code as providing material support or resources or concealing or disguising the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for or in carrying out various terrorist acts or acts of violence or in the preparation of, concealment of, or escape from such crimes. This is punishable by imprisonment for no more than fifteen years, a fine, or both. In the event that death results, the accused is subject to imprisonment for a term of years or capital punishment.

There is a separate offense of knowingly providing **material support to a foreign terrorist organization** or an attempt or conspiracy to do so. This is also subject to imprisonment for up to fifteen years, a fine, or both. The death of a victim may result in imprisonment for up to life. Material support or resources in support of terrorism include money, financial services, housing, training, expert advice or assistance, personnel, safe houses, false documentation,

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communication equipment, facilities, weapons, lethal substances, explosives, transportation, and other "physical assets." Medical and religious materials are exempt from the prohibition on material support.[22] The U.S. secretary of state is charged with determining whether a group is a foreign terrorist organization.[23]

These two statutes are the primary laws relied on by prosecutors in terrorist prosecutions in the United States. Prosecutors explain that the material support statutes are central in combating terrorism because hard-core terrorists rely on the support provided by individuals willing to provide financial resources, passports, expertise in computer technology, weapons, and information. These laws also have been relied on by the government to prosecute individuals for "providing personnel to terrorist organizations" who have traveled abroad to undergo terrorist training. The material support statutes have the advantage of permitting the arrest of individuals before terrorist plots are carried out. Critics caution that the material support provisions may be used to prosecute individuals who do not pose a threat. For instance, defendants in a New York case who had attended a terrorist training camp abroad and who had not been involved with terrorist activities after returning to the United States pled guilty to providing material support. It is also argued that these statutes are broadly written and that individuals may be criminally prosecuted who have merely donated money to a hospital or school in the Middle East run by a group labeled as terrorist.

In 2010, in *Holder v. Humanitarian Law Project*, the U.S. Supreme Court addressed the constitutional status of the material support statute.[24] The U.S. secretary of state designated the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE) as "foreign terrorist organizations." Two U.S. citizens and six domestic organizations claimed that they wished to provide support for the lawful and nonviolent humanitarian and political activities of the PKK and LTTE and that applying the material support law to prevent them from doing so violated their First Amendment rights. The plaintiffs explained that they wanted to provide "training" and "expert advice or assistance" to members of the PKK on how to seek humanitarian financial support from various international institutions such as the United Nations and how to use international law to peacefully resolve disputes. They also wished to engage in political advocacy promoting the cause of Kurds living in Turkey and Tamils living in Sri Lanka. The plaintiffs expressed the fear that "such advocacy might be regarded as 'material support' in the form of providing 'personnel' or 'expert advice or services.'"

The Supreme Court first held that the intent requirement of the material support statute is satisfied by knowledge of the "organization's connection to terrorism" and that the government is not required to establish that a defendant possessed the "specific intent to further the organization's terrorist activities."

The Court decided that terms like *training*, *expert advice or assistance*, *service*, and *personnel* provided fair notice to a person of ordinary intelligence of "what is prohibited." Further, the Court ruled that those terms are not "so standardless" that they authorize or encourage "seriously discriminatory enforcement." The plaintiffs undoubtedly were aware that activities in which they seek to engage "readily fall within the scope of the terms 'training' and 'expert advice or assistance.'"

The most significant part of the decision in *Holder* addresses whether the material support statute, as applied to plaintiffs, violates the freedom of speech guaranteed by the First Amendment. The Court clarified that the material support statute does not prohibit "independent advocacy" on behalf of a terrorist organization. Individuals are free to "say anything they wish on any topic." The material support statute is "carefully drawn to cover only a narrow category of speech . . . under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations."

The Court explained that nonviolent or humanitarian material support intended to promote peaceable lawful conduct can further violent terrorists in "multiple ways." Terrorist organizations often conceal their violent activities behind what appears to be lawful activity. Advocacy by outside groups working under the guidance or with the cooperation of a terrorist group may promote the organization's legitimacy as a responsible political organization, which helps the organization to recruit members and raise funds. Money that is raised for medical assistance or refugee support releases the organization's other funds to support terrorism. Terrorist organizations may use the skills they learned in peaceful negotiation for "lulling opponents into complacency and ultimately preparing for renewed attacks." The Supreme Court in *Holder* made the important point that humanitarian assistance to a terrorist organization allowed the organization to devote funds to violent terrorism that formerly were used for humanitarian purposes. Counterterrorism prosecutions in federal courts of late have focused on the prosecution of individuals who have attempted to travel to the Middle East to fight on behalf of the Islamic State (ISIS).[25]

Read *Holder v. Humanitarian Law Project* and *United States v. Bell* on the study site.

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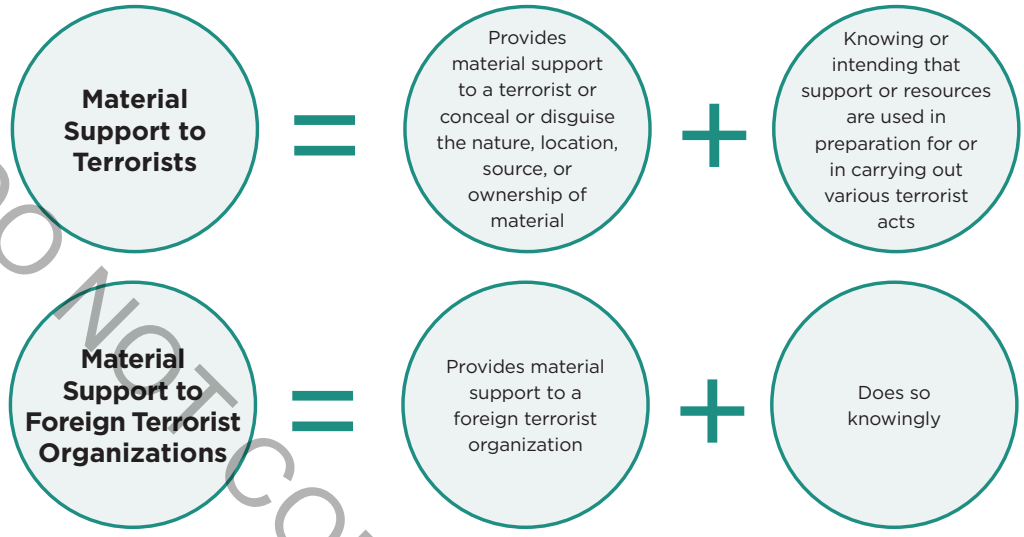
The Legal Equation 14.5: Support to Terrorists



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Terrorist Recruitment

In 2014, then FBI director James Comey pronounced that the recruitment of potential homegrown terrorists in the United States by the Islamic State (ISIS) takes place "24 hours a day" in "all fifty states." He stated that the challenge was to "stop them [these recruits] from acting" against the United States. According to CIA estimates, roughly two thousand Westerners traveled to Iraq and Syria (most via Turkey) to join ISIS. More than two hundred of these individuals were from the United States, five hundred were from the United Kingdom, and more than seven hundred were from France. An additional 150 Americans attempted to travel to Syria. The defeat and deterioration of ISIS is not likely to lessen the recruitment of young people by both domestic and foreign terrorist groups.

A cautionary note. Young people of every background are being recruited to violent extremist groups that represent various religious faiths and political ideologies.

This recruitment of young people to join ISIS and other terrorist groups constitutes a crime under American law, and individuals who recruit fighters for ISIS and other terrorist groups as well as the combatants themselves are criminally liable for providing "material support" to a terrorist organization. The recruiters, however, are difficult to apprehend because their communications invariably are encrypted and they typically are outside the United States and beyond the reach of American law enforcement.

In October 2014, three American teenage girls from Colorado of Somali and Sudanese descent, age sixteen, seventeen, and eighteen, stole their passports and $2,000 in cash from their parents and boarded a flight to Germany where they were arrested by the FBI. In April 2014, Shannon Conley, a nineteen-year-old convert, was arrested at Denver International Airport attempting to board a flight to Turkey with the intent of marrying an ISIS member. Earlier in the year, Mohammed Khan, a Chicago teenager, was arrested before boarding a plane to the Middle East. These recruits not only bolster ISIS ranks overseas; they pose a potential threat when they return to the United States and Europe and are able to blend into these countries without raising suspicion. Most of the terrorists responsible for attacking sites in Paris in 2015 and in Belgium in 2016 had been trained by ISIS in Syria.

Mufid Elfgeeh, a Yemen-born manager of a pizza restaurant in Rochester, New York, was charged with recruiting members to ISIS. In announcing Elfgeeh's arrest, then U.S. attorney general Eric Holder proclaimed that "[w]e are focused on breaking up these activities on the front end, before supporters of ISIS can make good on plans to travel to the region or recruit sympathizers to this cause."

The Center on National Security at Fordham Law has found that individuals arrested for agreeing to assist ISIS are a diverse group. The median age is twenty-five.

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Three-quarters are American citizens, 90 percent are males, and more than one-third are converts to Islam. Roughly 25 percent of these cases involved individuals of Middle Eastern descent, and the other cases involved individuals from a wide variety of ethnic backgrounds. Virtually none of the arrestees had criminal backgrounds, and a large number lived with their parents. Nearly 90 percent of cases involved social media, including online chats with either a real recruiter or a government informant or undercover agent.

Commentators speculate that ISIS offers a sense of family and emotional support to the teenagers looking for purpose, meaning, self-esteem, and heroic adventure. ISIS recruits young people on social media with sophisticated appeals and videos. The terrorist organization's violent tactics provide the organization with an aura of strength and defiance that attracts young people who may feel isolated, alienated, and alone. Many of these American young people are from families that emigrated from the Middle East and other parts of the world or that converted to Islam. ISIS appeals to their sense of obligation to protect the Islamic faith from what ISIS portrays as an onslaught by the United States and Europe. Most of the individuals who have volunteered for ISIS lack a detailed knowledge of Islam and are susceptible to ISIS's distorted view of their religious obligations. This support for ISIS often seems particularly difficult to understand because young women are drawn to ISIS despite the group's repressive treatment of women.

In another case, Ali Shukri Amin, a seventeen-year-old from Manassas, Virginia, pled guilty and was sentenced to eleven years in prison, a $100,000 fine, and federal supervision for the rest of his life, including monitoring of his internet activities, for providing material support to ISIS and its radical agenda.

Amin was an honors student who at one time was in a program for gifted students and had been accepted to college. He was transformed by a recruiter from a small, shy, and sickly young person into a jihadist "rock star" who was notorious for his online "prank" of superimposing the black flag of ISIS onto the flagpole atop the White House and heralding the group's "upcoming conquest of the Americas." His Twitter account attracted thousands of followers including jihadists across the Middle East, and he posted more than seven thousand positive tweets about ISIS including instructions on how to use Bitcoin to send money to ISIS.

Why did these individuals, most of whom were financially well-off young people with the promise of educational opportunity and a successful career, turn to ISIS? Should these young people be sentenced to federal prison?[26]

Criminal Law in the News

Dzhokhar Tsarnaev, "Jahar" to his friends, was a popular high school student who liked wrestling, soccer, and hip-hop; enjoyed marijuana; and followed popular television programs like *The Walking Dead* and *Game of Thrones*. On April 15, 2013, nineteen-year-old Jahar and his twenty-six-year-old brother Tamerlan positioned two pressure cooker homemade bombs at the finish line of the Boston Marathon. The marathon is held each year on Patriots' Day, a long-standing citywide celebration. The bombs exploded as the runners approached, killing three persons, including an eight-year-old child, and injuring 264 others, a number of whom sustained life-altering injuries. As you read about the Tsarnaev brothers, do not forget about the pain and suffering of the victims.

As the investigation centered on the Tsarnaev brothers, they fled and encountered and killed Sean Collier, a Massachusetts Institute of Technology police officer; and they stole an SUV, kidnapped the driver, and when cornered by the police engaged in a shoot-out in which Tamerlan was killed. Jahar escaped in the SUV and took refuge in a dry-docked motorboat. Roughly eighteen hours later, Jahar found himself surrounded by police and surrendered to FBI negotiators. Jahar before being apprehended scrawled a message in the boat that "the U.S. . . . is killing our innocent civilians. . . . I can't stand to see such evil go unpunished. . . . We Muslims are one body, you hurt one, you hurt us all. . . . F__ America." He allegedly also referred to the victims of the Boston bombings as "collateral damage" who deserved their fate because of the Muslims killed by the United States across the globe. Jahar also allegedly wrote that he did not mourn for his brother who now was a martyr in paradise.

Jahar pled not guilty to thirty counts, seventeen of which carried a potential death penalty. The central count charged him with using and conspiring to use a weapon of mass destruction that resulted in death. Media reports indicate that Jahar told the FBI that following the Boston bombing, along with his brother, he had planned to drive to New York City to launch a second attack in Times Square. Investigators failed to find direct links between the

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Tsarnaev brothers and foreign terrorist groups although there is substantial evidence that they were inspired by online jihadist videos and postings.

A police investigation later connected Tamerlan to a triple homicide that took place on the tenth anniversary of the September 11, 2001, attacks on the World Trade Center and Pentagon.

An estimated twenty-five terrorist plots by homegrown terrorists had been foiled prior to the attack launched by the Tsarnaev brothers. The brothers' attack was the first large-scale domestic terrorist attack that had proven successful since the September 11 attacks. Experts on terrorism continue to speculate on why Jahar, whose extremist views undoubtedly are shared by other young Americans, decided to translate these views into a deadly attack.

Tamerlan already was a teenager when his family emigrated to the United States, and his speech was heavily accented. He abandoned his aspirations to be an Olympic boxer when he was disqualified from competition for taunting an opponent. Tamerlan fit the profile of a frustrated young migrant who is angered by the downward trajectory of his life in America and who finds comfort in religious fundamentalism. Zubeidat, Tamerlan's mother, who herself had become increasingly religious, encouraged Tamerlan to abandon his life in the "fast lane" and to turn to Islam. He became increasingly intolerant and militant, and at one point Tamerlan was arrested for domestic battery against his girlfriend, who alleged that he pressured her to convert to Islam and to dress modestly. Tamerlan's outspoken condemnation of fellow Muslims in the mosque and his online interest in al Qaeda led to his being placed on U.S. and Russian terrorist watch lists. At one point, he traveled to Dagestan in an effort to join the Islamic resistance to the Russians. Married with a child, Tamerlan found himself unemployed and on public assistance and on the verge of being forced to vacate his apartment in Cambridge, Massachusetts.

Jahar, on the other hand, was a formidable high school wrestler and popular with his peers at Cambridge Rindge and Latin high school in Cambridge, Massachusetts. He was a volunteer in the "Best Buddies" program, became a U.S. citizen on September 11, 2012, and earned a $2,500 scholarship to the University of Massachusetts at Dartmouth.

His friends described Jahar as "superchill," "smooth," "cool," and "always joking" and cannot recall him ever referring to his Islamic faith. He seemed to fit right into the diverse, politically progressive world of Cambridge. Jahar's tweets were the typical teenage mixture of immature observations and occasional philosophical reflections and were more concerned with wrestling and smoking marijuana than with Islam and politics.

Jahar's calm and controlled exterior was briefly broken on only one occasion when he proclaimed his anger over Americans' equation of Islam with terrorism. He argued that jihadist terrorism was justified because of the violence of U.S. foreign policy and tweeted that 9/11 was an "inside job."

Jahar beneath the surface was percolating with anger and frustration. Anzor, his father, was a lawyer who after arriving in the United States worked as a mechanic for $10 an hour and regularly erupted in anger. His frustration over the growing Americanization of his daughters Ailina and Bella led him to force them into arranged marriages. Anzor, depressed over his inability to support his family and opposed to Zubeidat's growing fundamentalism, returned to Russia. He divorced and later reconciled with Zubeidat, who fled Boston after being arrested for shoplifting.

Jahar, although earning strong grades in high school, was disappointed over the fact that the elite private Boston colleges were beyond his financial means. He abandoned his aspiration of studying engineering after flunking most of his university classes. Jahar found himself heavily in debt from college and made money by selling marijuana.

Jahar created a Facebook page that describes his worldview as divided between "Islam" and a "career and money" and posted links to Islamic fighters. Jahar tweeted that the Prophet Muhammad was his role model and proclaimed "never underestimate the rebel with a cause."

In early February, Tamerlan drove to New Hampshire and purchased forty-eight mortars containing approximately eight pounds of low-explosive powder. He also bought nine-millimeter handguns along with two hundred rounds of ammunition. Jahar began downloading al Qaeda military manuals including an article on "Make a Bomb in the Kitchen of Your Mom," which offered detailed instructions on how to construct a pressure cooker explosive.

On April 15, 2013, Jahar, wearing his high school wrestling jacket, ignited the bomb at the finish line of the Boston Marathon. Was the bombing a political statement or a product of personal frustrations? Why did Jahar bomb the Boston Marathon? In May 2015, a Boston jury determined that Jahar should receive the death penalty. Do you agree with the verdict?

Combat Immunity

American John Walker Lindh, the so-called American Taliban, was captured by U.S. forces in Afghanistan and subsequently pled guilty to supplying services to the Taliban (the Islamic fundamentalist ruling party of Afghanistan)

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and of carrying an explosive during the commission of a felony. Lindh's lawyer made various arguments on his behalf, including **combat immunity**. This is the contention that, as a member of the Afghan military, Lindh was immune from criminal prosecution for acts of lawful combat undertaken in the defense of Afghanistan against the United States. The U.S. government, however, contended that Lindh was not entitled to the status of a legal combatant and that his acts on behalf of the Taliban regime in Afghanistan were unlawful criminal offenses rather than acts of lawful warfare. The standard for determining whether an individual is a lawful or unlawful combatant is set forth in the **Geneva Convention of 1949**. The Geneva Convention is an international treaty regulating the law of war that the United States has signed and recognizes as part of U.S. law.

The Geneva Convention Relative to the Treatment of Prisoners of War sets forth four criteria an organization must meet for its members to qualify for lawful combatant status:

1. The organization must be commanded by a person responsible for his subordinates;
2. The organization's members must have a fixed distinctive emblem or uniform recognizable at a distance;
3. The organization's members must carry arms openly; and
4. The organization's members must conduct their operations in accordance with the laws and customs of war.

A federal district court concluded that Lindh did not qualify as a lawful combatant. The Taliban lacked a coherent command structure; wore no distinctive, recognizable insignia; and, although they carried arms openly, failed to observe the laws and customs of war by targeting civilians.[27]

State Terrorism Statutes

Virtually every state has a terrorism statute to cover criminal acts that do not fall within federal jurisdiction. Consider the "beltway sniper" case from Virginia, *Muhammad v. Commonwealth*.[28] The two defendants killed at least ten individuals as they traveled from Maryland and the District of Columbia through Virginia. Muhammad was sentenced to death and appealed his conviction to the Virginia Supreme Court.

An act of terrorism under Virginia law is an "act of violence . . . committed with the intent to (i) intimidate the civilian population at large or (ii) influence the conduct or activities of the government of the United States, a state, or locality through intimidation." An "act of violence" includes a list of aggravated felonies including murder, voluntary manslaughter, mob-related felonies, malicious assault or bodily wounding, robbery, carjacking, sexual assault, and arson.

The jury sentenced Muhammad to two death sentences based on his terrorist killings. The Virginia Supreme Court held that the provisions of the statute provided sufficient notice to ordinary individuals to understand "what conduct they prohibit and do not authorize" and that the law did not impose "arbitrary and discriminatory enforcement." *Intimidate* has been defined in various cases to mean "putting in fear," and *population at large* requires a "more pervasive intimidation of the community rather than a narrowly defined group of people. . . . We do not believe that a person of ordinary intelligence would fail to understand this phrase."

Criminal Law and Public Policy

On June 5 and June 6, 2014, British newspaper the *Guardian* and the *Washington Post* disclosed that an anonymous source had leaked classified information that the U.S. government was requiring large telecommunications providers to turn the telephone numbers dialed by Americans over to the National Security Agency (NSA), the U.S. agency charged with gathering foreign electronic intelligence. On June 9, the *Guardian* released a video interview with Edward Snowden, the individual responsible for leaking the information. The thirty-three-year-old Snowden was a former CIA and NSA contractor. After fleeing the United States and being denied asylum in Hong Kong and unsuccessfully seeking asylum in several other countries, Snowden received temporary asylum for three years in Russia.

Little is known about Snowden's background. He reportedly never received a high school diploma and briefly attended a community college. There is little doubt that he had a strong interest and aptitude for computers and maintained an active online presence. In 2004, Snowden,

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whose father was a veteran of the Coast Guard, joined the military in the aftermath of 9/11 and enlisted in a program that fast-tracked him into the Special Forces.

Snowden's slight build and various physical limitations made him an unlikely candidate for the Special Forces. In the summer of 2005, he was discharged from the Army after allegedly breaking both his legs. Snowden spent the next several months as an IT security specialist at the University of Maryland Center for Advanced Study of Language, a joint enterprise with the U.S. government.

In 2007–2008, Snowden worked in Geneva, Switzerland, as a contractor for the CIA maintaining network security. He later claimed that he grew disillusioned with the agency, and in 2009, Snowden terminated his relationship with the CIA, perhaps in response to an investigation into his attempt to access classified files.

Snowden next was hired by Dell as a contractor engaged in computer analysis for the NSA. He was sent to Japan, which fulfilled a longtime interest in Japanese culture and language. At some point, Snowden was certified as an "Ethical Hacker" employed by the NSA to counteract efforts to penetrate the agency's computer system. Snowden subsequently was transferred to Hawaii to work at the NSA's regional cryptological center.

A central event in shaping Snowden's attitudes toward U.S. security services was his inadvertent discovery of a report that provided a detailed account of the Bush administration's warrantless wiretapping of both Americans and foreigners following 9/11. His sense of alienation was heightened in March 2013 when James Clapper, the director of national intelligence, denied before a congressional committee that the NSA had been collecting data on U.S. citizens, a claim that Snowden knew to be false.

Snowden next took a job with the technology consulting firm Booz Allen Hamilton (BAH), which like Dell contracted to work with the NSA. Snowden worked as a professional hacker charged with detecting vulnerabilities in U.S. technology that might be exploited by foreign countries. Snowden's responsibilities allowed him access to top-secret internet programs and provided him with the opportunity to illicitly transfer data onto a thumb drive that he transmitted to journalists whom he trusted at the *Guardian* and *Washington Post*.

The information leaked by Snowden to journalists revealed that since 2006 the NSA had engaged the bulk collection of the domestic and foreign telephone numbers dialed by Americans. This secret "metadata" program called PRISM was based on bulk search warrants issued every three months by the Foreign Intelligence Surveillance Court (FISC) that directed nine internet providers to turn records of the phone numbers dialed by every American over to the government. Once an individual was specifically singled out for additional investigation, the NSA followed a "three hops rule," analyzing all phone calls made by the target and all phone calls made by individuals called by the target, as well as all phone calls made by the individuals they called. This might be followed by a search warrant allowing the government to monitor the content of an individual's phone calls and emails.

Snowden believed that the government's bulk collection and storage for five years of all the numbers dialed by Americans without any basis to suspect that U.S. citizens or residents were agents of a foreign power or were engaged in criminal activity violated the Fourth Amendment prohibition on unreasonable searches and seizures and violated the privacy of U.S. citizens. Studies concluded that the collection of the numbers dialed by an individual could reveal virtually every aspect of an individual's life. Snowden argued that the U.S. public was entitled to be informed that the phone numbers they dialed were being monitored, and explained that his goal in revealing large amounts of information to selected journalists was to spark a worldwide discussion on privacy and on the state surveillance of individuals across the globe.

A special review committee appointed by President Obama concluded that the "metadata" program had not been proven essential to detecting terrorist plots and the information obtained through the "metadata" program could have been obtained by relying on the traditional search warrant procedure.

The disclosure of PRISM led President Obama to propose reforms in the program.

Congress after an extended debate adopted the USA Freedom Act, which provided that phone providers retain metadata rather than turning the data over to the government. The NSA may obtain access to these records only by obtaining a warrant from FISC.

The U.S. government has charged Snowden with espionage, and government officials labeled him a coward for fleeing rather than remaining in the United States and assuming responsibility for his actions. Critics asked how Snowden could portray himself as a defender of liberty and human rights and yet seek asylum in a repressive regime like Russia. Some high-ranking intelligence officials claim that Snowden's disclosures have made the United States less safe and have placed Americans at risk.

Polls indicated that the majority of Americans view Snowden as a whistle-blower rather than a traitor. Absent his unlawful leaking of information, the "metadata" program would not have been revealed. Snowden's revelations led to the disclosure of other surveillance programs, such as the Post Office's extensive monitoring of the mail sent and received by Americans and the Obama administration's

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approval of the warrantless search for suspicious addresses or computer codes that might be linked to malicious hackers regardless of whether they were affiliated with a foreign government.

The journalistic community recognized Snowden's contribution to public awareness of government surveillance by awarding him the Ridenhour award for "truth telling," and the journalists who worked with him also were the recipients of prestigious awards for their reporting.

In March 2019, the NSA shut down the PRISM program, which is scheduled to expire at the end of 2019 absent congressional renewal of the USA Freedom Act. The NSA reportedly experienced "technical irregularities" that resulted in the unlawful collection of hundreds of millions of call and text records from American telecommunications firms unconnected to the target telephone number. The PRISM program was used in 2016 to target 42 terrorism suspects and to collect 151 million records and was used in 2017 to target 40 suspects and collect 534 million phone records.[29]

Should Snowden be permitted to return to the United States and plead guilty to a minor criminal violation?

IMMIGRATION

Immigration law regulates the entry of individuals into the United States, the length of their stay, whether they may work or attend school, the treatment of individuals who are in the United States unlawfully, and the process by which individuals can become legally naturalized citizens. Immigration law protects the border of the United States and the sovereign right of the United States to control who may enter and who may remain in the country. The United States is known as a "nation of immigrants," and underlying U.S. immigration policy is the widespread recognition that immigrants have made substantial contributions to U.S. society.

In 2012, in *Arizona v. United States*, the U.S. Supreme Court affirmed that immigration is the responsibility of the federal government with a limited state role.[30] The Court held that three provisions of the Arizona law SB 1070 were preempted by the federal Immigration Reform and Control Act (IRCA). Allowing state legislation would interfere with the ability of the federal government to set a uniform immigration policy.

The United States historically favored immigration from Europe and limited immigration and citizenship for nonwhites and for individuals who were considered to possess an immoral character. This restrictive policy changed with the Immigration and Nationality Act of 1952 (INA).[31] The act eliminated restrictions on Asian immigration and naturalization but continued a quota system introduced in the early twentieth century based on country of origin. The act also created quotas for individuals with special skills and opened the door to reuniting families. The INA, which continues to provide the foundation of U.S. immigration law, also created the Immigration and Naturalization Service (INS) to enforce the law.

The 1986 IRCA, also known as the Simpson-Mazzoli Act, obligated employers to check their employees' immigration status, imposed criminal penalties on employers who hired undocumented workers, and provided an amnesty for immigrants who unlawfully entered the United States before January 1, 1982.[32]

The Immigration Marriage Fraud Amendments of 1986 sought to limit "sham marriages" by placing restrictions on the ability of individuals to marry to obtain citizenship.[33] The Immigration Act of 1990 attempted to equalize immigration from various countries by establishing "diversity visas" for regions that, in the previous year, had not received a fair portion of immigration.[34]

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) addresses a broad range of areas.[35] One important focus is on immigration-related offenses such as alien smuggling, the creation of fraudulent documents, and the deportation of aliens who commit criminal offenses.

In 2003, the INS was subsumed in the newly created Department of Homeland Security (DHS). The Bush administration's intent was to combine a number of agencies into the new department in order to increase cooperation in responding to domestic terrorism, natural disasters, and other emergencies and to promote the sharing of intelligence. Most of the responsibilities of the INS were divided between three services of the DHS. Customs and Border Protection has assumed the INS's border patrol duties; Citizenship and Immigration Services now is responsible for the INS's naturalization, asylum, and permanent residence functions; and Immigration and Customs Enforcement handles the INS's deportation, intelligence, and investigatory functions.

In 2007, Congress voted to build roughly seven hundred miles (1,100 km) of fencing along the United States–Mexico border to fortify those portions of the border not already protected.

Roughly forty million migrants have been legally admitted into the United States since 2000. There are approximately two million residents in the United States who have been admitted to work or to attend school. Individuals can enter the United States from Mexico or Canada to shop or to visit friends as long as they possess certain documents. Immigration enforcement at the border, airports, and seaports involves ensuring that individuals do not enter the United States without the required documents or with forged documents (see Table 14.1). Estimates are that there are roughly

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eleven million individuals in the United States without legally required documentation. Many of these individuals have lived and worked in the United States for a lengthy period of time. Immigration reform is intended to legalize the status of these individuals and of their families.

Deferred Action for Childhood Arrivals (DACA) was implemented by the Obama administration in June 2012 and allows undocumented immigrants who entered the country before their sixteenth birthday and before June 2007 to receive a renewable two-year work permit and exemption from deportation. DACA does not provide a path to citizenship. In November 2014, President Obama once again bypassed the U.S. Congress and implemented Deferred Action for Parents of Americans (DAPA), which provides temporary residence and work privileges to the parents of lawful residents and U.S. citizens. The Fifth Circuit Court of Appeals issued an injunction blocking enforcement of DAPA, pending a trial on the constitutionality of President Obama's executive order. In 2016, the U.S. Supreme Court divided 4–4 on the case, which had the effect of upholding the injunction and returning the case to the lower court for trial. On June 15, 2017, John Kelly, at the time secretary of homeland security, signed a memo rescinding DAPA, which had the effect of ending the litigation.

A number of legal challenges have been filed in federal courts to the constitutionality DACA.

TABLE 14.1
Selected Provisions of U.S. Immigration Law

8 U.S.C. § 1324 (a) Criminal penalties for harboring an undocumented individual	(1) (A) Any person who— (i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry . . . or (ii) remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law; (iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation; (iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or (v) (I) engages in any conspiracy to commit any of the preceding acts, or (II) aids or abets the commission of any of the preceding acts, shall be punished as provided in subparagraph (B). (B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs— (i) in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined . . . [and/or] imprisoned not more than 10 years, or both; (ii) in the case of a violation of subparagraph (A)(ii), (iii), (iv), or (v)(II), be fined . . . [and/or] imprisoned not more than 5 years, or both; (iii) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) during and in relation to which the person causes serious bodily injury to . . . or places in jeopardy the life of, any person, be fined [and] imprisoned not more than 20 years, or both; and (iv) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) resulting in the death of any person, be punished by death or imprisoned for any term of years or for life, fined . . . or both.
8 U.S.C. § 1324C (e) Criminal penalties for failure to disclose role as document preparer	(1) Whoever . . . knowingly and willfully fails to disclose, conceals, or covers up the fact that they have, on behalf of any person and for a fee or other remuneration, prepared or assisted in preparing an application which was falsely made . . . for immigration benefits, shall be fined . . . imprisoned for not more than 5 years, or both, and prohibited from preparing or assisting in preparing, whether or not for a fee or other remuneration, any other such application. (2) Whoever, having been convicted of a violation of paragraph (1), knowingly and willfully prepares or assists in preparing an application for immigration benefits . . . shall be fined in accordance with title 18, imprisoned for not more than 15 years, or both, and prohibited from preparing or assisting in preparing any other such application.

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8 U.S.C. § 1253 (a) Penalty for failure to depart	(1) In general Any alien against whom a final order of removal is outstanding . . . who— (A) willfully fails or refuses to depart from the United States within a period of 90 days from the date of the final order of removal . . . , (B) willfully fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure, (C) connives or conspires, or takes any other action, designed to prevent or hamper or with the purpose of preventing or hampering the alien's departure pursuant to such, or (D) willfully fails or refuses to present himself or herself for removal at the time and place required by the Attorney General pursuant to such order, shall be fined . . . or imprisoned not more than four years.
8 U.S.C. § 1325 (c) Marriage fraud	Any individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, or fined not more than $250,000, or both.
8 U.S.C. § 1227 (i) Crimes of moral turpitude	Any alien who— (I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status) and (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable. (ii) Multiple criminal convictions. Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefore and regardless of whether the convictions were in a single trial, is deportable. (iii) Aggravated felony. Any alien who is convicted of an aggravated felony at any time after admission is deportable. (iv) High speed flight. Any alien who is convicted of a violation (relating to high speed flight from an immigration checkpoint) is deportable. (v) Failure to register as a sex offender . . . is deportable. . . . (B) Controlled substances (i) Conviction. Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable. (ii) Drug abusers and addicts. Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable. (C) Certain firearm offenses Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device . . . is deportable. (E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and (i) Domestic violence, stalking and child abuse Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. . . .

Violations of Immigration Law

The relevant immigration laws are compiled in the U.S. Code. According to the DHS, some of the most frequently violated provisions of federal immigration law include those listed below. Individuals violating these provisions are subject

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to fines and, in some instances, to criminal penalties and to deportation from the United States back to their country of origin:

- Making, altering, or using counterfeit immigration documents.
- Assisting or encouraging aliens to come to the United States unlawfully in violation of the law.
- Harboring an illegal alien.
- Knowingly employing aliens who do not have permission to work in the United States.
- Failing to depart the United States when ordered removed (deported).
- Attempting to enter the United States by misrepresenting (lying about) material facts.
- Entering into a marriage to circumvent the immigration laws.
- Entering or attempting to enter the United States without permission after having been removed (deported).
- Assisting an alien to enter the United States for prostitution or other immoral purposes.

State Laws

A number of U.S. cities and towns have declared themselves to be "sanctuary cities." The police and other city workers in these cities and towns are instructed to overlook the presence of undocumented individuals whom they encounter. Government officials and many law enforcement officers in these jurisdictions believe that undocumented individuals who fear deportation will be reluctant to share information with the police and to report crimes. The police in these sanctuary city jurisdictions are prohibited from questioning the immigration status of individuals whom they encounter during an investigation or questioning the immigration status of individuals whom they detain or arrest for misdemeanors or for minor felony offenses. These cities and towns in general only alert federal authorities when an individual is detained or arrested who has committed any one of a number of serious felonies or in those instances in which there is a federal immigration "detainer" (warrant) for the individual. California is the first state to declare itself a sanctuary state. The legal authority of local jurisdictions to refuse to fully cooperate with federal immigration authorities at present is being litigated in federal courts. The federal government asserts that sanctuary cities interfere with federal enforcement of immigration law, promote illegal immigration, and allow dangerous individuals to remain in the United States.

Keep in mind that although sanctuary cities do not turn over to federal authorities individuals who commit misdemeanors or minor felonies, these individuals are subject to local and state prosecution and punishment. Federal authorities also are free to detain undocumented individuals in sanctuary jurisdictions.

A larger number of cities and counties continue to notify federal law enforcement when they detain or arrest individuals who are unlawfully present in the United States. Critics of this policy assert that the program results in the deportation of individuals who do not pose a danger and often have been resident in the United States for many years.

There is a strong backlash against immigrants. Federal courts in most instances have held state and local measures restricting the access of undocumented individuals to housing and basic education and limiting their civil rights as unconstitutional.

The current issue at the U.S.–Mexican border primarily centers on individuals and families from Central America who are seeking political asylum. The Trump administration has responded by limiting the availability of asylum and restricting the number of refugees from abroad admitted into the United States.

INTERNATIONAL CRIMINAL LAW

The origins of **international criminal law** can be traced to the prosecution of Nazi war criminals at Nuremberg in 1944. The international community subsequently agreed to a number of treaties that addressed crimes so serious that they are considered to be the concern of all nations and peoples. These treaties prohibit and punish acts such as genocide, torture, war crimes, and terrorism. A majority of countries in the world have signed these treaties and have incorporated the provisions into their domestic criminal codes.

International crimes typically are committed by individuals acting on behalf of the government. The exception, of course, is terrorism, which in most cases is committed by "non-state actors." Prosecutors in countries in which regimes carry out international crimes are reluctant or frightened to indict government officials for crimes, even after the officials have left office. As a result, the perpetrators of international crimes, in many instances, have not been brought to the bar of justice.

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The international community periodically has convened tribunals to prosecute and to punish government leaders who have carried out international crimes and who otherwise would have gone unpunished. In 1993, the United Nations established criminal tribunals to hear cases arising from genocide and war crimes in Rwanda and in Yugoslavia. The most significant step occurred in 2001 with the formation of the International Criminal Court (ICC). This court has jurisdiction over serious international crimes and comprises judges from countries that have joined the court. The United States, although a leading nation in the movement to prosecute and punish international crimes, is not a member of the ICC.

The United States, as part of its international obligation to punish international crimes, has claimed jurisdiction over international offenses committed outside its territorial boundaries and has brought offenders to trial before U.S. domestic courts. The United States, for example, has prosecuted pirates for attacks on European and U.S. ships off the coast of the African country of Somalia.

CASE ANALYSIS

In *People v. Morales*, a New York court decided whether the criminal acts of a member of a street gang constituted terrorism under New York law.

Was the defendant guilty of terrorism?

PEOPLE V. MORALES

982 N.E.2D 580 (N.Y. 2012)

Shortly after the horrendous attacks on September 11, 2001, the New York legislature convened in special session to address the ramifications of these terrorist actions. Confronted with the tragic events of that infamous day, the legislature recognized that "terrorism is a serious and deadly problem that disrupts public order and threatens individual safety both at home and around the world." It decided that New York laws needed to be "strengthened" with comprehensive legislation ensuring "that terrorists . . . are prosecuted and punished in state courts with appropriate severity."

The result was Penal Law article 490 and, among its provisions, was the new "crime of terrorism." It occurs when a person "commits a specified offense" with the "intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping." Specified offenses include many class A and violent felonies, as well as attempts to commit those crimes. Article 490 does not, however, contain a statutory definition of "intent to intimidate or coerce a civilian population." This appeal requires us to consider whether this phrase encompasses the acts perpetrated by defendant.

Defendant Edgar Morales was a member of a street gang known as the "St. James Boys" or "SJB"—apparently named for the vicinity of the Bronx where the SJB operated. . . . The SJB was originally formed to protect its members from other gangs and its primary objective was to be the most feared Mexican gang in the Bronx. The SJB allegedly targeted and assaulted individuals who belonged to rival confederations, extorted monies from a prostitution business and committed a series of robberies.

On the evening of August 17, 2002, several SJB members, including defendant, went to a christening party in the Bronx. They saw a man named Miguel who they thought belonged to a gang that was responsible for a friend's death. When Miguel refused to comply with their demand to leave the party, they planned to assault him after the festivities ended. Defendant took possession of a revolver from another SJB member, agreeing to shoot Miguel if it appeared that his cohorts were losing the battle.

Around midnight, a fight broke out between the SJB members and Miguel and his companions. During the melee, an SJB member directed defendant to shoot and he fired five bullets from the handgun. Three shots hit one of the rivals and paralyzed him. A 10-year-old girl was shot in

(Continued)

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(Continued)

the head and died. After the SJB members fled the scene, defendant handed the gun to a female member who later passed the weapon to another SJB member. Another SJB member threw the five spent shell casings into a sewer. . . .

The People subsequently secured a 70-count indictment against the SJB members. Defendant, along with certain accomplices, was charged with crimes of terrorism pursuant to Penal Law § 490.25 predicated on: intentional murder in the second degree; manslaughter in the first degree; attempted murder in the second degree; gang assault in the first degree; and criminal possession of a weapon in the second degree. The underlying offenses were charged separately without the terrorism designations. Defendant and 19 others were also charged with conspiracy in the second degree based on a multitude of overt acts, including various assaults and homicides that occurred from mid-2001 to mid-2004. . . .

The People assert that the term "civilian population" as used in Penal Law article 490 embraces all of the Mexican-Americans who resided within the SJB's designated area, as well as the subset of rival Mexican-American gangs in the same vicinity. The prosecution . . . contend[s] that there was sufficient evidence that defendant's actions after the party furthered the SJB's objective to intimidate or coerce other Mexican-American gangs in the Bronx and, as a result of those activities, the SJB intended to intimidate and coerce the entire Mexican-American community during the time period charged in the indictment. Defendant argues that neither the population of Mexican-Americans in the St. James Park neighborhood, nor the smaller category of rival gangs, can constitute a "civilian population" as a matter of law. . . .

[W]e find it unnecessary to precisely define the contours of the phrase "civilian population" for two reasons. First, even assuming that all of the Mexican-Americans in the St. James Park area may be considered a "civilian population," the evidence at trial failed to demonstrate that defendant and his fellow gang members committed the acts against Miguel and his companions with the conscious objective of intimidating every Mexican-American in the territory identified at trial. Rather, viewing the proof in the light most favorable to the People, the prosecution demonstrated that defendant and his accomplices arranged the attack because of Miguel's assumed membership in a rival gang and his refusal to leave the party. We do not believe that this discrete criminal transaction against identified gang enemies was designed to intimidate or coerce the entire Mexican-American community in this Bronx neighborhood.

Second, while there is a valid line of reasoning and permissible inferences from which the jury could have concluded that one of defendant's possible goals for attacking Miguel was to intimidate or coerce another gang, there is no indication that the legislature enacted article 490 of the Penal Law with the intention of elevating gang-on-gang street violence to the status of terrorism as that concept is commonly understood. Specifically, the statutory language cannot be interpreted so broadly so as to cover individuals or groups who are not normally viewed as "terrorists" and the legislative findings in section 490 clearly demonstrate that the legislature was not extending the reach of the new statute to crimes of this nature. This is apparent in the examples of terrorism cited in the legislative findings: (1) the September 11, 2001 attacks on the World Trade Center and the Pentagon; (2) the bombings of American embassies in Kenya and Tanzania in 1998; (3) the destruction of the Oklahoma City federal office building in 1995; (4) the mid-air bombing of Pan Am Flight number 103 in Lockerbie, Scotland in 1988; (5) the 1997 shooting from atop the Empire State Building; (6) the 1994 murder of Ari Halberstam on the Brooklyn Bridge; and (7) the bombing at the World Trade Center in 1993 (*see* Penal Law § 490.00). The offenses committed by defendant and his associates after the christening party obviously are not comparable to these instances of terroristic acts.

We must also consider the sources that the legislature consulted in drafting the new statutes. The definitional provisions of Penal Law article 490 were "drawn from the federal definition of 'international terrorism.'" The federal antiterrorism statutes were designed to criminalize acts such as "the detonation of bombs in a metropolitan area" or "the deliberate assassination of persons to strike fear into others to deter them from exercising their rights"—conduct that is not akin to the serious offenses charged in this case. . . . "[D]rive-by shootings and other street crime," and "ordinary violent crimes . . . robberies or personal vendettas," do not satisfy the intent element of ". . . terrorism." . . .

If we were to apply a broad definition to "intent to intimidate or coerce a civilian population," the People could invoke the specter of "terrorism" every time a Blood assaults a Crip or an organized crime family orchestrates the murder of a rival syndicate's soldier. But the concept of terrorism has a unique meaning and its implications risk being trivialized if the terminology is applied loosely in situations that do not match our collective understanding of what constitutes a terrorist act. History and experience have shown that it is impossible for us to anticipate every conceivable manner in which evil schemes can threaten our society. Because the legislature was aware of the difficulty in defining or categorizing specific acts of terrorism, it incorporated a general definition of the terrorism and referenced seven notorious acts of terrorism that serve as guideposts for determining whether a future incident qualifies for this nefarious designation.

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CHAPTER SUMMARY

The founding figures of the United States were fearful of a strong centralized government, and they provided protections for individual freedom and liberty. Nevertheless, they appreciated that there was a need to protect the government from foreign and domestic attack and accordingly incorporated a provision on treason into the Constitution. This was augmented by congressional enactments punishing sedition, sabotage, and espionage. In recent years, the United States has adopted laws intended to combat global terrorism.

Treason is defined in Article III, Section 3 of the U.S. Constitution. Treason requires an overt act of either levying war against the United States or providing aid and comfort to an enemy of the United States. The accused must be shown to have possessed the intent to betray the United States. The Constitution requires two witnesses or a confession in open court to an act of treason.

Sedition at English common law constituted a communication intended or likely to bring about hatred, contempt, or disaffection with the king, the constitution, or the government. This was broadly defined to include any criticism of the king and of English royalty. U.S. courts have ruled that the punishment of seditious speech and libel may conflict with the First Amendment right to freedom of expression. As a result, judges have limited the punishment of seditious expression to the urging of the necessity or duty of taking action to forcibly overthrow the government. A seditious conspiracy requires an agreement to take immediate action.

Sabotage is the willful injury, destruction, contamination, or infection of war materials, premises, or utilities with the intent to injure, interfere with, or obstruct the United States or an allied nation in preparing for or carrying on war. Sabotage may also be committed in peacetime and requires that the damage to property is carried out with the intent to injure, interfere with, or obstruct the national defense of the United States.

An individual is guilty of espionage who communicates, delivers, or transmits information relating to the national defense to a foreign nation or force within a foreign nation with the purpose of injuring the United States or with reason to believe that it will injure the United States or advantage a foreign nation. Espionage in wartime involves collecting, recording, publishing, communicating, or attempting to elicit such information with the intent of communicating this information to the enemy.

The U.S. Code, Title 18, Chapter 113B, punishes various terrorist crimes. This has been strengthened by the Antiterrorism and Effective Death Penalty Act (1996) and by the USA PATRIOT Act (2001). Terrorism is divided into international and domestic terrorism. International terrorism is defined as violent acts or acts dangerous to human life that occur outside the United States; domestic terrorism is defined as violent acts or acts dangerous to human life that occur inside the United States. Terrorist acts transcending national boundaries are coordinated across national boundaries.

Terrorist acts require the intent to either intimidate or coerce a civilian population, to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by mass destruction, assassination, or kidnapping. The U.S. government has primarily relied on the prohibition against material assistance to terrorists and to terrorist organizations in order to prevent and punish terrorist designs before they are executed. This law has proven to be a powerful tool to deny terrorists the resources they require to carry out attacks. Federal law also punishes terrorist crimes involving attacks on mass transit systems and the use of weapons of mass destruction and prohibits the harboring or concealing of terrorists. The United States does not consider terrorists to be lawful combatants, and they are not viewed as prisoners of war under the Geneva Convention by U.S. authorities. Virtually every state has adopted a terrorism statute.

Most terrorist offenses are based on the foundation offenses of treason, sedition, sabotage, and espionage.

Immigration law is intended to protect the sovereign authority of the United States to control individuals who enter and who reside in the territorial boundaries of the country.

CHAPTER REVIEW QUESTIONS

1. Treason is the only crime defined in the U.S. Constitution. What is treason? What type of evidence is required to establish treason?
2. Define sedition. Distinguish seditious speech from seditious libel. What constitutes a seditious conspiracy?
3. What is sabotage? Distinguish between sabotage and sabotage during wartime.
4. Explain the difference between espionage and espionage during wartime.
5. How do the definitions of international and domestic terrorism differ?
6. List some of the terrorist crimes set forth in the U.S. Code.
7. Define and discuss combat immunity.
8. What is the purpose of immigration law? Give some examples of violations of immigration law that are punished criminally.

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LEGAL TERMINOLOGY

combat immunity
crimes against the state
Deferred Action for Childhood Arrivals (DACA)
domestic terrorism
espionage
extraterritorial jurisdiction
federal crime of terrorism
Geneva Convention of 1949
immigration law
international criminal law
international terrorism
material support to a foreign terrorist organization
material support to a terrorist
sabotage
sedition
seditious conspiracy
seditious libel
seditious speech
terrorism transcending national boundaries
treason
weapons of mass destruction

TEST YOUR KNOWLEDGE: ANSWERS

1. True.
2. True.
3. True.
4. True.
5. True.
6. True.
7. False.
8. False.
9. False.

NOTES

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3. *D'Aquino v. United States,* 192 F.2d 338 (9th Cir. 1951).
4. *United States v. Gadahn* (2005), First Superseding Indictment, https://www.justice.gov/sites/default/files/opa/legacy/2006/10/11/adam_indictment.pdf.
5. *Dennis v. United States,* 341 U.S. 494 (1951).
6. *Yates v. United States,* 354 U.S. 298 (1957).
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8. 18 U.S.C. § 2153.
9. 18 U.S.C. § 2155.
10. 18 U.S.C. §§ 2152, 2156.
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12. *United States v. Walli*, 785 F.3d 1080 (6th Cir. 2015).
13. 18 U.S.C. § 794.
14. *Gorin v. United States,* 312 U.S. 19 (1941).
15. 18 U.S.C. § 2332(b)(g)(3)–(5).
16. 18 U.S.C. § 2332.
17. 18 U.S.C. § 2332(b).
18. 18 U.S.C. § 175.
19. *United States v. Bond*, 572 U.S. ___ (2014).
20. 49 U.S.C. § 46502.
21. 18 U.S.C. § 2339.
22. 18 U.S.C. §§ 2339A, 2339B.
23. 8 U.S.C. § 1189(a)(1).
24. *Holder v. Humanitarian Law Project,* 561 U.S. 1 (2010).
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31. Pub. Law No. 82-414, 66 Stat. 163.
32. Pub. Law No. 99-603, 100 Stat. 3359.
33. 8 U.S.C. § 1325(c).
34. Pub. Law No. 101-649, 104 Stat. 4978.
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