



5-1-2012

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Recommended Citation

Mueller, John and Stewart, Mark G. (2012) "Civil Liberties, Fear, and Terrorism," *Notre Dame Journal of International & Comparative Law*: Vol. 2: Iss. 2, Article 5.

Available at: <http://scholarship.law.nd.edu/ndjicl/vol2/iss2/5>

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CIVIL LIBERTIES, FEAR, AND TERRORISM

*John Mueller and Mark G. Stewart**

INTRODUCTION

No defense of civil liberties is likely to be terribly effective as long as people believe there is a threat out there that is dire, even existential.

The risk from terrorism has been massively exaggerated, but that fact has only very rarely been explained or even examined by those who are appalled at the system those exaggerations have spawned. Concerns are raised about prosecutorial misconduct, about the potential entrapment or misidentification of suspects, and about the legality of Guantánamo. Entirely legitimate concerns of course, but ones likely to be ineffective in front of judges anxious to set deterring examples and of juries composed of frightened citizens.

As Figure 1 suggests, there has been little change in the fear factor since the trauma of September 11, 2001. And until the fear of terrorism within the United States is undercut, little progress is likely to be made in seeking to reduce the cost and civil liberties excesses of the still-burgeoning counterterrorism enterprise. There are a number of notable precedents for this condition. An examination of two of these, which follow, may be instructive.

I. WITCHES

Between about 1480 and 1680, tens, or perhaps even hundreds, of thousands of people, the vast majority of them women, were executed in Europe, mostly by being burned at the stake.¹ This took place after they had confessed, generally (but not always) under torture, to such crimes as, in Steven Pinker's enumeration, "eating babies, wrecking ships, destroying crops, flying on broomsticks on the Sabbath, copulating with devils, transforming their demon lovers into cats and dogs, and making ordinary men impotent by convincing them that they had lost their penises."² For example, notes historian Hugh Trevor-Roper, one square in a German town "looked like a little forest, so crowded were the stakes," and during an eight year reign one prince-bishop "burnt 900 persons, including his own nephew, nineteen

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¹ See generally H. R. TREVOR-ROPER, *The European Witch-Craze of the Sixteenth and Seventeenth Centuries*, in *THE EUROPEAN WITCH-CRAZE OF THE SIXTEENTH AND SEVENTEENTH CENTURIES AND OTHER ESSAYS* 90-191 (1969).

² See Steven Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* 137-38 (2011).

Catholic priests, and children of seven who were said to have had intercourse with demons.”³

During this long period, a few people tried to debunk the process and some were tortured and executed themselves because of such heresy.⁴ Their attacks on it were ineffectual because they went after the consequences of the system, not its premise: that witches exist and that they are key elements of an on-going battle on earth between God and the Devil.⁵ As Trevor-Roper puts it, “[m]en revolted against the cruelty of torture, against the implausibility of confessions, [and] against the identification of witches. They did not revolt against the central doctrine of the kingdom of Satan and its war on humanity by means of demons and witches.”⁶

Crucially, Trevor-Roper observes, “[i]f the witch-craze were to be attacked at its centre, not merely doubted at its periphery, it was necessary to challenge the whole conception of the kingdom of Satan.”⁷ The witch-craze, with its colossal human, societal, and material costs, only died out, says Trevor-Roper, when theologians were able to sell a re-evaluation of the premise in which the notion of the “duel in Nature between a Hebrew God and a medieval Devil was replaced by the benevolent despotism of a modern, scientific ‘Deity.’”⁸

II. DOMESTIC COMMUNISTS

In a fascinating book, German literary specialist Alexander Stephan describes the US government’s surveillance of a group of émigré writers during and after World War II. None was found to pose much of a subversive threat, and the surveillance never led to real persecution—indeed, few of the writers noticed they were being watched.⁹ Instead, what impresses Stephan is the essential absurdity of the situation: the “high efficiency and grotesque overkill” as hundreds of agents were paid to intercept and catalogue communications, to endlessly recorded goings and comings, and to sift enterprisingly through trash bins seeking scraps of incriminating information among the debris.¹⁰ For example, as he notes, there is something profoundly ludicrous about the fact that dozens of government employees spent their time in the middle of a world war monitoring pillow talk between Bertolt Brecht and his Danish co-worker, Ruth Berlau, and all, notes Stephan, “at taxpayers’ expense.”¹¹

To justify and to impel such work, the Federal Bureau of Investigation (FBI) and other agencies for decades clearly exaggerated the degree to which

³ See TREVOR-ROPER, *supra* note 1, at 156.

⁴ *Id.* at 156.

⁵ *Id.* at 152.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 178.

⁹ See ALEXANDER STEPHAN, *COMMUNAZIS: FBI SURVEILLANCE OF GERMAN ÉMIGRÉ WRITERS* xii (Jan van Heurck trans., 2000) (1995).

¹⁰ See *id.*

¹¹ See *id.*

domestic Communists presented a threat to the republic. Then-FBI Director J. Edgar Hoover insisted in a 1958 book that the American Communist Party was working “day and night to further the communist plot in America” with “deadly seriousness,” that a “[B]olshevik transmission” was in progress that was “virtually invisible to the non-communist eye, unhampered by time, distance, and legality,” that it was “creating communist puppets throughout the country,” and that it had for “its objective the ultimate seizure of power in America.”¹² Thus impelled, Hoover’s agency spent a prodigious amount of time and public money pursuing the harmless and the nearly so. For example, in 1972, by which time the public and press were paying almost no attention to the issue, the FBI, in full perpetual motion mode, opened 65,000 new files as part of its costly quest to ferret out Communists in the United States.¹³

There seem to have been few, if any, instances in which domestic Communists engaged in anything that could be considered espionage after the Second World War.¹⁴ Furthermore, at no time did any domestic Communist ever commit anything that could be considered violence in support of the cause.¹⁵ Nevertheless, critics of this costly and often fundamentally absurd anti-Communist process, like those for the witch-craze, focused almost entirely on the potential for civil liberties violations. No one, it seems, attacked the premise of the system—that Communists were everywhere and posed a severe threat. That is, at no point during the Cold War did anyone say in public:

Many domestic Communists adhere to a foreign ideology that ultimately has as its goal the destruction of capitalism and democracy and by violence if necessary; however, they do not present much of a danger, are actually quite a pathetic bunch, and couldn't subvert their way out of a wet paper bag. Why are we expending so much time, effort, and treasure over this issue?¹⁶

It is astounding that this plausible, if arguable, point of view seems never to have been publicly expressed by anyone—politician, pundit, professor, editorialist—during the Cold War.

Instead, the fear of domestic Communism and the consequent costly anti-Communist surveillance system it spawned, persisted for decades. The pursuit died out only when international Communism collapsed at the end of the Cold War.

¹² See J. EDGAR HOOVER, *MASTERS OF DECEIT: THE STORY OF COMMUNISM IN AMERICA AND HOW TO FIGHT IT* 81 (1958); see also Joseph McCarthy, Senator “Enemies from Within,” Speech at Wheeling, West Virginia (Feb. 9, 1950).

¹³ MIKE O’CONNOR, *CRISIS, PURSUED BY DISASTER, FOLLOWED CLOSELY BY CATASTROPHE: A MEMOIR OF LIFE ON THE RUN* 278–279 (2007); see also JOHN MUELLER AND MARK G. STEWART, *TERROR, SECURITY, AND MONEY* 188 (2011).

¹⁴ See generally JOHN MUELLER AND MARK G. STEWART, *TERROR, SECURITY, AND MONEY* 187–88 (2011) (arguing that the perception of a communist threat faded into a “well deserved” oblivion due to a dearth of evidence that communists presented a grave danger).

¹⁵ *Id.*

¹⁶ *Id.*

III. TERRORISTS

Something comparable has now happened with the terrorist threat, and key to its dynamic is that Americans apparently continue to remain unimpressed by several inconvenient facts:

1. There have been no true al-Qaeda attacks in the United States since 2001;¹⁷

2. No true al-Qaeda cell (nor scarcely anybody who might even be deemed to have a “connection” to the diabolical group) has been unearthed in the country;¹⁸

3. The homegrown “plotters” who have been apprehended, while perhaps potentially somewhat dangerous at least in a few cases, have mostly been flaky or almost absurdly incompetent;¹⁹

4. Virtually all terrorist violence within the United States has taken place on television²⁰ and the number of homicides committed by Muslim extremists within the United States represents one fiftieth of one percent of the total homicides in the country;²¹

5. The total number of people killed worldwide by al-Qaeda types, maybes, and wannabes outside of war zones since 9/11 stands at some 300 or so a year (smaller than the yearly number of bathtub drownings in the United States alone);²²

6. Unless the terrorists are able somehow to massively increase their capacities (and, if anything, attacks have declined in intensity and sophistication), the likelihood a person in the United States will perish at the hands of a terrorist is about one in 3.5 million per year.²³

Unimpressed, the public has chosen, it appears, to wallow in what philosopher Leif Wenar has labeled a false sense of insecurity.²⁴ Accordingly, the public will presumably continue to demand that its leaders pay due deference to its insecurities and will uncritically approve as civil liberties erode

¹⁷ *Id.* at 189.

¹⁸ See Brian Ross, *Secret FBI Report Questions Al Qaeda Capabilities*, ABC NEWS ONLINE (Mar. 9, 2005), <http://abcnews.go.com/WNT/Investigation/story?id=566425&page=1#.TyoD366ryKw> (last visited Mar. 21, 2012).

¹⁹ See generally JOHN MUELLER (ED.), *TERRORISM SINCE 9/11: THE AMERICAN CASES* (2012), available at <http://psweb.sbs.ohio-state.edu/faculty/jmueller/SINCE.pdf>.

²⁰ See also HERBERT PHILBRICK, *I LED THREE LIVES* (1952). Although FBI informant Herbert Philbrick’s confessional book at no point documents a single instance of communist violence, planned or otherwise, violence became a central focus when his story was transmuted into a popular television series.

²¹ See DAVID SCHANZER, CHARLES KURZMAN, EBRAHIM MOOZA, *ANTI-TERROR LESSONS OF MUSLIM-AMERICANS* 16 (2010).

²² See MUELLER & STEWART, *supra* note 14, at 189.

²³ See *id.*

²⁴ John Mueller, *A False Sense of Insecurity?*, REGULATION, Aug. 2007, at 43.

and huge sums of money are shelled out in a quixotic and often mostly symbolic effort to assuage those insecurities.²⁵

Accordingly, agencies like the FBI, redirecting much of their effort from unglamorous enterprises like dealing with organized crime and white collar embezzlement, have kept their primary focus on the terrorist threat.²⁶ Like their predecessors during the quests to quash witchery and domestic Communism, they have dutifully and laboriously assembled masses of intelligence data and have pursued an endless array of leads. Almost all of this activity has led nowhere, but it will continue because, of course, no one wants to be the one whose neglect somehow leads to “another 9/11”—or, as the assistant chief for the FBI’s National Threat Center puts it, it’s the lead “you don’t take seriously that becomes the 9/11.”²⁷

Despite the importance of responsible policies which seek to communicate risk, and despite the costs of irresponsible fear-mongering, just about the *only* official who has *ever* openly put the threat presented by terrorism in some sort of context is New York’s Mayor Michael Bloomberg who, in 2007, pointed out that people should “get a life” and that they have a greater chance of being hit by lightning than of being struck by terrorism²⁸—an observation that is a bit off the mark, but roughly sound.

Things are not much better in the media. For example, on the December 28, 2009, PBS NewsHour, Gwen Ifill, in introducing a segment on the then-recent underwear bomber attempt to down an airliner, happened to note that the number of terrorist incidents on American airliners over the previous decade was 1 for every 16.5 million flights.²⁹ This interesting bit of information, however, was never brought up again either by Ifill or by the three

²⁵ See DANA PRIEST & WILLIAM M. ARKIN, *TOP SECRET AMERICA: THE RISE OF THE NEW AMERICAN SECURITY STATE* 8 (2011) (arguing that American taxpayers “have shelled out hundreds billions of dollars to turn the machine of government over to defeating terrorism without ever really questioning what they were getting for their money. And even if they did want an answer to that question, they would not be given one, both because those same officials have decided it would gravely harm national security to share such classified information—and because the officials themselves don’t actually know”).

²⁶ See GARRETT M. GRAFF, *THE THREAT MATRIX: THE FBI AT WAR IN THE AGE OF TERROR* (2011).

²⁷ See Donna Leinwand, *Psst, Information Tips on the Rise from Public to FBI*, USA TODAY (Aug. 15, 2008), http://www.usatoday.com/news/washington/2008-08-14-FBI-tips_N.htm (last visited Mar. 21, 2012). For a discussion of New York’s “If You See Something, Say Something” campaign that has generated tens of thousands of tips, none of which has led to a terrorism arrest, see MUELLER & STEWART, *supra* note 14, at 162.

²⁸ See Sewell Chan, *Buzz over Mayor’s ‘Get a Life’ Remark*, N.Y. TIMES (June 6, 2007), <http://empirezone.blogs.nytimes.com/2007/06/06/buzz-over-mayors-get-a-life-remark/> (last visited Mar. 21, 2012).

²⁹ See Gwen Ifill, *Christmas Day Bomb Scare Prompts Review of Airport Security*, PBS NEWSHOUR (Dec. 28, 2009), http://www.pbs.org/newshour/bb/terrorism/july-dec09/airport1_12-28.html (last visited Mar. 21, 2012).

terrorism experts she was interviewing.³⁰ Nor, of course, did anyone think of suggesting that, at that rate, maybe the airlines are safe enough.

Or put more broadly, the continual question, “are we safer?” is never answered with: “at present rates, your chances of being killed by a terrorist are about 1 in 3.5 million per year; how much safer do you want to be?”

The risk from terrorism, then, like that from witches and from domestic Communists, has been massively exaggerated, stoked during the George W. Bush administration and still promoted under Barack Obama. In 2008, then Department of Homeland Security Secretary Michael Chertoff uttered the bizarre, if exquisitely nuanced, observation to a couple of reporters that the threat from terrorism is “a significant existential” one.³¹ And at a 2011 press conference, current Homeland Security Chief Janet Napolitano opaquely, if creatively, announced that, though the likelihood of a large-scale organized attack is diminished, the continued danger of a small-scale disorganized attack means that the terrorist threat is higher than at any time since 9/11.³² Neither contention prompted skeptical query from rapt auditors.

In result, the costs of homeland security spending, like those entailed in the hunts for witches and domestic Communists, have become massive. Tallying the expenditures on domestic homeland security and adding in opportunity costs—but leaving out related overseas costs such as those entailed by the terrorism-induced wars in Iraq and Afghanistan—the increase in expenditures on domestic homeland security over the decade exceeds one trillion dollars.³³ This has not been enough to move the country into bankruptcy—Osama bin Laden’s stated goal after 9/11—but it clearly adds up to real money, even by Washington standards. As Alexander Stephan might amazedly suggest, taxpayers really ought to take note.³⁴

Standard risk-analytic procedures can be applied to the increases in domestic homeland security expenditures that have taken place since 9/11. If that is done, it would be found that, in order for them to be deemed cost-effective, they would have had to deter, prevent, foil, or protect against 333 otherwise successful car bomb attacks (ones likely quite a bit larger than the one attempted on Times Square in 2010) per year, or about one a day. And it appears that the protection of a standard office-type building would be cost-effective only if the likelihood of a sizable terrorist attack on the building is a thousand times greater than it is at present. Something similar holds for the protection of bridges. On the other hand, hardening cockpit doors on airliners

³⁰ See generally *id.* (exploring the underwear bomber attempt and portraying a high level of threat).

³¹ See Shane Harris & Stuart Taylor, *Homeland Security Chief Looks Back, and Forward*, GOV’T EXECUTIVE (Mar. 17, 2008), <http://www.govexec.com/defense/2008/03/homeland-security-chief-looks-back-and-forward/26507/> (last visited Mar. 21, 2012).

³² See Richard A. Serrano, *U.S. Faces Heightened Threat Level*, L.A. TIMES (Feb. 10, 2011). For commentary, see Heather Mac Donald, *The Ever-Renewing Terror Threat* (Feb. 13, 2011), available at secularright.org.

³³ See MUELLER & STEWART, *supra* note 22, at 1–3.

³⁴ See *id.* at 21.

may be cost-effective, though the provision for air marshals on the planes is decidedly not.³⁵

As with the hunts for witches and Communists, the chief challenge to the domestic counterterrorism system has been at what Trevor-Roper calls the “periphery.”³⁶ The point is not that there is nothing to find, but that civil liberties and cost excesses can only be reduced if the internalized hysteria about terrorism is substantially dampened. If people have come to believe that the chance every year of being killed by a terrorist is dangerously high (rather than one in 3.5 million), they are unlikely to be moved by concerns about civil liberty infringements or about expenditures, no matter how excessive, that are supposedly designed “to keep us safe.”

To undo, or even modify, the security system that has burgeoned over the last ten years, one must attack not simply the costs and consequences of the system, but the underlying premise that furnishes its essential engine.

³⁵ *See id.*

³⁶ *See* TREVOR-ROPER, *supra* note 1.