

Winter 2010

The Expansion of the Criminal Law of the Enemy in the US Legal System.

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THE EXPANSION OF THE CRIMINAL LAW OF THE ENEMY IN THE US LEGAL SYSTEM.

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Objectives of this presentation

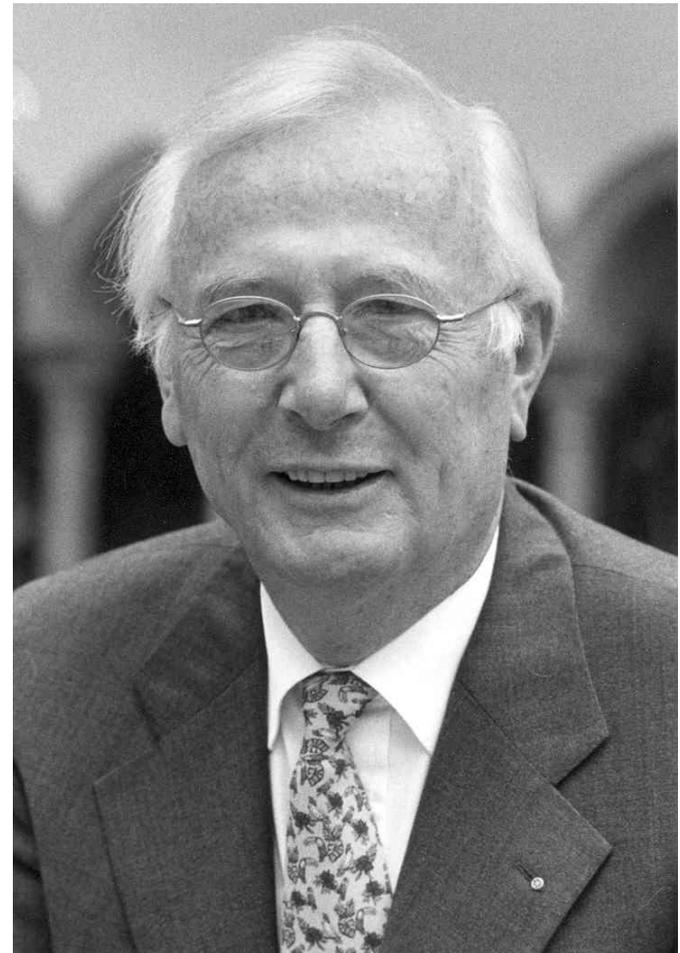
1. Elucidate main principles of the Criminal Law of the Enemy Theory:
2. Explaining how the criminal law of the enemy has been adopted and expanded in the US legal system, and
3. Give a quick glimpse to some comparative law examples on the Criminal Law of the Enemy Theory.

Criminal law and HR

- ❑ Criminal Justice System as known today (with the protection of minimum standards within the process) is the product of milleniums of developement and social struggles.
- ❑ The expansion of the criminal law of the enemy is a movement backwards history.
- ❑ It recovers old perverse investigative and judicial practices.

Criminal Law of the Enemy Theory

- Gunther Jakobs (1985)
- Created the term 'Feindstrafrecht' (translated variously as 'enemy criminal law', 'enemy penology' or 'criminal law of the enemy')
- It is commonly used and accepted by modern criminal theorists



Criminal Law of the Enemy in a Nutshell

Three prong theory.

- Tends to punish prospectively in a bid to prevent future harms;
- Secondly, it imposes disproportionate sanctions in the name of security;
- And thirdly, it departs from conventional procedural protections.

To whom is it applied?

- CLE is aimed to fight potential dangerous individuals that Jakobs broadly identified as “enemies”.
- Enemies, within the criminal justice system, do not receive the same treatment or are granted the same rights as other criminals.
- Discriminative parallel criminal justice system

The Enemy

- Determination of the enemy is a matter of criminal policy...and of law of course.
- Historical, criminal statistics, triggering events.
- Enemy is not the same in Mexico, Italy or Colombia, than the USA or the UK.

Risks

- Collateral damage for LAC?
- Discriminates between two kinds of subjects of criminal law
- Gives a lot of discretion to authorities that may result in fishing expeditions or innocent convictions
- Is it CLE compatible with a democratic system?

- **On the other hand the NS needs may pragmatically justify it.**

Federal legislation

- **Racketeer Influenced and Corrupt Organizations Act** (commonly referred to as **RICO Act** or **RICO**) 1970
- The **USA PATRIOT Act** (commonly known as the "Patriot Act") ...2003
- **United Nations Convention against Transnational Organized Crime (2003, 2005 US acc.)**

Test on RICO

Punishes prospectively in a bid to prevent future harms

Imposes disproportionate sanctions in the name of security

It departs from conventional procedural protections.

Charged any person who belongs to the organized crime and has committed any two of 35 crimes—27 federal crimes and 8 state crimes—within a 10-year period can be charged with racketeering.

Does not punish criminal activity *per se*. Why and what is punished then?

(Imagine if Palermo was enacted by Congress)

\$25,000 and sentenced to 20 years in prison PER racketeering count..

Allows the recovery of treble damages (damages in triple the amount of actual/compensatory damages).

Proportionate? Remember Beccaria...?

Example. Pre-trial restraining order or injunction to temporarily seize a defendant's assets and prevent the transfer of potentially forfeitable property, as well as require the defendant to put up a performance bond.

May affect legal counsel rights (lack of funds to pay one), regular 18 USC does not allow to do it...

Test on USA PATRIOT Act

<p>Punishes prospectively in a bid to prevent future harms</p>	<p>Imposes disproportionate sanctions in the name of security</p>	<p>It departs from conventional procedural protections.</p>
<p>Criminal description</p> <p>...attempting or conspiring to destroy or damage any structure, conveyance, or other real or personal property within the United States;</p> <p><i>Punished action. To conspire Danger action.</i></p>	<p>Penalties for anyone who cannot prove reasonably that they are using a biological agent, toxin or delivery system for these purposes are 10 years imprisonment, a fine or both.</p> <p><i>Reversal burden of proof.</i></p> <p>Unauthorized access and subsequent damage to a protected computer</p>	<p>Intelligence exceptions from limitations on interception and disclosure of wire, oral, and electronic communications (secret agents)</p> <p>Search of voicemail through a search warrant rather than through a title III wiretap order</p> <p>Nat Sec. Letter by the FBI(search telephone, email, and financial records without a court order)</p> <p>Indefinite detention of any alien whom the Attorney General believes may cause a terrorist act</p>

NOTICEABLE EXISTANCE OF TWO CRIMINAL SYSTEMS



U.S. Department of Justice
Federal Bureau of Investigation

In Reply, Please Refer to
File No. NH-43906

New Haven Division
600 State Street
New Haven, Connecticut 06511

May 19, 2005

Mr. Kenneth Sutton
Systems and Telecommunication Manager
Library Connection, Inc.
599 Mathanuck Avenue
Windsor, Connecticut

Dear Mr. Sutton:

Under the authority of Executive Order 12333, dated December 4, 1981, and pursuant to Title 18, United States Code (U.S.C.), Section 2709 (as amended, October 26, 2001), you are hereby directed to provide to the Federal Bureau of Investigation (FBI) any and all subscriber information, billing information and access logs of any person or entity related to the following:

IP Address: 216.47.180.118, Date: 02/15/2005, Time: 16:00 to 16:45 (PM) EST

In accordance with Title 18, U.S.C., Section 2709(b), I certify that the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, and that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States.

You are further advised that Title 18, U.S.C., Section 2709(c), prohibits any officer, employee or agent of yours from disclosing to any person that the FBI has sought or obtained access to information or records under these provisions.

You are requested to provide records responsive to this request personally to a representative of the New Haven field office of the FBI. Electronic versions of the records are requested, if available. Any questions you have regarding this request should be directed only to the New Haven field office. Due to security considerations, you should neither send the records through the mail nor disclose the substance of this request in any telephone conversation or electronic communication.

Your cooperation in this matter is greatly appreciated.

Sincerely,

Michael J. Wolf
Special Agent in Charge



U.S. Department of Justice
Federal Bureau of Investigation

In Reply, Please Refer to
File No.

[Redacted] 2004
President
[Redacted]
Dear [Redacted]

Under the authority of Executive Order 12333, dated December 4, 1981, and pursuant to Title 18, United States Code (U.S.C.), Section 2709 (as amended, October 26, 2001), you are hereby directed to provide the Federal Bureau of Investigation (FBI) the names, addresses, lengths of service and electronic communication transactional records, to include existing transaction/activity logs and all e-mail header information (not to include message content and/or subject fields), for the below-listed email address:

[Redacted]
In accordance with Title 18, U.S.C., Section 2709(b), I certify that the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, and that such an investigation of a United States person is not conducted solely on the basis of activities protected by the First Amendment to the Constitution of the United States.

You are further advised that Title 18, U.S.C., Section 2709(c), prohibits any officer, employee or agent of yours from disclosing to any person that the FBI has sought or obtained access to information or records under these provisions.

You are requested to provide records responsive to this request personally to a representative of the [Redacted] of the FBI. Any questions you have regarding this request should be directed only to the [Redacted]. Due to security considerations, you should neither send the records through the mail nor disclose the substance of this request in any telephone conversation.

Response of the SCOTUS

- Not necessary supports presidential or congressional issues...
- Hamdan
- Boumediene
- In those cases Scotus made clear that c-terrorism policies departed from traditionally recognized procedural rights.
- E.g.. *Habeas corpus* as quintessential remedy
but...

Response of the SCOTUS

- No opinion has been heard (yet) regarding certain provisions of PATRIOT act.
- Outcomes?
- Predictions.
- Issue finally is to find an equilibrium between HR and NS... *quid pro quo*

Mexico

- Yes
- Enemy, different than the US
- Started in 1994 +-
- Limitation of rights from investigation to conviction
- Same definition as Palermo, recently changed though
- Court declared portions of RICO equivalent Act as unconstitutional
- Response? Amend the Constitution!
- **Keep an eye on Anti-Maras Acts in Central America**

Thank you

□ Questions?