

n Boston, a trial is underway. Prosecutors say that Tarek Mahanna, a 29-year-old US-born Egyptian, is a terrorist. His attorneys claim he was merely exercising First Amendment rights. The outcome of the trial will have important legal implications.

Under American law, the police cannot arrest someone for what he thinks or says, but only after a crime has been committed. This, unfortunately, is why so many battered women who depend on a restraining order to keep a batterer at bay are murdered. The police can arrest the murderer after the fact, not prevent the crime.

The US has four types of law: constitutional, civil, criminal, and administrative, which apply to all American citizens and resident foreign nationals. But since 9-11, we are under attack by a new sort of enemy that our laws do not address. To meet this threat, the Patriot Act was passed to limit the constitutional protections of free speech in the interest of national security. This is not new. We have a long history of Presidents challenging constitutional rights during times of national peril. On behalf of national security, the FBI pursues those who aid and abet terrorism and are one step removed from activating an attack.

Mahanna would seem to be an unlikely terrorist. He is a Ph.D pharmacist, whose father was a professor at the Massachusetts College of Pharmacy and Health Sciences. He is one of a growing number of American-born Muslims who have "self-radicalized" through Jihadi web sites and associate with like-minded men met in religious circles. He and his friends shared a taste for videos of Americans being beheaded (Daniel Pearl) and mutilated overseas---a taste that should alarm us all.

He first ran into trouble in 2008, when he was at the Logan Airport, planning to move to Saudi Arabia. The FBI charged him with lying about his relationship to a man who was found guilty of training with a foreign terrorist organization. He was out on bail when in 2009, federal agents charged him with conspiracy to provide material support to terrorists. "Mahanna," said the prosecutor, "has held multiple conversations about obtaining automatic weapons for randomly shooting people in a shopping mall." He also proposed assassinating two federal officials. He then translated a treatise: "39 Ways To Serve and Participate in Jihad," making it available to English readers.

On his computer hard drive are pictures of him at Ground Zero, smiling and pointing to the sky. Authorities asked him about a trip he had taken with two friends to Yemen in 2004. Of course, he claims this was "educational." What kind of education does one get in Yemen today? He has also pursued "education" in Pakistan, Iraq, and Syria. He wanted to join the Jihad, says the FBI, but even in those radical venues, Jihadi groups turned him away.

There are few limits to freedom of speech. There is law against incitement to violence: urging a lynch mob or shouting fire in a crowded theater for the purpose of causing mayhem. Are these Jihadi websites incitement? A case can be made that they are, because they appear to seduce others into pursuing Jihadi mayhem.

Conspiracy law has also been used during times of war. It was also used in the war against the Mafia where men met to plan crimes. It was certainly used early in the Cold War to prosecute and execute the Julius and Ethel Rosenberg, charged with providing nuclear secrets to the Soviet Union.

Perhaps treason law can cover American citizens who choose to war with foreign enemies against the United States. President Obama has been criticized by civil libertarians for going after American-born Al Qaeda enemies in Yemen, with Drone aircraft. Could he cover this infringement on the defendants' constitutional right to due process by holding a trial in absentia?

There is no perfect way to prosecute such people who mean us harm today. The courts are groping their way and we all have much to think about. If the prosecutors are right, Mahanna is an enemy combatant. Words and ideas can kill.

679 words

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