

**THE GHOST IN THE GLOBAL WAR ON TERROR:  
CRITICAL PERSPECTIVES AND DANGEROUS  
IMPLICATIONS FOR NATIONAL SECURITY  
AND THE LAW**

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INTRODUCTION

In this Article, I set out to discuss the dangerous implications of the Global War on Terror (GWOT) and, more generally, the attempts of the United States government to address notions of terrorism and its effect on the safety of the United States and world citizens. I am primarily concerned with engaging a poststructuralist critique of the GWOT to strengthen legal discussions of terrorism and national security policy. While many in the legal academy have focused on particular issues relating to terrorism, I will engage in a macro-level analysis of the way the legal academy conceptualizes terrorism<sup>1</sup>—not how it discusses acts of terrorism. While I am concerned with the legal basis for the GWOT, I am more concerned with how our idea of terrorism affects our ability to address terrorism in our legal and political lives and how these decisions affect our national and personal security. Using the concept of the ghost in the machine<sup>2</sup> to help further the poststructuralist criticism, I will demonstrate the utility of applying poststructural and postcolonial criticisms to terrorism and the GWOT. In conclusion, I argue that the GWOT has far-reaching implications that threaten to debase our legal system and our civil rights regime. The goal of this Article is to provide a poststructural and postcolonial legal framework through which scholars, students, and practitioners may analyze their own work on terrorism.

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1. Here, I mean to indicate that terrorism has an absent referent, i.e., the *idea* of terrorism has been disembodied from the *act* of terrorism. See *infra* Part III.

2. See *infra* Part II.

## I. THE LEGAL BASIS FOR THE GLOBAL WAR ON TERROR

In the wake of the bombing of the Alfred P. Murrah Federal Building, an act of domestic terrorism in 1995, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).<sup>3</sup> Most remember the bombing as the United States' first awakening to the threat of terrorism.<sup>4</sup> It showed Americans that terrorism is not simply an international concern but also a domestic one. The two can be discussed together, as both are motivated by the politics of fear, but this Article primarily addresses international terrorism. Let us remember that terrorism has not been a primary U.S. foreign policy concern. Despite its long history,<sup>5</sup> it has only become a pressing U.S. concern since roughly the mid-1990s. Although terrorism has occurred throughout U.S. history in the form of pirate attacks and the bombing of U.S. barracks in Beirut, serious policy consideration did not begin until some twelve years after the Beirut bombings. Without delving into the intricacies of legislation, I seek to outline the world in which this legal apparatus has positioned the United States.<sup>6</sup> The AEDPA limited federal judges' ability to remedy unjust convictions and, more broadly, affected habeas corpus law.<sup>7</sup> It is a law that arguably began the modern legal apparatus of counter-

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3. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 18, 22, 28, and 42 U.S.C.).

4. Igor Primoratz describes that there was not much philosophical discussion of terrorism until September 11. See Igor Primoratz, *A Philosopher Looks at Contemporary Terrorism*, 29 CARDOZO L. REV. 33, 33 (2007) (observing that "[b]efore the terrorist attacks in the United States on September 11, 2001, the topic of terrorism did not loom large in philosophical discussion").

5. See JOSEPH T. MCCANN, *TERRORISM ON AMERICAN SOIL: A CONCISE HISTORY OF PLOTS AND PERPETRATORS FROM THE FAMOUS TO THE FORGOTTEN* 290 (2006) ("[W]hile terrorism is not a new phenomenon, the threat has intensified in recent years and attacks have become increasingly deadly.").

6. Many scholars have already discussed this legislation in profound and captivating detail. See, e.g., Gerald G. Ashdown, *The Blueing of America: The Bridge Between the War on Drugs and the War on Terrorism*, 67 U. PITT. L. REV. 753, 779-802 (2006).

7. See Justice Sandra Day O'Connor, *Balancing Security, Democracy, and Human Rights in an Age of Terrorism*, Speech at the Harold Leventhal Mem'l Lecture Series (Nov. 12, 2007), in 47 COLUM. J. TRANSNAT'L L. 6 (2008) (discussing Abraham Lincoln's suspension of habeas corpus). For an analysis of habeas corpus law and the GWOT, see Aaron L. Jackson, *Habeas Corpus in the Global War on Terror: An American Drama*, 65 A.F. L. REV. 263 (2010); Jared Perkins, Note, *Habeas Corpus in the War Against Terrorism: Hamdi v. Rumsfeld and Citizen Enemy Combatants*, 19 BYUJ. PUB. L. 437 (2005).

terrorism. This is where the philosophical inquiry described below<sup>8</sup> breaks with the striating space of current terrorism discourse.<sup>9</sup>

The next major piece of legislation designed to confront terrorism was the Authorization for Use of Military Force (AUMF),<sup>10</sup> which allowed the President to militarily engage those responsible for attacks on the homeland. Passage of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act)<sup>11</sup> followed shortly after the September 11, 2001, attacks on New York City, Washington, D.C., and Pennsylvania. This legislation substantially increased the authority of the government in surveillance,<sup>12</sup> border security,<sup>13</sup> terrorism policing,<sup>14</sup> money laundering policing,<sup>15</sup> and intelligence gathering.<sup>16</sup> Simply put, “[s]ince the tragic events of September 11, 2001, the nation has fought a war against terrorism.”<sup>17</sup> President George W. Bush’s rhetoric in the days immediately following the attack communicated an important image of struggle against a socio-

8. See *infra* Parts II-III.

9. Here, I have in mind Deleuze and Guattari’s notions of smooth and striated space. GILLES DELEUZE & FÉLIX GUATTARI, *A THOUSAND PLATEAUS: CAPITALISM AND SCHIZOPHRENIA* 500 (Brian Massumi trans. 1987).

10. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). See generally Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2048 (2005) (discussing the AUMF and its importance to scholarly discussions of the war on terrorism).

11. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

12. See *EFF Analysis of the Provisions of the USA PATRIOT Act that Relate to Online Activities*, ELEC. FRONTIER FOUND., (Oct. 27, 2003) [http://w2.eff.org/Privacy/Surveillance/Terrorism/20011031\\_eff\\_usa\\_patriot\\_analysis.php](http://w2.eff.org/Privacy/Surveillance/Terrorism/20011031_eff_usa_patriot_analysis.php) [hereinafter *EFF Analysis*]; *PATRIOT Act*, ELEC. FRONTIER FOUND., <http://www.eff.org/issues/patriot-act> (last visited Apr. 16, 2011) (“The USA PATRIOT Act broadly expands law enforcement’s surveillance and investigative powers and represents one of the most significant threats to civil liberties, privacy and democratic traditions in U.S. history.”).

13. See F. James Sensenbrenner, Jr., *INS Restructure Would Help Strengthen Our Nation*, MILWAUKEE J. SENTINEL, May 19, 2002, at 1J; Dave Weldon, *INS Must Prevent the Admission of Terrorists*, THE HILL, Apr. 24, 2002, at 44 (discussing preventing terrorists from crossing U.S. boundaries).

14. See Thomas A. Marino, *Patriot Act Balances Security and Civil Rights*, PATRIOT NEWS CO., May 29, 2005, at F3; Paul Perez, *In Defense of the PATRIOT Act*, TAMPA TRIB., Feb. 5, 2006, at 1; Michael J. Sullivan, *Security Means Keeping Patriot Act*, HERALD, Apr. 14, 2005, at 35.

15. See CHARLES DOYLE, CONG. RESEARCH SERV., RL 31377, *THE USA PATRIOT ACT: A LEGAL ANALYSIS* 24-48 (2002).

16. See *EFF Analysis*, *supra* note 12.

17. Joshua Azriel, *Five Years After the 9/11 Terrorist Attacks: Are New Sedition Laws Needed To Capture Suspected Terrorists in the United States?*, 6 CONN. PUB. INT. L.J. 1, 2 (2006).

political phenomenon<sup>18</sup> that, while historically rooted, had not been a significant agenda item in United States political history. In doing so, Bush created a new world.

This fight against terrorism has problematized our modern world because it positioned us in a complex battle against an unknown. The breakdown of traditional dichotomies,<sup>19</sup> a welcome change in legal and political thought, has not resulted in a change in dichotomous thinking. Seemingly, it is us versus them, white versus brown, the United States versus the rest of the world.<sup>20</sup> This dichotomous thinking forces an oversimplification of relations and demands diametrical opposition, instead of careful analysis of the multiple variables of international relations.

## II. THE GHOST IN THE MACHINE

The most significant impact on U.S. national security since the September 11, 2001, attacks has been the battle against terror's ghost. Here I have in mind Gilbert Ryle's famous skepticism with respect to the mind/body dualism of René Descartes.<sup>21</sup> Ryle argued against the existence of a separate soul that interacts with the biological brain; he labeled this concept the "ghost in the machine."<sup>22</sup> The ghost I see functions quite differently, although Ryle's description surely informs my criticism of national security law. This ghost resides in the fight against terrorism, apart from and within it at once. It is apart from the fight against terrorism in that it has a life of its own apart from anything that could be labeled terrorism. It is terrorism within insofar as it informs the daily struggle against terrorism.

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18. See Mary Ellen O'Connell, *The Legal Case Against the Global War on Terror*, 36 CASE W. RES. J. INT'L L. 349, 349 (2004).

19. Rosa Ehrenreich Brooks describes this breakdown of traditional dichotomies: "The changing nature of conflict and threat—in particular the rise of global terrorism—has eroded the customary boundaries that separate war and peace, civilians and combatants, lawful and unlawful belligerents, national security issues and domestic issues." Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 744 (2004).

20. See Gareth Evans, *The U.S. Versus the World? How American Power Seems to the Rest of Us*, FLETCHER F. ON WORLD AFF., Summer/Fall 2003, at 99, 109 ("I think there is a message in all of this for the Europeans, and Canadians, and Japanese, and others, like Australians, who are anxious about a world in which it does seem like it's the U.S. versus The Rest.").

21. GILBERT RYLE, *THE CONCEPT OF MIND* 48–51 (1949) (describing the operations of the ghost in the machine in cognitive philosophy). Although Ryle was specifically concerned with René Descartes, his analysis carries broader implications.

22. *Id.*

Terrorism creates a disconnect from traditional geopolitics or military thinking. It differs from the actions from which laws are generally meant to protect against, while simultaneously influencing diverse fields. This is not to say that the United States should not rightfully concern itself with non-state actors or threats to the homeland, which represent clear dangers to U.S. national security. However, the all-encompassing fear of terrorism has morphed itself into a battle against the unlocated specter of terrorism's reality.<sup>23</sup> In this regard, the United States is battling ghosts.

The aspect of absurdity in this battle is not surprising. Many modern critical perspectives on philosophy have found it impossible to reduce complex social phenomena to reason-laden formulas.<sup>24</sup> The idea of reducing terrorism to a simple definition is further complicated when, as Jacques Derrida describes, "every terrorist in the world claims to be responding in self-defense to a prior terrorism on the part of the state, one that simply went by other names and covered itself with all sorts of more or less credible justifications."<sup>25</sup> Yet, it is not possible to confine the question of definitional success solely to critical perspectives. The law also struggles to define<sup>26</sup> terrorism, encountering difficulty in synthesizing conflicting definitions.<sup>27</sup> Terrorism law does not have the constraints of patent law or tax law, which although complex, are not as subject to the terse battle of definitional adequacy in defining problems and excluding non-germane legal considerations.<sup>28</sup> Lack of definitional certainty also makes prosecuting terrorists difficult, as the procedures for a criminal defendant differ from those required for a military adversary.<sup>29</sup>

23. See IAN S. LUSTICK, *TRAPPED IN THE WAR ON TERROR* ix (2006).

24. See Michel Rosenfeld, *Derrida's Ethical Turn and America: Looking Back from the Crossroads of Global Terrorism and the Enlightenment*, 27 *CARDOZO L. REV.* 815, 821 (2005).

25. GIOVANNA BORRADORI, *PHILOSOPHY IN A TIME OF TERROR: DIALOGUES WITH JURGEN HABERMAS AND JACQUES DERRIDA* 103 (2003).

26. THE CONSTITUTION PROJECT, *A CRITIQUE OF "NATIONAL SECURITY COURTS"* 2 (2008). See generally Cyrille Begorre-Bret, *The Definition of Terrorism and the Challenge of Relativism*, 27 *CARDOZO L. REV.* 1987 (2006) (discussing the challenges of defining terrorism).

27. See generally Upendra D. Acharya, *War on Terror or Terror Wars: The Problem in Defining Terrorism*, 37 *DENV. J. INT'L L. & POL'Y* 653 (2009) (analyzing the definitional problems relating to terrorism).

28. *Id.* I do recognize these areas of law are often technical and do often contain battles over wording, but it seems that defining a taxpayer or an invention is an easier exercise than defining a terrorist. While I intend for this comparison to be serious, I also hope that it is perceived with some levity.

29. Benjamin J. Priester, *Who Is a "Terrorist"? Drawing the Line Between Criminal Defendants and Military Enemies*, 2008 *UTAH L. REV.* 1255, 1255-56 (2008).

This inability to define terrorism makes it difficult to engage terrorism constructively by forcing us to battle an ephemeral specter. Without a firm base upon which to build a legal regime to address non-state actors that engage in terrorism, law is bound to fail.

Defining terrorism (and its extrapolations) is complicated because of its nature as a supercharged political act.<sup>30</sup> This is more than the notion that every rhetorical act is political. To define something as terrorism is to politically assign values, and it results in constructing the terrorist as Other. Defining terrorism is a political act that demands the oppressive politics of Otherization.

Because the law thrives on definitions and on knowing precisely what something is and is not, the abundance of definitions of terrorism complicates rather than complements dialogue.<sup>31</sup> From the birth of the “war on terror” – first spoken into existence by President George W. Bush on September 20, 2001<sup>32</sup> – the United States has had immense difficulty grappling with the precise parameters of terror and what exactly a war against it entailed. The 2002 National Security Strategy (NSS) defined the enemy as terrorism, as both a set of political/paramilitary exercises and a loose ideological paradigm.<sup>33</sup> Fighting ideas on the battlefield is a difficult task; it is compounded by a disembodied enemy.

The 2006 NSS did not do much to rectify the matter when it declared “militant Islamic radicalism”<sup>34</sup> the enemy. This definition limits terrorism to an expression of a particular form of religiosity. Further complicating national security policy post-September 11 is the conflation of Muslims with terrorists and Islam with terrorism. All Muslims are not the same<sup>35</sup> (nor are they Arab for that matter).<sup>36</sup> While it seems almost comical to make this observation, it is a neces-

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30. See Sami Zeidan, *Desperately Seeking Definition: The International Community's Quest for Identifying the Specter of Terrorism*, 36 CORNELL INT'L L.J. 491, 491 (2004) (“The difficulty of defining terrorism lies in the risk it entails of taking positions.”).

31. See generally Cyrille Begorre-Bret, *The Definition of Terrorism and the Challenge of Relativism*, 27 CARDOZO L. REV. 1987 (2006) (discussing the abundant definitions for terrorism).

32. See Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347 (Sept. 20, 2001).

33. WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 5 (2002), available at <http://osdhistory.defense.gov/docs/nss2002.pdf>.

34. WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 36 (2006), available at <http://osdhistory.defense.gov/docs/nss2006.pdf>.

35. ALAN RICHARDS, SOCIO-ECONOMIC ROOTS OF RADICALISM? TOWARDS EXPLAINING THE APPEAL OF ISLAMIC RADICALS 2–4 (July 2003).

36. Adrien Katherine Wing, *Civil Rights in the Post 911 World: Critical Race Praxis, Coalition Building, and the War on Terrorism*, 63 LA. L. REV. 717, 722–23 (2003).

sary clarification. The terms used in law, politics, and international relations carry with them important connotative baggage, and we risk straying into dangerous ground if we stand idly by as words are deployed in a disingenuous fashion.

Viewed as described by the NSS, the United States is engaged in a war against an idea as opposed to a state or people. This type of war is not new but has not been declared in very recent history. Lyndon Baines Johnson's War on Poverty<sup>37</sup> and Richard Milhous Nixon's War on Drugs<sup>38</sup> were both wars against ideas. These occurred against the backdrop of the Cold War, which presented an exciting tussle against the specter of communism.<sup>39</sup> Those efforts have been met by too much criticism to recount completely in any essay or article. To fight a war against an idea is a difficult policy to maintain and execute effectively. The GWOT is wrought with more difficulty because it lacks the geographical linkage that the War on Drugs, the War on Poverty (both anchored in the United States), and the fight against communism (directed against the Soviet Union) possessed. To be sure, one might consider the GWOT a fight against state-sponsored terror, but if this idea is true, then why have we not seen extensive military activity in Saudi Arabia?<sup>40</sup>

The GWOT is a battle against abstraction. It knows neither its objectives nor its enemy. It cannot be quantified in terms of enemies defeated or captured. François Debrix notes:

The war on terror, in its many inceptions (against al-Qaeda, against the Taliban, against Saddam Hussein, against Sunni insurgents in Iraq), is a violent rejection of the unthinkable and the intolerable. It is a revulsion against something (which the USA calls terror or evil) that does not make sense, that was/is still horrifying, that allegedly comes from elsewhere (although it was and may still be within us). It is also a revulsion that cannot be identified as a traditional object of geopolitics (a network, fleeting enemies whose leaders may or may not be dead, insurgent groups with multiple affiliations, masters of terror, a religion, a whole civilisation

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37. See generally FRANK STRICKER, *WHY AMERICA LOST THE WAR ON POVERTY—AND HOW TO WIN IT* (2007) (analyzing the War on Poverty from a sociohistorical perspective).

38. TONY PAYAN, *THE THREE U.S.–MEXICO BORDER WARS* 23 (2006).

39. See generally MELVYN P. LEFFLER, *THE SPECTER OF COMMUNISM: THE UNITED STATES AND THE ORIGINS OF THE COLD WAR* (1994) (discussing the ideological roots of the Cold War).

40. Ted Galen Carpenter, *Terrorist Sponsors: Saudi Arabia, Pakistan, China*, CATO INSTITUTE (Nov. 16, 2001), [http://www.cato.org/pub\\_display.php?pub\\_id=3841](http://www.cato.org/pub_display.php?pub_id=3841).

perhaps), and that is nonetheless necessary for America to establish itself.<sup>41</sup>

As such, the GWOT is decidedly outside the realm of traditional geopolitics. This makes it difficult for actors practicing traditional geopolitics to engage the mission effectively. A psychological dimension is also imputed, as it is unclear what, or whom, we are fighting. This plays out on several levels: (1) the impact of the tragedies terrorism inflicts,<sup>42</sup> (2) the psychological impact of fear,<sup>43</sup> and (3) the intellectual justification for a war against an enemy that cannot be located.<sup>44</sup> The fact that the United States remains unable to spot the evil specter, but nonetheless continues to fear it, shows that the driving revulsion against the idea of terrorism has subsumed rational thought.

The fact that the GWOT lacks not only a clear enemy but also a specific geographic location necessitates a war that consumes all resources and all locations to achieve its objectives. Without some limiting terrain (literally a place in which militaries can engage an enemy), there is no ability to cordon off the parameters of war. This lack of geographical locus for the current conflict<sup>45</sup> has caused a political paralysis of sorts. Without a physical space to challenge the GWOT, the United States risks falling into the de-territorialized space against which it is fighting. The political discourse needs a physical space, whether in a country, a classroom, or the halls of Congress. This de-territorialization renders people unable to politically engage their world.

What remains for the United States is a war that risks floating away from policy towards fantasy. In this war against terrorism, we become constantly immersed in terror. This very much stems from our inability to see the ghost and to engage in substantive policy with definitions, parameters, and certainty that resist at least elementary scrutiny. As David Fraser notes, "the primary goal of ter-

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41. François Debrix, *Discourses of War, Geographies of Abjection: Reading Contemporary American Ideologies of Terror*, 26 *THIRD WORLD Q.* 1157, 1159 (2005) (internal quotation marks omitted).

42. Ahmed S. Hashim, *The World According to Usama Bin Laden*, *NAVAL WAR C. REV.*, Autumn 2001, at 11, 11-12.

43. *Id.*

44. See Laurie R. Blank, *Where Is the Battlefield in the "War on Terror"? The Need for a Workable Framework*, *JURIST* (Dec. 1, 2010), <http://jurist.org/forum/2010/12/where-is-the-battlefield-in-the-war-on-terror-the-need-for-a-workable-framework.php>.

45. See Stuart Elden, *Terror and Territory*, 39 *ANTIPODE* 821, 821-22 (2007).

rorism is to terrorize, and people are terrorized when their base of meaning, their hermeneutic vision of the world, is upset, deconstructed, and put into question."<sup>46</sup> We live in perpetual terror while we desperately seek to fill the void left by terrorism—the void of the absence of meaning. Terrorism is unmoored from understanding, and the tension between practice and thought creates a void where terror finds a welcome port. The ghosts are ever present and our fear ever increasing. Terror has taken hold of us.<sup>47</sup> The result is our destruction<sup>48</sup> at the hands of fear and irrational hatred of the unknown.

We are in danger of this transformation as we progress from fighting a war with objectives to being consumed by the activity we claim to abhor.<sup>49</sup> Our national security strategy makes us less secure as it becomes indistinguishable from the very concept it sought to obliterate.<sup>50</sup> We are then the object of our hatred and the very terror we try to prevent.

The true danger of an undefined and ill-conceived war is that we become victims. National security is not the only area of sociopolitical significance where this phenomenon occurs. For example, those who fear authoritarian government can become so intense in their struggle that it becomes authoritarian, and they become victims of authoritarianism just as they seek to resist it. Divisive environmental issues, gun control, and abortion see similar processes where the evils of the opposing side become the characteristics of those arguing. For example, opposition to a government that plays a large role in a number of issue areas may at first start off as a call to reduce the size of government. After an initial push to shrink government, proponents may then feel the need to institute their reforms with such fervor that the control they exercise becomes more absolute. The quest to shrink government may involve creating an even larger apparatus to implement this shrinkage. Often

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46. David Fraser, *If I Had a Rocket Launcher: Critical Legal Studies as Moral Terrorism*, 41 *HASTINGS L.J.* 777, 794 (1990).

47. See Debrix, *supra* note 41, at 1157–58.

48. See generally ARTHUR KOESTLER, *THE GHOST IN THE MACHINE* (1967) (describing the dangers of the ghost to our well-being).

49. See Nadine Strossen, *Freedom and Fear Post-9/11: Are We Again Fearing Witches and Burning Women?*, 31 *NOVA L. REV.* 279, 282 (2007) (describing the danger of the war on terror).

50. See Todd Landman, *Imminence and Proportionality: The U.S. and U.K. Responses to Global Terrorism*, 38 *CAL. W. INT'L L.J.* 75, 77 (2008).

movements against something, if they succeed, fill the void with some equally problematic apparatus.

The politics of terror become the politics of war.<sup>51</sup> Because there is no way to combat terror, no place to find it, and no way to end it, we must root it out, and the only way to do so is violently. The logic of traditional geopolitics has failed. At this point, other outcomes have become impossible. The fantasy becomes the new focus of policy. This policy moves us further away from national security and closer toward national insecurity. Debrix notes:

Deeply ensconced in this costly condition of abjection, the USA's search for meaning since 9/11 has been narrowed down and impoverished. Kaplan, Hanson, Ledeen, and those in US foreign policy and geopolitical circles who agree with their views, have reduced the USA's quest for meaning to a desire (construed as the desire of the entire nation) always to remain one with the terror and war. Short of any visible and viable alternative, the only practical option offered by these masters of the abject is for the USA to continue to expand its search for more destruction and violence. War and terror, then, have become the finality, the only possible outcome.<sup>52</sup>

This abjection is a condition that is both within and beyond the individual subject.<sup>53</sup> The space of abjection is that position between the subject of the terrorist/freedom fighter/dissident and the idea of terrorism. Abjection is a search for meaning where meaning seems unthinkable.<sup>54</sup> This search is great in the discussion of terrorism, and in the end, it is what powers terrorism. It is rejection of the self while establishing the self. In this untenable position, fear is replicated along the borderlines of identity so that the quest against terror instills the fundamental terror it opposes.<sup>55</sup> It is in this abjection that we are doomed to annihilation in our quest for meaning.<sup>56</sup> We are drawn out of ourselves, and thus, we reinforce the fantasy.

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51. See Debrix, *supra* note 41, at 1170.

52. *Id.*

53. *Id.* at 1169.

54. *Id.*

55. See *id.*

56. See *id.*

Terrorism has come to describe an unknown entity divorced from the actual actors of terror.<sup>57</sup> It is, therefore, difficult to know who commits terror. Is it militia groups inside U.S. borders? Is it Arabs, Muslims, radical Islamists? Is it people of a certain religion, nationality, race, or ethnicity? The haze of ahistorical abstractions blinds us from pursuing rational ends.

While, now, it seems clear that the abuses of power imagined by the GWOT's harshest critics did not exactly come to fruition,<sup>58</sup> the patriotism brought about by the events of September 11 is decidedly unchecked. It has produced magnets on cars, flags where no flag existed, and a hatred of all that might share something in common with terrorism's ghost. The fight against terrorism has become an industry, both in the sense of an expansion of the military-industrial complex and the creation of an expanded industry of patriotism. However, this unrestrained, ill-defined, blind patriotism looks awfully like terrorism's ghost and has rendered many incapable of criticism.<sup>59</sup> It has become nationalistic,<sup>60</sup> no longer a defensive position to foster acceptance and appreciation of one's own country. This sort of patriotism is violently directed at the Other, designed to attack another people or state, not defend one's own pride in country. This is the re-creation of the United States as that within a security perimeter, defined by what it keeps out.<sup>61</sup> Patriotism is thus predominately concerned with creating barriers and firmly defending them. Patriotism is about exceptionalism. To be patriotic about the United States or any country is to be suspicious of anything not associated with that country. Those foreign ideas or people are threats to the status of U.S. exceptionalism. This is not the foundation of

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57. I am relying on Carol J. Adams's notion of the absent referent, which, although articulated in terms of vegetarianism, is applicable to broad linguistic analysis. Adams describes that the "absent referent" is that which separates the meat eater from the animal and animal from the end product. The function of the absent referent is to keep our "meat" separated from any idea that she or he was once an animal. To keep the "moo" or "cluck" or "baa" away from the meat, to keep something from being seen as having been someone. CAROL J. ADAMS, *THE SEXUAL POLITICS OF MEAT: A FEMINIST-VEGETARIAN CRITICAL THEORY* 40 (1991).

58. See Paul Rosenzweig, *Civil Liberty and the Response to Terrorism*, 42 DUQ. L. REV. 663, 665 (2004).

59. See Robert T. Schatz et al., *On the Varieties of National Attachment: Blind Versus Constructive Patriotism*, 20 POL. PSYCHOL. 151, 153 (1999).

60. See Seymour Feshbach, *Attachment Processes in Adult Political Ideology: Patriotism and Nationalism*, in *INTERSECTIONS WITH ATTACHMENT* 207 (Jacob Gewirtz & William Kurtines eds. 1991) (discussing blind patriotism and its shift toward nationalism).

61. Jennifer Hyndman, *Beyond Either/Or: A Feminist Analysis of September 11th*, 2 ACME: AN INT'L E-J. FOR CRITICAL GEOGRAPHIES 1, 2 (2003), [www.acme-journal.org/vol2/Hyndman.pdf](http://www.acme-journal.org/vol2/Hyndman.pdf).

well-thought-out policy but is a building block of terrorism. Fanaticism, anger, distrust, and contempt are the characteristics of terrorism. We now see these characteristics in our responses to terror.

### III. POSTSTRUCTURALIST AND POSTCOLONIAL CRITICISMS OF NATIONAL SECURITY

National security policy has become a force of dominance to crush dissent<sup>62</sup> and chill legitimate debate. Dissent has become synonymous with attack on the United States' liberal democratic tradition.<sup>63</sup> Dissent can, after all, be very threatening to a country's sense of stability and a ruler's dominance. National security entails a sense of stability, a need to keep the power structure strong, and support of the existing power apparatus. To dissent is to challenge all of this.

The rise of terrorist activity indicates that the realist perception on international law and relations is now fundamentally flawed.<sup>64</sup> International law must now appreciate the impact that forces beyond or apart from states may have on legal responses.<sup>65</sup> Intuitively, many in the United States already realized that issues such as global warming,<sup>66</sup> piracy,<sup>67</sup> etc., were extraterritorial in nature, but these do not pose the constant, tangible threat that terrorism's specter now poses. National security law faces a difficult challenge in adapting to a legal regime in which non-state actors and extraterritorial problems have become more the norm than ever before.

Postcolonial criticisms, which at their root are closely related to poststructuralist criticisms of national security, may also help illuminate the discussion. Postcolonial analysis seeks to demonstrate that all people have the same rights,<sup>68</sup> deserve the same privileges, and despite complex historical realities, should be able to live fulfill-

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62. See Makau Mutua, *Terrorism and Human Rights: Power, Culture, and Subordination*, 8 BUFF. HUM. RTS. L. REV. 1, 10 (2002).

63. See WHITE HOUSE, *supra* note 34, at 12 (stating that any government that supports or harbors terrorists is an enemy of the United States).

64. See Phillip C. Cerny, *Terrorism and the New Security Dilemma*, NAVAL WAR C. REV., Winter 2005, 11, 12.

65. *Id.*

66. See STRATEGIC STUDIES INST., *GLOBAL CLIMATE CHANGE: NATIONAL SECURITY IMPLICATIONS* 7-10 (Carolyn Pumphrey ed., 2008).

67. See PETER CHALK, *THE MARITIME DIMENSION OF INTERNATIONAL SECURITY: TERRORISM, PIRACY, AND CHALLENGES FOR THE UNITED STATES* 5-18 (2008); Charles J. Reinhardt, *Maritime Piracy: Sign of a Security Threat?*, 16 MERCER ON TRANSPORT & LOGISTICS 16-19 (2004).

68. ROBERT J.C. YOUNG, *POSTCOLONIALISM: A VERY SHORT INTRODUCTION* 2 (2003).

ing, just, and safe lives. Robert J.C. Young notes, "Postcolonial critique focuses on forces of oppression and coercive domination that cooperate in the contemporary world: the politics of anti-colonialism and neocolonialism, race, gender, nationalism, class and ethnicities define its terrain."<sup>69</sup>

The ability to view the larger context of Western domination of the Middle East, Africa, and Asia is an important first step to a strong analysis of current international relations. Western influence in the non-Western world has been wrought with violence.<sup>70</sup> It is a historical reality that the West has engaged in years of violent oppression of the racial, ethnic, and national Other.<sup>71</sup> Postcolonialism provides a way to better understand current policies in light of this oppression by considering the historico-political discourse of subjugation. It is on this terrain that one can find substantial ground from which to advocate against United States terrorism policies.

Postcolonial theory can be thought of, first, as a historical endeavor.<sup>72</sup> For instance, it is necessary to understand the September 11 attacks not as isolated horrible events but as outgrowths of the problematic image of the United States in various parts of the world. The beginning of this Article demonstrates that terrorism policy has a historical position that has evolved<sup>73</sup> and will continue to do so, that is along the lines of the struggle for colonial domination.<sup>74</sup> This is the backdrop upon which postcolonial theory may help to better understand the United States' terrorism policy.

Postcolonial criticism is most clearly demonstrated by an intervention in post-imperial domination imbued with the struggles of oppressive continental control upon the newly formed states of the

69. ROBERT J.C. YOUNG, *POSTCOLONIALISM: AN HISTORICAL INTRODUCTION* 11 (2001).

70. See generally INTERNATIONAL RELATIONS AND NON-WESTERN THOUGHT: IMPERIALISM, COLONIALISM AND INVESTIGATIONS OF GLOBAL MODERNITY (Robbie Shilliam ed., 2011) (containing several relevant discussions of the often-times horrible influence of the West on the rest of the world).

71. See generally COLONIALISM PAST AND PRESENT: READING AND WRITING AND COLONIAL LATIN AMERICA TODAY (Alvaro Félix Bolaños & Gustavo Verdesio eds., 2002) (making a particularly strong case that the Western violence against Latin America has left a tragic mark on this region of the world).

72. See Sharon Harzenski, *Post-Colonial Studies: Terrorism, a History, Stage Two*, 17 TEMP. INT'L & COMP. L.J. 351, 353-54 (2003).

73. See *supra* Part I.

74. See Ryan Charles Gaglio, Book Note, *Ratna Kapur's Erotic Justice: Law and the New Politics of Postcolonialism*, 17 YALE J.L. & FEMINISM 517, 520-21 (2005) (describing one author's view that, at least in regards to feminism and Indian society, the postcolonial condition is historically rooted).

world in the last several decades. The United States has become the new colonial occupier in the Middle East, supplanting years of British subjugation with a new, but similar, power. Robert J.C. Young explains that postcolonialism “names a theoretical and political position which embodies an active concept of intervention within such oppressive circumstances.”<sup>75</sup> The United States has engaged in a complex series of interventions into Afghanistan<sup>76</sup> and Iraq,<sup>77</sup> which began with the Gulf War. But it is and should be most presently considered in the context of the violent rupture following September 11.

Furthermore, postcolonial criticism is an appropriate set of tools to understand the law, which has been complicit in our colonial present.<sup>78</sup> Because postcolonial theory is interdisciplinary,<sup>79</sup> it represents a unique theoretical toolbox to analyze the complex matrix of national security law and, more specifically, terrorism. Postcolonial analysis provides a method for affording the Other an opportunity to speak.<sup>80</sup> This means that we may be able to better understand terrorism by understanding what those labeled as terrorists think and why they do what they do.

Despite postcolonial criticism’s utility, the legal literature has, for the most part, failed to apply it to terrorism.<sup>81</sup> Scholars have applied postcolonial theory to gender,<sup>82</sup> commercial, and economic issues,<sup>83</sup>

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75. YOUNG, *supra* note 69, at 57.

76. Afghanistan did not become independent from the United Kingdom until 1919 by the terms of the Treaty of Rawalpindi. See JEFFERY J. ROBERTS, *THE ORIGINS OF CONFLICT IN AFGHANISTAN* 41 (2003); M.G. CHITKARA, *COMBATING TERRORISM* 258 (2003).

77. Iraq did not become independent from the Ottoman Empire until World War I. CENT. INTELLIGENCE AGENCY, *THE WORLD FACTBOOK* 304 (2010). It did not become independent from the United Kingdom until 1932. *Id.*

78. See Nan Seuffert & Catharine Coleborne, *Law, History and Postcolonial Theory and Method*, 7 L. TEXT. CULTURE 1, 1 (2003).

79. See Ian Duncanson, *Writing and Praxis: Law, History and the Postcolonial*, 7 L. TEXT CULTURE 9, 10–12 (2003).

80. See *id.* at 22–23.

81. *But cf.* Sundhya Pahuja, *The Postcoloniality of International Law*, 46 HARV. INT’L L.J. 459, 459–69 (2005) (applying postcolonial theory to international law).

82. See generally Ratna Kapur, *Post-Colonial Economies of Desire: Legal Representations of the Sexual Subaltern*, 78 DENV. U. L. REV. 855 (2001) (applying postcolonial theory to sex and gender).

83. See generally Allen Kamp, *Stories of the Code*, 12 TEX. WESLEYAN L. REV. 377 (2005) (discussing postcolonialism and the Uniform Commercial Code); Chantal Thomas, *Causes of Inequality in the International Economic Order: Critical Race Theory and Postcolonial Development*, 9 TRANSNAT’L L. & CONTEMP. PROBS. 1 (1999) (applying postcolonial theory to the international economic regime).

and they have used it to analyze the events in various countries including India,<sup>84</sup> New Zealand,<sup>85</sup> Tanzania,<sup>86</sup> South Africa,<sup>87</sup> and Australia.<sup>88</sup> It has also been applied to Native Americans<sup>89</sup> and nation-state violence.<sup>90</sup> Yet, a void remains in the legal scholarship regarding postcolonial criticism of terrorism and national security law. To fully explore the interaction of terrorism and law this must be addressed.

The conflict lies in the fact that national security casts the Other as a lurking shadow hidden in caves and secreted away in the hills. The creation of the Other in opposition to the West is central to the postcolonial condition.<sup>91</sup> Postcolonialists seek to improve, civilize, and control the Other. The postcolonial model of oppression uses the driving force of civilization to reject the Other. National security policy, especially as it relates to terrorism, has positioned this brown or black Other as an absent Other, never present in immediacy, but omnipresent in doubt. The fear of the Other directs us to action, even though the results are a displaced action untethered to present subjectivities.

One particularly important reason why postcolonial criticism has largely been excluded from national security law is that legal analysis is resistant to such critiques.<sup>92</sup> Law's formalism<sup>93</sup> suggests that

84. See generally Ratna Kapur, *Postcolonial Erotic Disruptions: Legal Narratives of Culture, Sex, and Nation in India*, 10 COLUM. J. GENDER & L. 333 (2001) (applying postcolonial theory to culture and gender in India).

85. See generally Nan Seuffert, *Race-ing and Engendering the Nation-State in Aotearoa/New Zealand*, 10 AM. U. J. GENDER SOC. POL'Y & L. 597 (2002) (discussing postcolonialism and gender in New Zealand politics).

86. See generally Mark J. Calaguas et al., *Legal Pluralism and Women's Rights: A Study in Postcolonial Tanzania*, 16 COLUM. J. GENDER & L. 471 (2007) (discussing postcolonialism and gender in Tanzania).

87. See generally Mark Sanders, *Renegotiating Responsibility After Apartheid: Listening to Perpetrator Testimony*, 10 AM. U. J. GENDER SOC. POL'Y & L. 587 (2002) (discussing postcolonialism in post-apartheid South Africa).

88. See generally Thalia Anthony, *Postcolonial Feudal Hauntings of Northern Australian Cattle Stations*, 7 L. TEXT CULTURE 277 (2003) (applying postcolonial theory to Australian cattle farming); Mark Harris, *Mapping Australian Postcolonial Landscapes: From Resistance to Reconciliation?*, 7 L. TEXT CULTURE 71 (2003) (discussing postcolonialism and critical geography).

89. See generally Eric Cheyfitz, *Theory and Practice: The Case of the Navajo-Hopi Land Dispute*, 10 AM. U. J. GENDER SOC. POL'Y & L. 619, 619-32 (2002) (applying postcolonial theory to indigenous people's struggles over ancestral land).

90. See generally E. San Juan, Jr., *Post-Colonialism and the Question of Nation-State Violence*, 78 DENV. U. L. REV. 887 (2001) (applying postcolonial theory to nation-state violence).

91. See Pahuja, *supra* note 81, at 460-61.

92. See Chantal Thomas, *Critical Race Theory and Postcolonial Development Theory: Observations on Methodology*, 45 VILL. L. REV. 1195, 1213 (2000).

outsider critiques, or critiques from the margin, are not only problematic in terms of methodology but also problematic as a challenge to linear conceptions of law.<sup>94</sup> Thus, application of postcolonial theory to the Other<sup>95</sup> represents a much larger affront to law than might be apparent on the surface.

An application of postcolonial theory to terrorism leads to broad dialogue about the people labeled as terrorists. This application includes understanding the motivations for terror, seeking dialogue with the heads of terrorist organizations, and desiring to understand the historically contingent realities that beget terrorism. Such an analysis is markedly different from current national security thought, which views the terrorist as the abhorrent Other, denies subjectivity, and seeks to eliminate differences, as opposed to understanding terrorism's expressions. While postcolonial theory does seek to give voice to the dispossessed,<sup>96</sup> it does not mean sanctioning terrorist acts. Postcolonial theory may help with understanding the effects of international economic inequality and the lasting legacy of colonial oppression, which continues to perpetuate its vestiges in countries and people across the world.

Postcolonial theory allows resistance to dominant discourses so that those maligned by the law may be able to resist it.<sup>97</sup> Resistance to colonial legacies is inevitable, whether violent<sup>98</sup> or more ostensibly benign.<sup>99</sup> Postcolonial theory helps to understand the influences that motivate terrorists and understand their desire to rebel. Again, the purpose is not to sanction terrorism but to understand its various motives—religious, political, or cultural—so as to better understand terrorists and their actions. Where terrorism is understood as

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93. *Id.*

94. See David Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, 21 *NEW ENG. L. REV.* 209, 268 (1986) (presenting an analysis of law's formalism).

95. For a historical situating of postcolonial theory and the Other, see generally Thomas, *supra* note 92, at 1216-17. "Emerging somewhat later than the work summarized under the other methodological strands, a wave of post-structuralists, beginning with Edward Said, generated an analysis of the ideological components of Northern hegemony by tracing the development of the discursive categories of the 'colonizer' and the 'colonized' or 'other.'" *Id.* at 1216.

96. See Stefanie Lehner, *Towards a Subaltern Aesthetics: Reassessing Postcolonial Criticism for Contemporary Northern Irish and Scottish Literatures*. James Kelman and Robert McLiam Wilson's *Rewriting of National Paradigms*, 5 *ESHARP* 1, 2 (2005).

97. Richard Delgado, *Rodrigo's Corrido: Race, Postcolonial Theory, and U.S. Civil Rights*, 60 *VAND. L. REV.* 1691, 1712 (2007).

98. *Id.* at 1711.

99. *Id.* at 1710.

a reaction to practices of a dominant power, one may begin to better comprehend and address the power structures that shape terror.

#### IV. IMPLICATIONS FOR LAW AND RIGHTS

The GWOT has served to consolidate the powers of globalization in the United States government.<sup>100</sup> The power swell has endangered rights on an international scale.<sup>101</sup> Mark D. Kielsgard argues, "The indirect impact of terrorism stems from overly intrusive, reactionary, counter-terrorist measures. Terrorist acts frequently provoke states into overreacting by implementing serious breaches of human rights and freedoms."<sup>102</sup> The fight against terrorism has become a race toward destruction by pitting one ethic of violence against another.<sup>103</sup> The stakes are high and the tactics are dangerous. Violence is the inevitable outcome.

Former Attorney General John Ashcroft made this assertion in response to criticisms to the GWOT: "[T]o those who scare peace-loving people with phantoms of lost liberty; my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies and pause to America's friends."<sup>104</sup> Interestingly, Ashcroft's first sentence establishes a dichotomy between persons who worry about lost liberty and peace-loving persons. According to Ashcroft, to oppose the war on terror is to actually challenge peace, which seems quite the dialectal absurdity. The reliance on Hegelian dialectics locks us into a position of docile acceptance. The danger in this dialectic is that it is overly linear in that it seeks to draw straight lines from point A to point B and remove all bumps in the intellectual road. It is well-intentioned but overly simplistic. It removes from us the ability to fully engage our agency.<sup>105</sup> We need not reject the

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100. See *Mutua*, *supra* note 62, at 1.

101. See NAT'L COMM'N ON THE TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 394 (2004).

102. See Mark D. Kielsgard, *A Human Rights Approach to Counter-Terrorism*, 36 CAL. W. INT'L L.J. 249, 261 (2006).

103. See Rosenfeld, *supra* note 24, at 829.

104. Azriel, *supra* note 17, at 1-2 (quoting *Department of Justice Oversight: Preserving Our Freedom While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 313 (2001) (statement of John Ashcroft, Att'y Gen. of the United States)).

105. Here I have in mind Jacques Derrida's critique of Hegel's dialectic:

Since the dialectic feeds on negativity, to oppose the dialectic simply nourishes its evolving totality. Since the dialectic, the *Aufhebung*, does not have a position to

dialectic; we may, however, work within it to expose its absurdity.<sup>106</sup> Furthermore, the claim of lost liberty is positioned as an attack on unity and resolve—to question or criticize is a direct attack on patriotism, according to Ashcroft.<sup>107</sup> Ashcroft even insinuates that challenging or questioning actually enables terrorism.<sup>108</sup> The Attorney General's words are powerful and offer a dramatic statement of his desire to restrict dissidence. It is this sort of rhetorical choice that supports the assertion that the government's response to the September 11 attacks on U.S. soil has endangered First, Fourth, Fifth, and Sixth Amendment rights.<sup>109</sup> With national security at stake, rights seem to matter less, and dissent becomes a threat that warrants infringing upon constitutional rights.<sup>110</sup>

To be sure, challenging U.S. responses does not mean one is condoning terrorists, terrorism, or whatever one chooses to label mass violence committed by a non-state actor.<sup>111</sup> The argument that criticism of one idea necessarily implies the support of another is intellectually dishonest and sophomoric.<sup>112</sup> One must understand, however, that the vitriolic attacks used to belittle and marginalize thoughtful criticisms of the GWOT threaten certain fundamental rights.

People do not desire to be attacked, and countries do not wish to have their citizens live in fear and their economies decimated. Leaders want to be viewed as strong. Yet, the reaction of the U.S. government to terrorism has cast an expansive shadow as suffocating as London's pea-soup fog<sup>113</sup> over the rights of citizens to protest, ques-

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defend, it cannot be opposed. All criticism is grist to the mill. So Derrida's approach is different, not resisting Hegel's dialectic, but working within it, seeing how it can be extended to a point at which it begins to unravel itself.

HUGH RAYMENT-PICKARD, *IMPOSSIBLE GOD: DERRIDA'S THEOLOGY* 140 (2003).

106. *Id.*

107. See Azriel, *supra* note 17, at 1-2.

108. See *id.*

109. See Kielsingard, *supra* note 102, at 263 (citing CTR. FOR CONSTITUTIONAL RIGHTS, *THE STATE OF CIVIL LIBERTIES: ONE YEAR LATER, EROSION OF CIVIL LIBERTIES IN THE POST 9/11 ERA* 1 (2001)).

110. See *id.*

111. See RICHARDS, *supra* note 35, at 1.

112. *Id.*

113. I intended this analogy to also call to mind the terrorist attacks on London in 2005, which encouraged similar rhetoric and response strategies in the United Kingdom. Todd Landman, *The United Kingdom: The Continuity of Terror and Counterterror*, in *NATIONAL INSECURITY AND HUMAN RIGHTS: DEMOCRACIES DEBATE TERRORISM* 75 (Alison Brysk & Gershon Shaf-

tion, and critique. This fear has an important purpose; however, it should motivate us to protect our freedoms and ourselves.<sup>114</sup> This should not take the form of a reactionary patriotic fervor; we must appreciate the possibility that the very fight we have begun may be the fight that does us in. We must understand that patriotism has its place, but ostentatious or misguided patriotism can devolve into violent nationalism, which is precisely what we are trying to prevent.

It now appears that there is a multifaceted battle occurring. Both the rights of U.S. citizens and those of certain ethnic identities in the United States are in danger. To lose our rights as we battle to keep them is simply unacceptable.<sup>115</sup> This fear of fear approach has been characterized as McCarthyism.<sup>116</sup> Of course, people have spoken out,<sup>117</sup> but their criticisms were quickly disparaged as unacceptable threats to U.S. citizens.<sup>118</sup> This seems particularly easy with an undefined enemy because a fluid enemy allows for virtually any opposition to be declared a threat as befits the power apparatus. Because terrorism has been conceptualized as a national security threat—a threat perhaps as great as any this country has known—there have been no violations of rights,<sup>119</sup> or so the argument goes. Those who suggest that no right has been violated tend to be conservative or Republican,<sup>120</sup> which further polarizes the discussion. Nevertheless, we ought to err on the side of suspicion because it is this very fundamental right—the right to dissent—that the Founders sought to

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ir eds., 2007) (encouraging similar rhetoric and response strategies in the United Kingdom).

114. Martha Minow, *The Emergency Constitution in the Post-September 11 World Order: The Constitution as Black Box During National Emergencies: Comment on Bruce Ackerman's Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*, 75 *FORDHAM L. REV.* 593, 605 (2006).

115. Alejandra Rodriguez, Comment, *Is the War on Terrorism Compromising Civil Liberties? A Discussion of Hamdi and Padilla*, 39 *CAL. W. L. REV.* 379, 394 (2003) (“The freedoms we have now should not be compromised by our nation’s war on terrorism. To do so would entail the gradual evisceration of the principles upon which our nation was founded.”).

116. See generally David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 *HARV. C.R.-C.L. L. REV.* 1, 1–30 (2003) (discussing how in times of fear the government adopts preventative law enforcement strategies akin to those used during past eras marked by crisis). See also David Schultz, *Democracy on Trial: Terrorism, Crime, and National Security Policy in a Post 9-11 World*, 38 *GOLDEN GATE U. L. REV.* 195, 209 (2008) (“The cost of this McCarthyism is the war on democracy and civil liberties.”).

117. See Schultz, *supra* note 116, at 206–07.

118. See Azriel, *supra* note 17, at 1–2.

119. See Rosenzweig, *supra* note 58, at 721–22.

120. See Michael Chertoff, *Law, Loyalty, and Terror: Our Legal Response to the Post-9/11 World*, *WKLY. STANDARD*, Dec. 1, 2003, at 15, 16–17.

protect, which is most at risk. Our fundamental right to disagree is being eroded.

From a doctrinal perspective, the concern is the balance between the right to privacy and the national security interest. The right to privacy in this context is the traditional notion of the right to be let alone.<sup>121</sup> There are lengthy arguments for and against the right to privacy.<sup>122</sup> However, this discussion will be limited to indicate only that the rights of U.S. citizens are in danger. This threat must be included in any sort of risk analysis. Though the national security interest of a country is important, the responses to terrorism since September 11 have greatly impinged on the right to privacy.<sup>123</sup> Rehashing these debates over privacy and the need for national security would not be instructive, but it is important to remember that an overly ambitious government with a confusing agenda has the potential to view even those people it claims to serve as potential targets for investigation. Privacy matters must be weighed against national security concerns because no one is safe in a country without privacy, yet no one requires so much privacy as to deny the value of some sense of collective security.

The fight against terrorism also poses serious threats to the health of U.S. citizens, a right that I wish to isolate to ground this discussion in a traditional geopolitical consideration, specifically the threat of biological attack.<sup>124</sup> Although typically left out of the discussion of rights and liberties, the argument that citizens have a fundamental right to health is important. Biological attack is a serious concern, and as we engage in a fight against terrorism we fail to adequately

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121. See Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) ("Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term 'property' has grown to compromise every form of possession—intangible, as well as tangible."); see also *Public Utilities Commission v. Pollak*, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting) ("The right to be let alone is indeed the beginning of all freedom."); Ferdinand Schoeman, *Privacy: Philosophical Dimensions of the Literature*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY* 2–4 (Ferdinand David Schoeman ed., Cambridge Univ. Press 1984).

122. See, e.g., Emanuel Gross, *The Struggle of a Democracy Against Terrorism—Protection of Human Rights: The Right to Privacy Versus the National Interest—The Proper Balance*, 37 CORNELL INT'L L.J. 27, 30–36 (2004).

123. See *id.* at 36–45.

124. See generally Lawrence O. Gostin, *Dunwoody Distinguished Lecture in Law: When Terrorism Threatens Health: How Far Are Limitations on Personal and Economic Liberties Justified?*, 55 FLA. L. REV. 1105 (2003) (discussing the risk of bioterrorism and its interaction with the public's liberty).

prepare for this threat on the health of U.S. citizens. The evidence is not clear enough to indicate that the war against terrorism has made anyone safer from biological attack or, arguably, other attacks. Thus, the right to a healthy life is imperiled. Biological weapons are a particularly significant threat because of their ease of transport, which makes them a plausible option for non-state actors. It is infinitely easier to hide a vile of Anthrax than a nuclear warhead. As the fight against terrorism continues, we must question the fight's impact on biological-weapon accessibility because this poses a direct threat to the health of U.S. citizens. It seems that this battle against terrorism has not mitigated the threat of biological attack, and this may be one of its greatest failings relative to the rights of U.S. citizens. There are practical dangers to rights in the United States beyond the somewhat ephemeral privacy concerns, and as the war against terrorism continues with unclearly defined goals, we must concern ourselves with the broader international threat of an increased capacity for terrorists to procure biological weapons and threaten the health of U.S. citizens, challenging the life, liberty, and pursuit of happiness that U.S. citizens cherish.

There are solutions to these threats, or at least ways to reconceptualize terrorism discourse to better frame our discussion of rights and liberties in a post-terrorism world. First, we must reject war and criminal justice rhetoric.<sup>125</sup> We have not seen such rejection and likely will not in the immediate future. There is danger in this rhetoric in that it presupposes the object of derision, namely an enemy or a criminal. National security will suffer if scholars and practitioners conceptualize terrorism as some sort of elaborate battle<sup>126</sup> or as entailing a criminal act. This is not because there are not military and criminal interests involved in such thinking but rather because a myopic view guarantees the conclusion it seeks to avoid. If we focus on rigid definitions, then we might define ourselves into the same state of terror we are seeking to avoid. In trying to declare certain actions as terroristic, or certain people as terrorists, we may artificially increase terror by constructing an edifice of fear. But, like the threat of nuclear or chemical attack, the threat of biological attack is difficult to quantify<sup>127</sup> and therefore difficult to address. The threat

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125. See Minow, *supra* note 114, at 601.

126. Bruce A. Williams, *War Rhetoric's Toll on Democracy*, *CHRON. OF HIGHER EDUC.*, Apr. 16, 2004, at B15.

127. See Gostin, *supra* note 124, at 1111.

of bioterrorism is but another link into the ghost-in-the-machine theory whereby the citizenry must fight against a specter that it cannot fully analyze nor address. Every threat seems to bring about a more complex linkage into the ghost-in-the-machine argument. We ignore more thorough considerations of terrorism and national security risks at our peril. Fear and hatred are poor reasons to engage in a protracted war of confusion.

#### CONCLUSION

To make a change in the way we perceive terror—let alone fight it—we must recognize the tremendous power of terrorism’s rhetorical construction as well as the rhetorical constructions that characterize the terrorist’s quest. To be consumed by terror does not address terror’s threats. To destroy the ghosts, we must not ignore them—we must engage them and reconfigure our understanding of the ghosts. I believe that poststructural and postcolonial theories can help us understand the shifting terrain of terrorism and national security discourse. To fight terrorism effectively, we must reject the devolution toward violence and embrace an ethic of constructive engagement. “Rather than a ‘war on terror,’ what is needed is to transform security itself . . . pursuing a civilianization of politics and society, stressing social development, welfare, and good governance.”<sup>128</sup> Only when we can reconceptualize the notions of terror and security will there be a coherent strategy for peace, understanding, and continued engagement. When fantasy rules policy, the phantasmagorical always wins.

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128. See Cerny, *supra* note 64, at 14.