

Fragmented State, Pluralist Society: How Liberal Institutions Promote Fear

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There are words like *Freedom*
Sweet and wonderful to say.
On my heartstrings freedom sings
All day everyday.

There are words like *Liberty*
That almost make me cry.
If you had known what I know
You would know why.

– Langston Hughes, *Words Like Freedom*

This Article examines the use of fear as an instrument of political repression. By political repression, I mean the use of coercive power to inhibit or eradicate specific political ideas or movements. Political repression is more than the neutral application of coercion on behalf of social order. It is coercion applied in a discriminatory fashion, targeting those whose actions or ideas pose a threat to established arrangements of power and authority. The aim of repression is not to ensure that laws are followed but that the powerful are obeyed.¹ In using fear to repress, the agents of repression intend to do more than simply coerce one dissenting individual or group; they aim to send a message to anyone else who may be considering a challenge to established power and authority—that if she speaks up or acts out, she too will become the victim of coercion. The instruments of coercion that arouse fear are various: legal bans on particular kinds of speech, legal proscriptions of groups and parties, harassment and surveillance, onerous regulations, economic sanctions, political trials, imprisonment, and state violence or state-sanctioned private violence. And what we find in the United States is that it only takes a little bit of coercion to produce a great deal of fear.

Among analysts who have considered repressive fear, there is a strong consensus about the type of political structure that arouses it: a centralized, unified state monopolizing the means of coercion, which crushes a pluralist, independent, autonomous civil society and leaves men and women with no countervailing forms of power to resist the state. If the state is decentralized

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1. ROBERT JUSTIN GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO THE PRESENT* xvi-xxi (1978).

and fragmented—limited by the separation of powers, federalism, and the rule of law—and if civil society is allowed to flourish as an independent and pluralist alternative to the state, repressive fear will be limited, if not eliminated altogether. This line of argument includes realist theorists of the state like Bodin, Hobbes, Weber, and Skocpol, as well as liberal theorists like Locke, Montesquieu, Tocqueville, and their twentieth-century exponents.²

In this Article, I would like to challenge this way of thinking about repressive political fear. Though elites and their collaborators often use the state to arouse repressive fear, that state is not necessarily the one described by Hobbes and his realist successors or by Locke and his liberal successors. It need not be lawless, centralized, or unified, monopolizing the means of coercion. It can be fragmented by the separation of powers and federalism, and constrained by the rule of law, conforming to the most basic strictures of our constitutional faith. The agents of repressive fear also work through pluralist,

2. For realist theorists of repression, fear, and the state, see JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH* (1967); JOHN A. HALL & G. JOHN IKENBERRY, *THE STATE* 9-15, 95-100 (1989); THOMAS HOBBS, *LEVIATHAN* 110-11, 120-21, 124-25, 127, 223, 225, 228 (Richard Tuck ed., 1991); STEPHEN D. KRASNER, *DEFENDING THE NATIONAL INTEREST: RAW MATERIALS INVESTMENTS AND U.S. FOREIGN POLICY* (1978); GIANFRANCO POGGI, *THE STATE: ITS NATURE, DEVELOPMENT AND PROSPECTS* 5, 8-9, 13, 19-23 (1990); THEDA SKOCPOL, *STATES AND SOCIAL REVOLUTIONS: A COMPARATIVE ANALYSIS OF FRANCE, RUSSIA, AND CHINA* 22, 29-30 (1979); 2 MAX WEBER, *ECONOMY AND SOCIETY* ch. 9 (Guenther Roth & Claus Wittich eds., 1968); 3 *id.* at chs. 10, 13; Quentin Skinner, *The State*, in *POLITICAL INNOVATION AND CONCEPTUAL CHANGE* 90 (Terence Ball et al. eds., 1989); Theda Skocpol, *Bringing the State Back In: Strategies of Analysis in Current Research*, in *BRINGING THE STATE BACK IN* 3, 9 (Peter B. Evans et al. eds., 1985); Max Weber, *Politics as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 77, 78-80 (H.H. Gerth & C. Wright Mills eds., 1946). For liberal and conservative theorists of fear, repression, and the state, which include some version of these arguments, see 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 254-57 (1991) [hereinafter ACKERMAN, *WE THE PEOPLE*]; AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 6-7, 123 (1998); ROBERT A. DAHL, *WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY* (1961); JEAN BETHKE ELSHTAIN, *DEMOCRACY ON TRIAL* 38-39, 42-43, 45-52 (1995); *THE FEDERALIST PAPERS* (Isaac Kramnick ed., 1987); MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 3 (2002); LON L. FULLER, *THE MORALITY OF LAW* 40 (1964); JOHN GRAY, *POST-LIBERALISM: STUDIES IN POLITICAL THOUGHT* 158 (1993); F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 21, 137, 142, 185 (1960); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., 1988); MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Anne M. Cohler et al. eds., 1989); JOHN RAWLS, *A THEORY OF JUSTICE* 58, 239-41 (1971); CHARLES TAYLOR, *PHILOSOPHICAL ARGUMENTS* 22, 204-05, 214 (1995); Bruce Ackerman, *The Political Case for Constitutional Courts*, in *LIBERALISM WITHOUT ILLUSIONS: ESSAYS ON LIBERAL THEORY AND THE POLITICAL VISION OF JUDITH N. SHKLAR* 205, 212-13, 215-16 (Bernard Yack ed., 1996) [hereinafter Ackerman, *Political Case*]; Judith N. Shklar, *The Liberalism of Fear*, in *LIBERALISM AND THE MORAL LIFE* 21 (Nancy L. Rosenblum ed., 1989) [hereinafter Shklar, *The Liberalism of Fear*].

autonomous institutions of civil society—schools and churches, private associations and the family, civic groups and political organizations, and the workplace—where they find a sizeable armory of repressive weapons. These weapons are seldom as physically coercive as those possessed by the state. Indeed, most are fairly non-violent: firing; blacklisting; denials of promotion and economic opportunity; ostracism; exclusion or expulsion from favored circles of intimates, associates, and friends; and everyday forms of humiliation and degradation. Because the Constitution makes it difficult for the state to wield weapons of fear with abandon, elites often rely upon these weapons of civil society, which are not subject to much constitutional restraint. We best approach the distinction between state and society, then, as a division of labor or joint venture between the public and private sectors: What government officials cannot do well or with efficient ease, private elites do instead, and vice versa.

I focus here on the downsides of the fragmented state and social pluralism. Readers may wonder about their upsides: Don't the separation of powers and the rule of law forestall fear? Don't federalism and social pluralism give people opportunities for resistance? They do. I don't discuss their positive effects here because many scholars have written about them elsewhere. But there is another reason to dwell on the negative effects of the fragmented state and social pluralism. All too often in the United States, we assume that repressive fear arises outside our political system, beyond the Constitution and institutions of civil society. Trying to understand an instance of repressive fear, we assume that federalism and the separation of powers must have failed, or that the rule of law has been defeated, as if everything designed to support freedom must stand on one side of the fence and everything designed to arouse fear on the other. When it comes to problems like pollution or poverty, we know that the world is not black and white. But when the issue is repressive fear, and the venue is the United States, we assume that a force for good cannot also be a force for ill. I would like to take a different tack, to see how constituent elements in the American polity can be both instruments of freedom and weapons of fear. Because it suggests that our solutions are also our problems, such an inquiry does not yield easy or simple remedies. Indeed, it only produces paradoxes and incongruities. But such puzzles need not dampen our spirits, for as philosophers discovered long ago, perplexity is often the beginning of wisdom.

I. FRAGMENTED STATE

Inspired to a great degree by Montesquieu, the authors of the United States Constitution believed that a unified and, to a lesser degree, centralized state posed a threat to freedom. Regardless of who wielded it on whose behalf, government power, indivisible and concentrated, was an invitation to political repression. "The accumulation of all powers . . . in the same hands,"

wrote James Madison, is “the very definition of tyranny.”³ So the Framers placed in the Constitution three obstacles: the separation of powers, federalism, and the rule of law. They divided the national government into three branches, and the legislative branch into two houses. They created a federalist structure of national and state governments, to which we may add local and county governments. And though the rule of law is not an explicit provision of the Constitution, its components appear so often throughout—from the enumeration of congressional powers to the due process clauses of the Fifth and Fourteenth Amendments—that we can include it as a constituent element. Whatever the nationalist aspirations of the Framers, there can be no doubt that the Constitution fragments the state in order to check the repressive ambitions of tyrants old and new.

A. The Separation of Powers

In prescribing the separation of powers as a remedy for government tyranny, Madison and the Framers propounded a simple logic: grant independent power to the different branches of government, and each member of that branch will have a personal interest in maintaining that power and preventing the other branches from carrying out their repressive designs. Though each branch can and does influence the other—the Constitution mandates not just a separation but also a mingling of powers—the possession of independent power ensures that officials in one branch have, in the words of Madison, “personal motives to resist encroachments [from] the others,”⁴ or to cooperate with only those schemes not malignant to the commonweal.⁵ The two options, then, available to a government of separated powers are stalemate born of attempted repression or cooperation born of benign intent. In the words of the Supreme Court, “if government power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will.”⁶

3. THE FEDERALIST NO. 47, at 303 (James Madison) (Isaac Kramnick ed., 1987). See also BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 272-301 (1967); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 244-87 (1996); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 150-61, 446-53, 547-53, 602-06 (1969).

4. THE FEDERALIST NO. 51, at 319 (James Madison) (Isaac Kramnick ed., 1987).

5. THE FEDERALIST NOS. 10, 51 (James Madison).

6. *United States v. Brown*, 381 U.S. 437, 443 (1965). See also HAYEK, *supra* note 2, at 185; 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 122 (3d ed. 2000).

There is much to recommend this logic, and historical experience demonstrates that it has often held sway.⁷ But granting independent power to different branches of government also means that small groups within those branches have significant power at their disposal, which they can use repressively, without consulting the other branches of government—indeed, without consulting members of their own branches. These occurrences are not failures of the separation of powers; they are directly attributable to it, for as Madison observed, if each branch of government did not possess independent power, how could it check the others or have an investment in checking them? Often overlooked in the grant of independent power, then, is just how coercive that power can be and how small a constituency is required to use it repressively. Tiny outposts of state intimidation, these forms of independent power can pose a considerable threat to dissenters and potential dissenters.

Consider those famous congressional committees investigating communist infiltration and leftist subversion during the McCarthy era. Many legislative committees mounted such investigations, but three were particularly important: the House Committee on Un-American Activities (HUAC), the Senate Internal Security Subcommittee, and the Senate Permanent Investigations Subcommittee. Though authorized by legislative majorities, these committees were very much the work of small minorities. Because committee chairs were chosen by seniority, they were seldom controlled by or accountable to party majorities. Despite procedural constraints, they were free to manage their committees as they saw fit, launching investigations and calling witnesses without informing other committee members. Traditions of senatorial privilege also dictated that party leaders not interfere with individual committees and their chairs. In both houses, committee chairs were able to manipulate congressional rules in order to mount intrusive investigations of the executive branch and civil society.⁸

Congressional committees possess two instruments of coercion, which can be wielded without consent of the other branches of government. Brandishing the weapon of “*prescriptive publicity*,”⁹ congressional committees put uncooperative witnesses—as well as their families and friends—under an embarrassing spotlight, exposing them to public obloquy and political stigma. In 1954, for instance, Sylvia Bernstein, a leftist in Washington and mother of

7. Cf. DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946-1990* (1991); TELFORD TAYLOR, *GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS* (1955).

8. WALTER GOODMAN, *THE COMMITTEE: THE EXTRAORDINARY CAREER OF THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES 168-69* (1968); ROBERT GRIFFITH, *THE POLITICS OF FEAR: JOSEPH R. MCCARTHY AND THE SENATE* 58, 89, 104-13, 206-07, 210-12, 303-04 (2d ed. 1987). See also DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POSTREFORM HOUSE* 4-5 (1991); Nelson W. Polsby, *The Institutionalization of the U.S. House of Representatives*, 62 *AM. POL. SCI. REV.* 144 (1968).

9. EARL LATHAM, *THE COMMUNIST CONTROVERSY IN WASHINGTON: FROM THE NEW DEAL TO MCCARTHY* 381 (1966).

future Watergate journalist Carl Bernstein, was called before HUAC.¹⁰ When her attorney asked HUAC's chair to instruct a newspaper photographer to stop taking pictures of the session, the chair responded, "News photographers have a perfect right, *especially in cases where the witness refuses to give any information*, a perfect right to take their pictures" ¹¹ Publicity, in other words, was a punishment for the uncooperative witness—and a threat to other uncooperative witnesses. The next day, the *Washington Post* ran Bernstein's photograph under the front-page headline, "Red Party 'Hard Core' in Capital, Velde Says."¹² Such negative publicity invariably followed the witness to her neighborhood, to her friend and family circles, and to her workplace, from which she could be fired. Bernstein's daughter was thrown out of nursery school, relatives ceased all communication with the family, and friends of the children were forbidden to associate with them.¹³ That hounding, as a 1948 HUAC report intimated, was one of the purposes of its hearings:

"to permit American public opinion . . . an . . . opportunity to render a continuing verdict on all of its public officials and to evaluate the merit of many in private life who either openly associate with and assist disloyal groups or covertly operate as members or fellow-travellers of such organizations."¹⁴

Congressional committees can also threaten uncooperative witnesses with contempt citations or potential charges of perjury. Between 1857 and 1949, Congress cited only 113 witnesses for contempt; between 1950 and 1952, however, it cited 117.¹⁵ And while contempt citations require the collaboration of the courts in order to yield prison sentences, their mere threat—which Congress wields on its own—can be enough to persuade witnesses to testify and to cease their leftist associations. In 1951, for instance, actor Larry Parks was called before HUAC.¹⁶ Asked to name names, he capitulated, bearing painful witness to the effects of a threatened contempt citation: "Don't present me with the choice," he said, "of either being in contempt of this Committee and going to jail or forcing me to really crawl through the mud to

10. CARL BERNSTEIN, *LOYALTIES: A SON'S MEMOIR* 33 (1989).

11. *Id.* at 105 (emphasis added).

12. *Id.* at 113.

13. *Id.* at 115-16, 118-21.

14. LATHAM, *supra* note 9, at 381 (quoting Report of House Committee on Un-American Activities, Aug. 27, 1948) (alteration in original).

15. DAVID CAUTE, *THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER* 96 (1978).

16. ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* 329 (1998).

be an informer. For what purpose? I don't think this is a choice at all."¹⁷ Fifty-eight of the subsequent 110 Hollywood witnesses HUAC called that spring made the same choice as Parks.¹⁸

Madison's argument that the possession of independent power inspires government officials to check each other's repressive policies also overlooks another possible outcome. The investment in the power of one's own branch can inspire officeholders to implement those policies themselves, if for no other reason than to keep intruders from the other branches out of their domain. In March 1947, for example, President Harry Truman issued Executive Order 9835, which launched investigations of every federal employee for signs of political subversion, and authorized the firing and refusal to hire of anyone suspected of communist sympathies.¹⁹ More than any single government policy, EO 9835 chilled the political air, making it difficult to sustain leftist views without fear of sanction. Truman was not eager to issue this order.²⁰ Convinced that the threat of communist infiltration of the government had been overstated and could easily be contained by less repressive measures, he worried that EO 9835 would only empower the FBI, which he likened to the Gestapo and the NKVD.²¹ Though historians still disagree about why Truman issued it, one of his motivations was to protect the executive branch from congressional intrusion.²² In early 1946, congressional Republicans had warned that if they won the midterm election in November, they would conduct, in the words of one Kansas representative, "an immediate and thorough housecleaning" of the executive branch.²³ Fearing that members of Congress wanted to "join in the administration of the loyalty program,"²⁴ Truman decided that the executive branch should police its own employees, thereby keeping congressional investigators at bay. As much as it may inspire resistance between the branches, the impulse to maintain autonomy can also inspire cooperation between those branches.

17. THIRTY YEARS OF TREASON: EXCERPTS FROM HEARINGS BEFORE THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES, 1938-1968, at 333 (Eric Bentley ed., 1971).

18. SCHRECKER, *supra* note 16, at 329.

19. Exec. Order No. 9835, 12 Fed. Reg. 1935 (Mar. 21, 1947); *see also* CAUTE, *supra* note 15, at 25-29; GRIFFITH, *supra* note 8, at 40-43, 90-93; ALAN D. HARPER, THE POLITICS OF LOYALTY: THE WHITE HOUSE AND THE COMMUNIST ISSUE, 1946-1952, at 23-25 (1969); LATHAM, *supra* note 9, at 364-66.

20. ALONZO L. HAMBY, MAN OF THE PEOPLE: A LIFE OF HARRY S. TRUMAN 427-29 (1995).

21. CURT GENTRY, J. EDGAR HOOVER: THE MAN AND THE SECRETS 319 (1991); HAMBY, *supra* note 20, at 429; 2 MEMOIRS BY HARRY S. TRUMAN 1946-52: YEARS OF TRIAL AND HOPE 273 (1956).

22. CAUTE, *supra* note 15, at 27; SCHRECKER, *supra* note 16, at 209.

23. RICHARD M. FREELAND, THE TRUMAN DOCTRINE AND THE ORIGINS OF MCCARTHYISM 120-21 (1985).

24. 2 MEMOIRS BY HARRY S. TRUMAN, *supra* note 21, at 281.

B. Federalism

Though federalism was the Framers' more or less unhappy brainchild,²⁵ its conservative proponents often uphold its "counterintuitive" assumption that "freedom," in the words of Justice Kennedy, is "enhanced by the creation of two governments, not one."²⁶ Since the Civil War, most liberal jurists and writers have been suspicious of federalism, seeing in its celebration of state and local rights a defense of slavery and Jim Crow, as well as opposition to the New Deal. But more recently, some liberals, including the late Justice Brennan, have backed away from their opposition to federalism.²⁷ Though they remain aware of its covert oppressions, contemporary liberals believe that federalism gives state governments the opportunity to challenge a conservative national government and ordinary citizens the chance to participate in local, and presumably more democratic, forums. Today's liberals thus follow Tocqueville, who famously claimed,

Local institutions are to liberty what primary schools are to science; they put it within the people's reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it. Without local institutions a nation may give itself a free government, but it has not got the spirit of liberty.²⁸

In the same way that the separation of powers inspires a vested interest in checking the power of ambitious tyrants, federalism is supposed to arouse a desire to work against a centralizing state. "[P]opulism and federalism—

25. Federalism, it should be recalled, was a compromise forced upon the Framers. Madison was a nationalist, who conceived of a strong national government as a check against tyrannical states and localities, as was Hamilton, who thought of the national government as an instrument of a continental empire. Inspired by these competing nationalist visions, Madison had initially proposed a scheme that ran just shy of "abolishing the states altogether." RAKOVE, *supra* note 3, at 169. But loyalty to the states being what it was, his and Hamilton's aggressive nationalism had to give way. *Id.* at 169-70.

26. *United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring). See also FRIEDMAN, *supra* note 2, at 3; HAYEK, *supra* note 2, at 183-86.

27. See, e.g., ACKERMAN, *WE THE PEOPLE*, *supra* note 2, at 254-57; GEORGE KATEB, *THE INNER OCEAN: INDIVIDUALISM AND DEMOCRATIC CULTURE* 42, 70 (1992); Ackerman, *Political Case*, *supra* note 2, at 212-13, 215-16; William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). For excellent critiques, see JOHN D. DONAHUE, *DISUNITED STATES* (1997); Edward L. Rubin and Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

28. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 63 (George Lawrence trans., J.P. Mayer ed., 1969).

liberty and localism—work together,” writes Akhil Reed Amar. “We the People conquer government power by dividing it between the two rival governments, state and federal”²⁹

Though the creation of two or more levels of government is supposed to arouse conflict and check power between the various levels, it also offers more opportunities for repression—not because state and local governments are more tyrannical than the federal government, but because state and local governments often work in tandem with the federal government. Each level of government replicates what the other levels are already doing or uses its own particular powers to do what the other levels cannot do.³⁰ Federalism, in other words, enables each level of government to duplicate or supplement the coercion of the other levels, sometimes doubly, even trebly increasing the coercive burdens borne by any one individual. Each level also influences the other, with the federal government inspiring in the lower levels the motive and means to act repressively, and vice versa.

Consider the duplication of the government’s coercive measures during the Cold War. Throughout the late 1940s and 1950s, the federal government used the Smith Act, which criminalizes the teaching and advocacy of the violent overthrow of the federal government, to prosecute the Communist Party leadership in court.³¹ It also used, as previously mentioned, Executive Order 9835.³² In addition, in 1950, Congress passed, over Truman’s veto, the Internal Security Act, which among other provisions mandated that Communist organizations register with the Attorney General.³³ In 1954, Congress passed the Communist Control Act, outlawing the Communist Party.³⁴ Congress also fielded, as we have seen, three legislative committees to investigate communist subversion.

Far from challenging these federal programs and policies, state and local governments mimicked each of them. An estimated 150 municipalities passed anti-subversion ordinances like the Smith Act; eleven states passed registration statutes similar to the 1950 Internal Security Act; eight states outlawed the Communist Party.³⁵ By 1967, forty-five states had an anti-sedition law on their books.³⁶ Though the Supreme Court in 1956 would strike down one of

29. AMAR, *supra* note 2, at 123.

30. This is not to be confused with Hayek’s contention that federalism requires both levels of government to work together in order to act coercively. HAYEK, *supra* note 2, at 185.

31. Smith Act, ch. 439, 54 Stat. 670 (1940); *see also* 1 THOMAS I. EMERSON ET AL., *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 104-06 (3d ed. 1967).

32. *See supra* notes 19-24 and accompanying text.

33. Subversive Activities Control Act of 1950, ch. 1024, 64 Stat. 987; *see also* 1 EMERSON ET AL., *supra* note 31, at 157-65.

34. Communist Control Act of 1954, ch. 886, 68 Stat. 775; *see also* 1 EMERSON ET AL., *supra* note 31, at 198-200.

35. 1 EMERSON ET AL., *supra* note 31, at 209.

36. *Id.* at 207.

these state anti-sedition laws,³⁷ it later qualified this position by claiming that states could take action against sedition that threatened them individually.³⁸ While federalist theory would suggest that Congress would be jealous of any state effort to preempt its authority, members of Congress were outraged by the Court's 1956 decision.³⁹ They repeatedly attempted to pass bills stipulating, in the words of one proposed statute, "[t]hat no act of Congress shall be construed as indicating an intent on the part of Congress to occupy the field in which such act operates, to the exclusion of all State laws on the same subject matter."⁴⁰ When this legislation was finally amended to apply only to anti-subversion laws, it passed the House but died in the Senate.⁴¹

Like Congress, thirteen states set up legislative committees with an explicit mandate to investigate subversion; this did not include the myriad other state legislative committees investigating subversion without such mandates.⁴² Some of these state committees preceded their federal counterparts, clearing the path for later federal efforts. In 1940-41, for instance, New York's Rapp-Coudert committee investigated communist subversion in New York City's public schools and colleges, forcing city agencies to fire more than fifty teachers and professors.⁴³ As if to prove that federalism could pave a two-way street for repression, Rapp-Coudert investigator Robert Morris used his experience in New York to catapult himself to the position of chief counsel to two Senate investigating committees.⁴⁴ These Senate committees also summoned witnesses who testified before Rapp-Coudert and worked with many of Rapp-Coudert's informants.⁴⁵

With the exception of anti-sedition laws, state and local governments most consistently replicated federal programs in the field of public employment. By 1950, thirty-two states barred alleged subversives from working in government, at times turning the most innocuous posts into the front lines of national security.⁴⁶ As governor of California, Earl Warren signed the 1950 Levering Act, which made every single state employee a "civil defense worker" and barred alleged subversives from employment.⁴⁷ New York State

37. *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

38. *Uphaus v. Wyman*, 360 U.S. 72 (1959); *see also* 1 *EMERSON ET AL.*, *supra* note 31, at 219.

39. 1 *EMERSON ET AL.*, *supra* note 31, at 217.

40. *Id.* at 218.

41. *Id.*

42. *See CAUTE*, *supra* note 15, at 80; RICHARD M. FRIED, *NIGHTMARE IN RED: THE MCCARTHY ERA IN PERSPECTIVE* 104-13 (1990); SCHRECKER, *supra* note 16, at 97.

43. SCHRECKER, *supra* note 16, at 97; ELLEN W. SCHRECKER, *NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES* 75-83 (1986).

44. *See* SCHRECKER, *supra* note 43, at 77.

45. FRIED, *supra* note 42, at 105.

46. CAUTE, *supra* note 15, at 339.

47. *Id.* at 341.

defined all of the following as security-sensitive government positions not open to alleged subversives: scientists in the paleontology division of the Department of Education (“they have knowledge concerning the location of caves and their suitability for defense storage purposes”); sanitation workers in New York City (“disease might spread in the event that department did not perform its duty”); and probation workers in the city’s Domestic Relations Court.⁴⁸ States also had employees take loyalty or test oaths, swearing that they were not, would not be, and had never been, subversive.⁴⁹ Some of these oaths, like Oklahoma’s, required individuals to swear that they would not advocate “a change in the form of government” not just by force or violence but also by any “unlawful means.”⁵⁰ By 1967, thirty-two states required loyalty or test oaths, with an additional five requiring them of public school teachers and university professors.⁵¹ All told, 70 to 75 percent of the nation’s state and local employees worked in states requiring such oaths.⁵²

States not only copied one another; they also attempted to outdo one another by leveraging their ever more particular powers against dissenters. At the height of the McCarthy years, states like Ohio denied unemployment compensation to those advocating the violent overthrow of the government and required applicants for benefits to file affidavits regarding their beliefs on such matters.⁵³ California denied honorably discharged veterans property-tax exemptions granted to all other veterans if they refused to take a loyalty oath.⁵⁴ The City of Los Angeles even denied constitutionally mandated property-tax exemptions to churches refusing to take the oath.⁵⁵ In 1969, a government commission found that local police departments used their power not as a neutral force for law and order but as a way to channel conservative political imperatives.⁵⁶ Police officers saw “students, other anti-war protestors and blacks as a danger to our political system [and] themselves as the political force by which radicalism, student demonstrations and black power [could] be blocked.”⁵⁷

48. RALPH S. BROWN, JR., *LOYALTY AND SECURITY: EMPLOYMENT TESTS IN THE UNITED STATES* 106-07 (1958).

49. *Id.* at 92-93, 169, 181; 1 EMERSON ET AL., *supra* note 31, at 395-96.

50. BROWN, JR., *supra* note 48, at 96-97.

51. 1 EMERSON ET AL., *supra* note 31, at 395.

52. *See* BROWN, JR., *supra* note 48, at 178.

53. 1 EMERSON ET AL., *supra* note 31, at 306.

54. *Speiser v. Randall*, 357 U.S. 513, 516 (1958); *see also* 1 EMERSON ET AL., *supra* note 31, at 286-92.

55. *First Unitarian Church v. County of Los Angeles*, 357 U.S. 545, 546 (1958); *see also* 1 EMERSON ET AL., *supra* note 31, at 292.

56. *THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI’S SECRET WARS AGAINST DISSENT IN THE UNITED STATES* 217 (Ward Churchill & Jim Vander Wall eds., 2d ed. 2002).

57. *Id.*

During the Cold War, state and local governments also turned their licensing procedures into instruments of political intimidation. Texas required pharmacists to take an oath that they did “not believe in” the overthrow of the American government through “illegal or unconstitutional methods.”⁵⁸ In Washington, D.C., insurance sales representatives were required to answer questions about their membership in the Communist Party and any of the other 197 political organizations proscribed by the Attorney General’s list.⁵⁹ They had to disclose whether they had refused, for constitutional reasons, to answer questions put to them by a court or other government tribunal.⁶⁰ Politically driven licensing procedures often provided occasions of surreal comedy, with local officials costuming themselves as soldiers in a great pageant of national security. Indiana’s Athletic Commission, for instance, insisted that professional wrestlers and boxers take loyalty oaths, while New York denied anyone refusing to take an oath permits to fish in the city’s reservoirs.⁶¹ Most men and women could forego the right to fish, but what were leftist lawyers to do in the five states where they were required to take such oaths, or in the nearly twenty states where they were asked questions about their loyalty? Questions could range from, “Do you belong to or have you attended the meetings of any group which advocates any theory or ‘Ism’ which would prevent you from taking the . . . oath wholeheartedly,” to whether applicants thought Communists should be eligible to practice law, to “Did you vote for Henry Wallace in 1948?”⁶²

Whether acts of state and local repression are duplicates or substitutes for federal repression, their federalist character makes political fear a denser, more socially repressive enterprise. Struggles in this country over civil rights, labor unions, and social progress have always had a local dimension, and state and local coercion has figured prominently in their suppression. In Houston, real estate magnates used repressive anticommunism to stop anti-zoning legislation; in California, conservative politicians used it to go after sex education in the schools. Throughout the South and the Midwest, government officials and economic elites used anticommunism to fight civil rights. The Alabama Citizens Council declared, “The attempt to abolish segregation in the South . . . is fostered and directed by the Communist Party,” and several southern states put this theory into practice.⁶³ Wielding their power in the name of national security, they outlawed the NAACP, forced it and other civil rights organizations to hand over their membership lists to state investigating committees, and indicted civil rights leaders for sedition.⁶⁴ Federalism

58. 1 EMERSON ET AL., *supra* note 31, at 313.

59. *Id.*

60. *Id.*

61. *Id.* at 313-14.

62. BROWN, JR., *supra* note 48, at 110-12.

63. SCHRECKER, *supra* note 16, at 391-94.

64. *Id.* at 393-94.

thus allows local and state elites to customize repressive fear, to use it on behalf of their own peculiar concerns.

Federalism can also make efforts to roll back or resist politically repressive fear more difficult. Not only does federalism force the resisters to fight their battles on multiple fronts, but it also enhances the obscurity and isolation of small towns and specific states. By distributing institutions of state coercion to nooks and crannies around the country, by circling them with a protective cordon against federal intrusion, federalism shields local and state elites from national publicity and oversight. We often remember the spotlight the national media put on the violent confrontations in Birmingham between civil rights demonstrators and Bull Connor's fire hoses and police dogs. But for every Birmingham, there is a forgotten hamlet, overlooked state legislative subcommittee, or obscure local ordinance which garners no publicity, receives no attention. This same criticism could be applied to the federal government: How many reports from a congressional committee can one journalist read? How many administrative regulations can one activist keep track of? The key difference is that centralized government offers a more geographically concentrated, politically coherent target for resistance and opposition; federalism scatters these targets to the wind.

C. *The Rule of Law*

By the rule of law, I refer only to those procedures that limit and regulate the exercise of government power.⁶⁵ Political fear, many claim, is aroused by arbitrary, unpredictable government power subject to no legal constraint. When rulers are free to do as they will, the ruled cannot possibly know which of their actions will or will not incur government sanctions. Such uncertainty, the argument goes, creates political fear in its purest form. Uncertain subjects are not, and cannot be, free because they are perpetually inse-

65. For some scholars, reducing the rule of law to "the law of rules" – that is, to mere procedures – misses the aspirations of the law: its commitment to robust individual rights, its moral vision of fairness and equity. The rule of law, these scholars claim, contains substantial principles of justice, a higher law if you will. By restricting myself to the procedural, I do not mean to suggest that the rule of law excludes these substantive claims. Indeed, I am quite sympathetic to interpretations that highlight them, and agree that the strictly procedural often contains, at least implicitly, substantive principles of justice. I only focus here on the procedural because it is law's procedures, according to many writers, that preclude or make difficult rule by fear. For procedural interpretations, see JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210-29 (1979); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). For more substantive interpretations, see RONALD DWORKIN, *A MATTER OF PRINCIPLE* 9-28 (1985); RAWLS, *supra* note 2, at 58; JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 39-47, 120-23 (1964).

cure about their lives and liberties.⁶⁶ But when rulers are constrained by the rule of law, the argument continues, subjects know the perimeter of legitimate action. They see bright “no trespassing” signs and confine themselves to the interior. By generating secure expectations in the population, the rule of law substantially minimizes the fear aroused by unpredictable exercises of government power. “Knowing what things [the law] penalizes and knowing that these are within their power to do or not to do,” explains Rawls, “citizens can draw up their plans accordingly. One who complies with the announced rules need never fear an infringement of his liberty.”⁶⁷ Because the rule of law requires the threat of punishment, it cannot eliminate all fear. But when the fear of punishment is firmly attached to a finite set of infractions, the argument concludes, its objects are limited, its emotive qualities less intense and paralyzing. By upholding the rule of law, moreover, this fear of punishment minimizes the immobilizing dread born of lawlessness or arbitrary power.⁶⁸ A rule-bound polity may create injustice and unfairness—imposing uniform duties across the population, as did Jim Crow’s rules of racial segregation, regardless of their deleterious impact upon specific groups or individuals—but it cannot generate a fear-ridden society.

Taken on its own terms, this account makes some sense. As I will argue below, the McCarthy era was limited by the rule of law, and one finds in the memoirs of and about the time little of the trembling paralysis that theorists of the rule of law seek to avoid. Political options may have been constricted, but men and women were not uncertain about the limits of legitimate con-

66. “*Freedom of Men under Government*,” writes Locke, entails among other things “not to be subject to the inconstant, uncertain, unknown, Arbitrary Will of another Man.” LOCKE, *supra* note 2, II.22, at 284. According to Rawls, if laws are “vague and imprecise, what we are at liberty to do is likewise vague and imprecise. The boundaries of our libert[ies] are uncertain. And to the extent that this is so, liberty is restricted by a reasonable fear of its exercise.” RAWLS, *supra* note 2, at 239. Hayek claims that:

The coercion which a government must still use . . . is reduced to a minimum and made as innocuous as possible by restraining it through known general rules, so that in most instances the individual need never be coerced unless he has placed himself in a position where he knows he will be coerced. Even where coercion is not avoidable, it is deprived of its most harmful effects by being confined to limited and foreseeable duties, or at least made independent of the arbitrary will of another person.

HAYEK, *supra* note 2, at 21. When “there is a general and drastic deterioration in legality,” argues Fuller, “the principal object of government seems to be, not that of giving the citizen rules by which to shape his conduct, but to frighten him into impotence.” FULLER, *supra* note 2, at 40. What the rule of law seeks to prevent, writes Shklar, is fear “created by arbitrary, unexpected, unnecessary, and unlicensed acts of force.” Shklar, *The Liberalism of Fear*, *supra* note 2, at 29.

67. RAWLS, *supra* note 2, at 241. See also HAYEK, *supra* note 2, at 21, 142.

68. HAYEK, *supra* note 2, at 21, 137, 142; RAWLS, *supra* note 2, at 240-41; Shklar, *The Liberalism of Fear*, *supra* note 2, at 29.

duct. The problem with this account is that predictability can also obtain in societies where no one would doubt that repressive fear governs. During the Soviet purges of the late 1930s, writes Anne Applebaum, it was not easy “to predict with any certainty who would be arrested,” but “it became possible to guess who was *likely* to be arrested.”⁶⁹ This hardly made Stalin’s persecutions just or reasonable, but it did make them somewhat foreseeable. Foreigners, for example, were a suspect category so “most ordinary Soviet citizens . . . worked out the pattern, and wanted no foreign contacts at all.”⁷⁰ Telling or listening to jokes about Stalin—not to mention speaking against him—was also suspect so men and women learned to stay away from such talk.⁷¹ Though this litany of crimes was remote from any reasonable definition of justice,⁷² it was finite. And though it was arbitrary in the sense that men and women could be punished for acts that would never be considered crimes under any coherent definition of the rule of law, it was not arbitrary in the sense held to matter most: It was not irregular.

Repressive regimes may conform to routines, theorists of the rule of law will respond, but how can one square the rule of law with the titanic violence and countries of walking dead over which these regimes preside? The rule of law is supposed not only to regulate, but also to limit, state power. How can one reconcile its stringent demands with the medieval tortures of Hitler and Stalin? Here we come back to the instructive case of McCarthyism. During those years, two hundred men and women, at most, spent time in jail or a detention center for what we might call political crimes, usually for no more than one or two years, and the number of politically driven indictments and convictions lies somewhere in the hundreds.⁷³ Simply put, the state’s violence during the McCarthy era was virtually nil, its levied punishments minimal. And yet repressive fear was rampant.

Where then do the theorists of the rule of law go wrong? In their assumption that the “principal object” of political fear is to frighten men and women “into impotence.”⁷⁴ No regime, no matter how malignant, can afford to create universal impotence among its subjects. Though some rulers might harbor such fantasies, they still wish to see their subjects bow and scrape. They still depend upon a secret police, which must effectively fulfill its duties, possess the most up-to-date instruments of rule, and work with collaborators throughout society. The economy must be maintained, if for no other reason than to support the military against the threat of an invading army. People must be clothed and fed, and social order preserved. Saddam Hussein, explained one army officer after his fall, “could do many things to the people,

69. ANNE APPLEBAUM, *GULAG: A HISTORY* 122 (2003).

70. *Id.* at 124.

71. *Id.* at 125-26.

72. *Id.* at 122-27.

73. SCHRECKER, *supra* note 16, at 361-62, 532 n.8.

74. FULLER, *supra* note 2, at 40.

. . . but while he could kill them, he could not afford to starve them. So yes, he made sure the Ministry of Trade organized things correctly. . . . It helped the regime maintain its legitimacy.”⁷⁵ Tyrants don’t always succeed in this; indeed, some of them can pursue the most hair-brained schemes to modernize their economies and societies. But that hardly means that they seek to create an impotent society. What they seek is a politically repressed society, where men and women perform only those tasks acceptable to the regime or not prohibited by it and avoid the rest.

If we understand the consequence of political fear as suppression rather than impotence, we can see how the wielders of fear can accommodate the rule of law and even benefit from it. If nothing else, the rule of law offers a patina of legitimacy to otherwise repressive acts of power. As Applebaum reports of Stalin’s Russia, “[u]ndoubtedly, the conviction that they were acting within the law was part of what motivated those working within the security services, as well as the guards and administrators who later controlled the prisoners’ lives in the camps.”⁷⁶ But, again, McCarthyism offers the more instructive example—of how not only the illusion but also the reality of legalism can support repressive fear. Though officials sometimes violated the rule of law, what is most impressive about McCarthyism is just how often they conformed to it. With time, legislators refined the target of their statutes, gradually narrowing the range of actions deemed criminal. Pressed by liberal-minded politicians and writers, successive pieces of legislation tightened the circle of politically suspect activity and widened the sphere of legitimate activity. Over time, more procedural guarantees were provided to alleged subversives, as were more elaborate forms of judicial appeal. Courts, moreover, proved increasingly willing to strike down legislation or government acts on procedural grounds, claiming that officials were not acting in accordance with established rules, and that individual rights were being threatened. And yet fear flourished.

If we compare the three major pieces of federal anti-subversion legislation of the time—the Smith Act,⁷⁷ the Internal Security Act,⁷⁸ and the Communist Control Act⁷⁹—we see how the rule of law simultaneously inspired a gradual narrowing of the definition of criminal activity and aroused greater fear. The Smith Act prohibited advocating or teaching “the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States . . . by force or violence” and printing, publishing, selling, or distributing written materials to that effect.⁸⁰ So did it criminalize organizing or attempting to organize a group, or being a member of or affiliating with a

75. David Rieff, *Were Sanctions Right?* N.Y. TIMES, July 27, 2003, § 6 (Magazine), at 41.

76. APPLEBAUM, *supra* note 69, at 122.

77. Alien Registration Act of 1940, ch. 645, 62 Stat. 808.

78. Subversive Activities Control Act of 1950, ch. 1024, 64 Stat. 1010.

79. Communist Control Act of 1954, ch. 886, 68 Stat. 775.

80. 18 U.S.C. § 2385; *see also* 1 EMERSON ET AL., *supra* note 31, at 104-05.

group, performing any of these acts, as well as conspiracies of two or more persons to advocate, write, or organize groups that advocated, wrote, and so on.⁸¹ (In 1949, the Justice Department invoked the Smith Act to prosecute the Communist Party leadership in court—not for espionage or for attempting a violent overthrow of the government, but for conspiring to organize a party to advocate the violent overthrow of the government. The sheer number of nouns and verbs the indictment required to link the defendants to an actual crime—“conspiracy,” “organize,” “party,” “advocate”—suggests just how far removed the defendants were in this case from anything resembling criminal activity.) Yet even the Smith Act, arguably the broadest and vaguest legislation of the era, put serious constraints on what the government could do. In order to use it to prosecute the leadership of the Communist Party, Hoover, the FBI, and the Justice Department were forced to amass mountains of evidence—nearly two thousand pages of party documents and testimony—that the Party indeed advocated a revolutionary overthrow of the government by force and violence.⁸² Hoover and the FBI had to work a full four years before the Justice Department would even use the Smith Act to launch criminal charges against the Party. The first Smith Act trial lasted ten months, one of the longest in American history,⁸³ offering defendants ample time to rebut the evidence presented against them. Tried and convicted, the leaders used their rights of appeal all the way up to the Supreme Court.⁸⁴ Once the Court ruled against them, the government was able to prosecute only 129 of the Party’s lower-level leaders and members, of whom ninety-six were convicted.⁸⁵ And yet the fear these trials and prosecutions aroused in party members and fellow travelers—coupled with the financial and emotion burden the trials imposed on party leaders—helped to drain the party of its well of support.⁸⁶

The 1950 Internal Security Act mandated that “any Communist-action organization, Communist-front organization, or Communist-infiltrated organization” register with the Attorney General, and specified in great detail what each of these terms meant.⁸⁷ It created the Subversive Activities Control Board, which, at the request of the Attorney General or other individuals, could designate specific groups as “Communist-action,” “Communist-front,”

81. 18 U.S.C. § 2385; *see also* 1 EMERSON ET AL., *supra* note 31, at 104-05.

82. SCHRECKER, *supra* note 16, at 190-96.

83. *Id.* at 196-99.

84. *Id.* at 199-200; *see also* *Dennis v. United States*, 341 U.S. 494 (1951).

85. 1 EMERSON ET AL., *supra* note 31, at 127.

86. *See* MICHAL R. BELKNAP, *COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES* 185-206 (1977); PETER L. STEINBERG, *THE GREAT “RED MENACE”: UNITED STATES PROSECUTION OF AMERICAN COMMUNISTS, 1947-1952*, at 261-83 (1984).

87. Subversive Activities Control Act of 1950, ch. 1024, §§ 3, 7-8, 64 Stat. 987, 989-91, 993-95; *see also* 1 EMERSON ET AL., *supra* note 31, at 160-65.

or “Communist-infiltrated.”⁸⁸ The bill was debated extensively in Congress, received a full public hearing, and was vetoed by President Truman, whose veto was overridden by Congress.⁸⁹ Even with all these procedural guarantees, the Internal Security Act was able to tar 197 left-wing groups as Communist and Communist-front organizations, the stigma of which was enough to persuade many individuals to stay away from them.⁹⁰

The Communist Control Act, according to its liberal authors and sponsors, was designed to tighten the noose around the Communist Party and loosen it around the rest of the progressive Left.⁹¹ It was explicitly intended to overcome what many liberals, chief among them Hubert Humphrey, thought was the scatter-shot approach of the Internal Security Act. Max Kampelman, one of Humphrey’s top advisers, claimed that the bill’s purpose was “to protect innocent people from being attacked ruthlessly and recklessly.”⁹² The Communist Control Act thus made membership in the Communist Party a specifiable crime, which meant that members and suspected members would receive the full range of procedural protections guaranteed to criminal suspects, and identified fourteen acts as evidence of possible membership.⁹³ Though Humphrey would later admit that the law was “not one of the things I’m proudest of” and Kampelman would acknowledge that it did little to protect individual liberties, most liberals supported it as a significant advance over its predecessors, prompting Michael Harrington to dismiss it as “an abject capitulation by liberalism to illiberalism.”⁹⁴ The federal government seldom used the bill, though states and localities did invoke it to keep party members off election ballots and to deny unemployment claims to employees.⁹⁵

Equally impressive about each piece of legislation was how the government ensured that individuals and groups targeted by it enjoyed the right of

88. Subversive Activities Control Act § 12, 64 Stat. at 997; *see also* 1 EMERSON ET AL., *supra* note 31, at 165.

89. 1 EMERSON ET AL., *supra* note 31, at 169-70.

90. Ellen Schrecker, *McCarthyism and the Decline of American Communism, 1945-1960*, in *NEW STUDIES IN THE POLITICS AND CULTURE OF U.S. COMMUNISM* 123 (Michael E. Brown et al. eds., 1993). For a list of the 197 organizations cited on the Attorney General’s list, *see* ELLEN SCHRECKER, *THE AGE OF MCCARTHYISM: A BRIEF HISTORY WITH DOCUMENTS* 190-96 (2d ed. 2002).

91. MARY SPERLING MCAULIFFE, *CRISIS ON THE LEFT: COLD WAR POLITICS AND AMERICAN LIBERALS, 1947-1954*, at 132-44 (1978); *see also* WILLIAM W. KELLER, *THE LIBERALS AND J. EDGAR HOOVER: RISE AND FALL OF A DOMESTIC INTELLIGENCE STATE* 65-67 (1989).

92. MCAULIFFE, *supra* note 91, at 136.

93. Communist Control Act of 1954, ch. 886, §§ 4-5, 68 Stat. 775, 776-77; *see also* MCAULIFFE, *supra* note 91, at 137-38.

94. MCAULIFFE, *supra* note 91, at 138-42.

95. *See* 1 EMERSON ET AL., *supra* note 31, at 201; MCAULIFFE, *supra* note 91, at 143.

appeal. The initial Smith Act trial, as we have seen, was quite lengthy and thorough, and its convictions were appealed all the way to the Supreme Court.⁹⁶ (Interestingly, the two dissenters in that case, Justices Hugo Black and William Douglas, did not argue against the majority on the grounds of the rule of law, but on the basis of the First Amendment, indicating that a robust conception of free speech offers a better defense against repressive legislation than do procedural definitions of the rule of law.)⁹⁷ Its successor trials lasted anywhere from three to six months, and were also appealed.⁹⁸ In 1957, the Supreme Court finally began overturning some of these lower level convictions as unconstitutional even though the individual cases were not markedly different from that decided in the original one.⁹⁹ But by then, the damage had already been done.

Under the Internal Security Act, the Subversive Activities Control Board was careful not to tar all liberals or progressives as Communist. It established and published detailed internal regulations—some eight to twelve criteria—to guide and constrain its classification powers.¹⁰⁰ The Board required the Attorney General and the Communist Party to submit almost fifteen thousand pages of testimony and 507 documents before rendering its decision to register the Party.¹⁰¹ Any individual or group claiming to have been improperly classified by the Board had rights of judicial appeal—of which the Communist Party made extensive use—similar to those of suspected criminals.¹⁰² The appellate courts struck down two of the Board's individual findings about the Party because the Board lacked sufficient evidence.¹⁰³ The Supreme Court remanded the case on the grounds that the Party had not been given adequate opportunity to rebut the testimony of individual witnesses.¹⁰⁴ But when the case finally came back to the Supreme Court—in 1961, after multiple appeals and procedural reversals—the Court affirmed the Act's registration provision, and the Board's decision to register the Communist Party, as constitutional.¹⁰⁵

96. See *supra* notes 83-84 and accompanying text.

97. *Dennis v. United States*, 341 U.S. 494, 579-91 (1951) (Black, J., and Douglas, J., dissenting).

98. 1 EMERSON ET AL., *supra* note 31, at 127.

99. See, e.g., *Yates v. United States*, 354 U.S. 298 (1957), *overruled by* *Burks v. United States*, 437 U.S. 1 (1978); see also 1 EMERSON ET AL., *supra* note 31, at 129-43.

100. Subversive Activities Control Act of 1950, ch. 1024, § 13, 64 Stat. 987, 998-1000; 1 EMERSON ET AL., *supra* note 31, at 166-67.

101. 1 EMERSON ET AL., *supra* note 31, at 172.

102. See *id.* at 172-73.

103. *Communist Party v. Subversive Activities Control Bd.*, 223 F.2d 531 (D.C. Cir. 1954), *rev'd*, 351 U.S. 115 (1956); see also 1 EMERSON ET AL., *supra* note 31, at 172.

104. *Communist Party v. Subversive Activities Control Bd.*, 351 U.S. 115 (1956); see also 1 EMERSON ET AL., *supra* note 31, at 172.

105. *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961).

The federal and state governments provided equally elaborate checks for their loyalty and security employment programs, resulting in equally long processes of appeal.¹⁰⁶ They also guaranteed individuals a fairly wide range of rights similar to, though not as robust as, those granted to suspected criminals. Likewise, Congress provided procedural protections to committee witnesses. Even HUAC was compelled to establish, among other provisions, that it could initiate investigations only with the approval of a majority of committee members (though “preliminary inquiries” could be conducted by committee staff, if the chair approved).¹⁰⁷ Witnesses had the right to counsel and were “invited” to consult with the committee’s counsel or investigators “at any time.”¹⁰⁸ Individuals identified as subversives had to be notified by the committee in writing that they had been named—where, when, and by whom.¹⁰⁹ They also had the right to request an appearance before the Committee to clear their names, and the committee was required to provide them with a written copy of its procedures.¹¹⁰

In each of these cases, many government officials and their supporters sought to make sure that innocent persons were not punished, that even the guilty would have the rights of appeal—without stopping to think much about how they defined guilt (communism) and innocence (not just non-communism but anti-communism) in the first place. They devoted extensive resources to gathering information in order to pass reasonable legislation, issue fair indictments, launch legitimate prosecutions, and reach truthful verdicts. They publicized their decision-making procedures and non-security-sensitive information, making for some level of government transparency. Many cases, even those not of a criminal nature, consumed nearly ten years of the courts’ energy. At many points, the courts overturned government and lower court decisions, though usually on procedural grounds and without addressing the broader questions of free speech raised by these cases. And yet, repression during the McCarthy era flourished, as did political fear. Not the paralyzing fear imagined by theorists of the rule of law, but the repressive fear that makes men and women careful about what they say and do, that makes them draw back from dissident statements and insurgent movements.¹¹¹

Analysts of McCarthyism sometimes claim that repressive fear succeeded because the rule of law failed, while others claim that repressive fear

106. See 1 EMERSON ET AL., *supra* note 31, at 340-422.; SCHRECKER, *supra* note 90, at 171-87; SCHRECKER, *supra* note 16, at 266-358.

107. House Committee on Un-American Activities Rules of Procedure, § 1, 89th Cong., 1st Sess. (1965), in 1 EMERSON ET AL., *supra* note 31, at 505-10.

108. *Id.* §§ 7, 10 n.4.

109. *Id.* § 10.

110. *Id.*

111. For an exhaustive inventory of fear under McCarthyism, see SCHRECKER, *supra* note 16, at 359-415.

failed because the rule of law succeeded.¹¹² What neither camp seems willing to entertain is the possibility that repressive fear and the rule of law both succeeded. Sometimes the first happened in spite of the second, other times—as in the case of the liberal sponsorship of the Communist Control Act, or in the years of appeals consuming the time, energy, and treasury of the Communist Party—because of it.¹¹³ Ironically, it was one of the Supreme Court’s more conservative justices, Felix Frankfurter, who fully understood this relationship. Though he concurred with the majority in the Court’s main Smith Act case, Frankfurter reminded his colleagues and the nation that “constitutional-ity does not exact a sense of proportion or the sanity of humor or an absence of fear.”¹¹⁴ True, the federal government and the Court had made sure to apply the Smith Act only to the Communist Party. But there was no getting around the fact that:

Suppressing advocates of overthrow inevitably will also silence critics who do not advocate overthrow but fear that their criticism may be so construed. No matter how clear we may be that the defendants now before us are preparing to overthrow our Government at the propitious moment, it is self-delusion to think that we can punish them for their advocacy without adding to the risks run by loyal citizens who honestly believe in some of the reforms these defendants advance.¹¹⁵

In the years that followed the *Dennis* decision, many reform-minded men and women reacted just as Frankfurter predicted they would, withdrawing from the political fray and insurgent movements. The rule of law proved too flimsy a buffer against the repressive power hanging over them. Sometimes, it was the repressive power hanging over them.

II. PLURALIST SOCIETY

In September 1954, the Fund for the Republic commissioned a team of researchers and writers, including a young Michael Harrington, to investigate blacklisting in the radio, television, and movie industries.¹¹⁶ Like a hiker who picks up a rock and finds a universe underneath, the team uncovered a world of fear in the smallest of places. Perhaps the smallest was *Counterattack*, a four-page weekly newsletter identifying Communists in the culture industries,

112. For the latter claim, see STANLEY I. KUTLER, *THE AMERICAN INQUISITION: JUSTICE AND INJUSTICE IN THE COLD WAR* (1982).

113. For examples from the 1960s, see Churchill & Vander Wall, *supra* note 56, at 143, 183-84.

114. *Dennis v. United States*, 341 U.S. 494, 556 (1951) (Frankfurter, J., concurring).

115. *Id.* at 549 (Frankfurter, J., concurring).

116. 2 JOHN COGLEY, *REPORT ON BLACKLISTING: RADIO – TELEVISION v-x* (1956).

which the networks used to make decisions about hiring and firing.¹¹⁷ The editors of *Counterattack* had once worked for the FBI but left after deciding that “the efforts of our government to combat Communist activities have failed to eliminate the effectiveness of this 5th column.”¹¹⁸ Convinced they could do more outside the government, they formed a non-profit consulting practice, John Quincy Adams Associates, to expose the Party and its allies.¹¹⁹ When the enterprise failed, they established a for-profit company, with private funding from wealthy anti-communists.¹²⁰ The firm took off. Its most successful publication was a special report, *Red Channels*, which cited 151 men and women associated with “Communist causes” working in television and radio.¹²¹ Virtually all of these individuals were blacklisted.¹²² So frequently was *Red Channels* consulted by network executives, corporate sponsors, and advertising agencies that it was called “the Bible of Madison Avenue.”¹²³

What connected this rogue outfit of FBI dropouts to New York’s striped shirts? A Syracuse grocer by the name of Laurence Johnson. Owner of an upstate supermarket chain, Johnson was a leader in civic affairs and a fervent anti-communist.¹²⁴ Whenever a company sponsored a radio or television program involving someone cited in *Red Channels*, Johnson threatened to post notices above its products in his stores, informing customers that the company funded “subversives.”¹²⁵ He conscripted fellow supermarket owners to do the same, mobilized customers to send letters of complaint, and made personal visits to industry executives.¹²⁶ According to the Fund, Johnson “not only lends credence to the ‘economic’ argument for blacklisting; generally speaking, he *is* the argument.”¹²⁷ So powerful was the combined force of *Red Channels* and Johnson that one talent agent in the radio industry claimed, “I never hear about the FBI or the Attorney General—all I ever hear about is *Red Channels* and this Johnson of Syracuse and the other characters who have made a business out of this thing.”¹²⁸

Repressive fear in America is often like that: the state hovers in the background while civil society looms large. Though its advocates disagree about its definition, civil society generally refers to those social institutions and organizations not explicitly part of the government. These can range from

117. *Id.* at 1-4.

118. *Id.* at 3 & n.*.

119. *Id.* at 3 n.*.

120. *Id.*

121. *Id.* at 1.

122. *Id.* at 1-2.

123. *Id.* at 2.

124. *Id.* at 100-01.

125. *Id.* at 101.

126. *Id.*

127. *Id.*

128. *Id.* at 171.

family and neighborhood groups to the church and the Rotary Club to political parties and labor unions to corporations and the workplace.¹²⁹ Most, if not all, of civil society has some connection to the state, but a significant portion of its activity usually transpires outside of government. In theory, that is what makes civil society a source of freedom. Because it lies outside the government, men and women can carry on their activities there without fear of government coercion. To the extent that this activity is political, civil society is supposed to offer opportunities for mobilization through moral suasion, not force. To the extent that the activity is not political, civil society offers a balance to the oppressive demands of politics. If we are involved in churches, synagogues, and mosques, if we spend four nights out of the week at home with our families and the other three nights bowling in leagues, politics cannot claim the whole of our lives. Though Madison never spoke of civil society, it fulfills his dictum that diversity is a source of freedom. “[B]y comprehending in the society so many separate descriptions of citizens,” pluralism can “render an unjust combination of a majority of the whole very improbable.”¹³⁰

That is the theory. The practice is altogether different. Civil society, even in the most liberal polities, is often a supplement to state repression or a repressive agent in its own right.¹³¹ Particularly in liberal democracies, where

129. Some theorists define civil society as a “third way” between or beyond the state and the market. Given the intimate involvement of civil society in the market – from the Catholic Church’s real estate holdings to labor unions to civic associations like the Chamber of Commerce; virtually all of these organizations, it should be pointed out, are also employers – I see no basis for this definition. If we equate civil society solely with voluntary, non-economic associations, with minimal to no involvement in the market, we would have to exclude universities, professional associations, religious institutions, political parties, social movements, the family, and many other organizations, leaving us with little more than the PTA, the Rotary Club, and the Jaycees.

130. THE FEDERALIST NO. 51, at 321 (James Madison) (Isaac Kramnick ed., 1987).

131. Contemporary advocates of civil society are not blind to its oppressive dimensions, but they conceive of these oppressions along a distinctive axis. In Robert Putnam’s formulation, what distinguishes positive and negative “social capital” is whether it “bridges” or “bonds.” ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 22-24, 350-63 (2000). Bonding organizations connect us to people like us, bridging organizations to people who are different. *Id.* While bonding organizations have their benign or useful qualities, the specter of exclusion, intolerance, and hatred of outsiders always hangs over them. *Id.* We cannot eliminate bonding organizations, nor would we wish to. *Id.* But we must make sure, to the extent that we can, that they educate citizens in the values of tolerance and mutual accommodation, not narrow group identities and exclusion. *Id.* For theorists of civil society, in other words, trouble in civil society tracks issues of identity and membership, who is included and excluded, not repression and fear. *See id.*; *see also* Amy Gutmann, *Freedom of Association: An Introductory Essay*, in *FREEDOM OF ASSOCIATION* 3 (Amy Gutmann ed., 1998).

state power is limited, elites have every incentive to use civil society to promote fear. Though this is hardly a hard and fast rule, we may surmise that the more liberal a government becomes, the more attractive an instrument of fear civil society will seem. Consider the following statistics. In the Red Scare of 1919-20, the American government put some ten thousand men and women into jails and detention centers and deported about six hundred.¹³² During the McCarthy years, by contrast, liberal limitations upon the state ensured that no more than two hundred people spent time behind bars, and only a very few were deported. Yet McCarthyism lasted longer, affected more individuals, inflicted more permanent damage, and was in the long run a greater influence on American politics. Why? Many factors were at work—not least of which, the Cold War—but one of them was the greater involvement of civil society, particularly the workplace, during McCarthyism. For though the government directly penalized only a small number of individuals, anywhere from one to two of every five American workers was subject to a loyalty investigation at work.¹³³

There is little mystery as to why civil society can serve as a substitute or supplement to state repression. Civil society is not, on the whole, subject to restrictions like the Bill of Rights. What the state is forbidden to do, private actors in civil society may do instead. “If there is any fixed star in our constitutional constellation,” Justice Jackson famously declared, “it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”¹³⁴ But what star in our constitutional constellation forbids newspapers like *The New York Times*, which refused during the McCarthy years to hire members of the Communist Party,¹³⁵ from prescribing such orthodoxy as a condition of employment? What in the Constitution would stop a publisher from telling poet Langston Hughes that it would not issue his *Famous Negro Music Makers* unless he removed any discussion of Communist singer Paul Robeson?¹³⁶ Or stop Little, Brown from refusing to publish best-selling Communist author Howard Fast?¹³⁷ The Sixth Amendment guarantees “[i]n all criminal prosecutions” that the accused shall “have the Assistance of Counsel for his defence.”¹³⁸ But what in the Constitution would prevent attorney Abe Fortas, who would later serve on the Supreme

132. See GOLDSTEIN, *supra* note 1, at 156, 160; ROBERT K. MURRAY, RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919-1920, at 251 (1955); WILLIAM PRESTON, JR., ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903-1933, at 221 (1963).

133. BROWN, JR., *supra* note 48, at 181; GRIFFIN FARIELLO, RED SCARE: MEMORIES OF THE AMERICAN INQUISITION, AN ORAL HISTORY 42 (1995).

134. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

135. BROWN, JR., *supra* note 48, at 147.

136. SCHRECKER, *supra* note 16, at 397.

137. BROWN, JR., *supra* note 48, at 149.

138. U.S. CONST. amend. VI.

Court, from refusing to represent a Party member during the McCarthy years because, in his words, “We have decided . . . that we don’t think we can ever afford to represent anybody that has ever been a Communist?”¹³⁹ The Fifth Amendment stipulates that the government cannot compel an individual to incriminate herself,¹⁴⁰ but it does not forbid private employers from firing anyone invoking its protections before congressional committees.¹⁴¹ To the extent that our Constitution works against an intrusive state, how can it even authorize the government to regulate these private decisions of civil society? What the liberal state granteth, then, an illiberal civil society can taketh away.

Ironically, the very features of civil society that advocates presume to be its chief virtues—its pluralism, autonomy, and intimacy—often make it conducive to repressive fear. Like the federalist division of power, the pluralism and diversity of civil society creates more opportunities for men and women to participate in repression. One report from a New York public relations officer, whose specialty was to “clear” blacklisted employees of any suspicion so that they could work in television or radio, captures the connection between a diverse civil society and political repression. I quote it in full, for its very length suggests just how many players, institutions, and interests can be involved in repression. Reading like a parody of Montesquieu, *The Federalist Papers*, and Tocqueville, it invokes checks and balances, procedural justice, and interest group pluralism. It shows that diversity makes repression not less toxic but more baroque, requiring occasion after occasion of abject display and political submission.

“If a man is clean and finds his way to me the first thing I do is examine his record. I look particularly to see if it includes charges that he is a member of the Communist Party. I want to find out if he is ‘clearable.’ Once I am convinced that he is not a Communist, or if he has been a Communist, has had a change of heart, I ask him whether he has talked to the FBI. If he hasn’t, I tell him the first thing he must do is go to the FBI and tell them everything he knows. I tell him to say to them, ‘I am a patriotic citizen and I want you to ask me any questions you have in mind.’

“Then I find out where he is being blacklisted—where it is he can’t get work, who in the industry is keeping him from working, and who outside the industry has made him controversial. If, for instance, I find it is the American Legion, I call one of the top Legion officials and tell him this man has come to me for help and

139. SCHRECKER, *supra* note 16, at 303. See also JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 231-62 (1976); BROWN, JR., *supra* note 48, at 109-16; KUTLER, *supra* note 112, at 152-82.

140. U.S. CONST. amend V.

141. BROWN, JR., *supra* note 48, at 130, 136, 146-48.

says he is innocent. The official may say to me, 'Why this guy has 47 listings and I know people who say they don't believe him.' But I say, 'I'm going to have him make a statement.' Then, when the Legion guy gets the statement and has read it, I call and ask him for a note saying he is satisfied by the statement. He will usually say, 'I won't put anything in writing but if anyone is interested have him call me.'

"Somewhere along the line I may find George Sokolsky [a conservative journalist whose columns regularly charged or cleared individuals of being Communists] is involved. I go to him and tell him that the Legion official thinks this boy is all right. If I can convince Sokolsky then I go to Victor Reisel, Fred Woltman [also journalists] or whoever else is involved. When I've gotten four 'affidavits' from key people like these, I go to Jack Wren at BBD&O [New York advertising agency Batten, Barton, Durstine and Osborn] and to the 'security officer' at CBS.

"I wait a few days, then I telephone Wren. He may say to me, 'You're crazy. I know 15 things this guy hasn't explained.' So I send for the guy. He comes in here and he moans and wails and beats his head against the wall. 'I have searched my memory,' he will say. 'I have questioned my wife and my agent. There's not a thing they can remember.'

"I call Wren back and he says, 'When your boy is ready to come clean I'll talk to him.' In that case we've reached a dead end. My boy has been cleared but he can't get a job. I know cases where victims have sat around eight to ten months after 'clearance' before they got work."

. . . .

"Last of all . . . there is the possibility that Wren will pick up the phone and call a casting director or producer and say, 'Why don't you give Bill a part in the show? . . .'"

. . . .

"A guy who is in trouble, even if he has a good case for himself, will stay dead unless he finds someone like me who can lead him through the jungle of people who have to be satisfied. He has to persuade these people one by one. Usually he finds his way to a lawyer and that comes a cropper, or he finds a public-relations man

or press agent who doesn't have the confidence of the 'clearance men,' and he's only wasting his time."¹⁴²

And this, we should recall, is how the "innocent" are treated.

Diversity in civil society also makes for factional divisions among the very forces that might challenge repression. In *Federalist* 10, Madison argued that factions should be encouraged as an antidote to government tyranny; the more factions, he argued, the less able they would be to organize the government on their tyrannical behalf.¹⁴³ Two centuries later, J. Edgar Hoover brilliantly exploited Madison's prescription in order to foster government repression. During the 1960s, the FBI stoked division among civil rights organizations, the student Left, and other progressive organizations. It did not create these divisions—they were already there—but it exacerbated them. In a secret 1967 memo sent to twenty-two field offices throughout the country, the FBI issued the following instructions:

Efforts of the various groups [in the black liberation movement] to consolidate their forces or to recruit new or youthful adherents must be frustrated. No opportunity should be missed to exploit through counterintelligence techniques the organizational and personal conflicts of the leaderships of the groups and where possible an effort should be made to capitalize upon existing conflicts between competing black nationalist organizations.¹⁴⁴

A year later, the FBI sent out another memo, instructing its field offices to

[p]revent the coalition of militant black nationalist groups. In unity there is strength; a truism that is no less valid for all its triteness. An effective coalition of black nationalist groups might be the first step toward a real "Mau Mau" in America, the beginning of a true black revolution.¹⁴⁵

The FBI disrupted efforts by the Black Panthers to form multicultural coalitions among Puerto Rican organizations, white urban gangs, and the student movement, encouraging the militant separatism for which the Panthers and other practitioners of identity politics would later be criticized.¹⁴⁶ The FBI also tried to use the women's movement, which it saw as a "divisive and fac-

142. COGLEY, *supra* note 116, at 89-91.

143. THE FEDERALIST NO. 10, at 127 (James Madison) (Isaac Kramnick ed., 1987).

144. Churchill & Vander Wall, *supra* note 56, at 92-93.

145. *Id.* at 109-11; *see also id.* at 114, 120, 125.

146. *Id.* at 138-39; *see also id.* at 103.

tionalizing factor,” as a way “to weaken the revolutionary movement” and the New Left.¹⁴⁷

In the same way that the desire of officeholders like Truman to maintain the autonomy of their branch of government can lead them to cooperate rather than resist repression, so does a desire among elites in civil society to maintain the autonomy of their institutions inspire a willingness to cooperate with repressive forces. During the Cold War, leaders of civil society—university presidents, newspaper publishers, corporate magnates, and leaders of private associations—often initiated or agreed to implement repressive programs in their own institutions, if for no other reason than to keep the government and private blacklists at bay. The president of Barnard College announced, “If the colleges take the responsibility to do their own house cleaning, Congress would not feel it has to investigate.”¹⁴⁸ One HUAC investigator told the press that he intended to explicitly prey upon this concern when he spoke with Hollywood’s studio heads. “I plan to hold a number of meetings with industry heads, and the full resources of the House Committee and our investigative staff are at the disposal of those . . . who want to put their house in order before Congress does it for them.”¹⁴⁹ Irving Ferman of the ACLU claimed that he worked with the FBI in order to protect his organization from an investigation by HUAC and the American Legion.¹⁵⁰ Likewise the NAACP, which collected files on its entire membership, purged those deemed to be Party members, even its founder W.E.B. DuBois, who worked closely with the Communist Party and ultimately joined it late in life.¹⁵¹

What also makes civil society useful for repression and fear is that it is a sphere of intimacy and mutual trust. While individuals look upon politicians and state officials with suspicion, civil society is home to our friends and families, priests and rabbis, neighbors and colleagues. Even in the workplace or economy, civil society is populated by men and women we know well: front-line supervisors who live next door or marry our siblings, small business owners with a common touch, wealthy entrepreneurs who only yesterday worked beside us. When these familiars encourage us to capitulate to fear or when they themselves act repressively, we trust that their advice and actions are not impersonal dictates of the state but well meaning words and deeds of people who care about us or who are like us. This kind of intimacy supposedly holds a community together in the face of a predatory state. But what it

147. Ruth Rosen, *When Women Spied on Women*, THE NATION, Sept. 4/11, 2000, at 18.

148. CAUTE, *supra* note 15, at 405.

149. LARRY CEPLAIR & STEVEN ENGLUND, *THE INQUISITION IN HOLLYWOOD: POLITICS IN THE FILM COMMUNITY 1930-1960*, at 260 (1980).

150. KENNETH O'REILLY, *HOOVER AND THE UN-AMERICANS: THE FBI, HUAC, AND THE RED MENACE* 185 (1983).

151. *Id.* at 172-73; SCHRECKER, *supra* note 16, at 375.

can also do is transform repressive fear from a state-run enterprise into a more personal affair of the heart.¹⁵²

The specific mechanisms that individuals and institutions in civil society use to create fear include workplace sanctions, the orchestration of a social consensus on behalf of repression, the mobilization of civic groups to boycott stigmatized products, the suggestion by influential private elites that individuals submit to fear, and informers.¹⁵³ But two other mechanisms—ostracism and rumormongering—are worth discussing. Ostracism, we are often told, is the democrat's weapon of choice, for in a democracy, the rejection of the crowd is supposed to be the most difficult burden to bear. According to Emerson:

Yet is the discontent of the multitude more formidable than that of the senate and the college. It is easy enough for a firm man who knows the world to brook the rage of the cultivated classes. Their rage is decorous and prudent, for they are timid, as being very vulnerable themselves. But when to their feminine rage the indignation of the people is added, when the ignorant and the poor are aroused, when the unintelligent brute force that lies at the bottom of society is made to growl and mow, it needs the habit of magnanimity and religion to treat it godlike as a trifle of no concernment.¹⁵⁴

Ostracism, in this view, is the work of small town majorities, of narrow-minded men and women with nothing better to do than poke their noses in other people's affairs. Their chief goal is to reinforce popular tastes and sensibilities, and their target is the lonely genius defended by John Stuart Mill in *On Liberty*. In truth, ostracism is often the work of organized groups and influential elites in civil society. With the help of organizations like the American Legion or publications like *Counterattack*, elites form broad coalitions to disseminate both information about dissenting individuals and specific instructions to target them. These coalitions prey not upon the craven desire of the democratic individual to belong, but upon the activist's political need for comrades. Isolating the dissenter, they surround her with a stigma, making it difficult for her to mobilize a movement. In the words of *Counterattack*:

The way to treat Communists is to ostracize them. How would you act towards men [and women] who had been convicted of trea-

152. I develop this theme at greater length in my *FEAR: THE HISTORY OF A POLITICAL IDEA* chs. 2, 6 (2004).

153. *See id.* at ch. 6. On informers in the United States, see O'REILLY, *supra* note 150, at 83-88, 173-89; NORA SAYRE, *RUNNING TIME: FILMS OF THE COLD WAR* 12-13 (1982); SCHRECKER, *supra* note 16, at 107, 228; Rosen, *supra* note 147.

154. RALPH WALDO EMERSON, *Self-Reliance*, in *ESSAYS: FIRST AND SECOND SERIES* 47, 57 (1883).

son? Would you befriend them, invite them [sic], listen to them? Or would you treat them as outcasts?

Total ostracism . . . that's the only effective way. It's the only way to freeze the Communists out. It's the only DEED that will prove you believe what you say about them. And so it's the most convincing propaganda.¹⁵⁵

As *Counterattack* indicates, ostracism can be a substitute for penalties of state. But it can also supplement those penalties. In 1949, for example, screenwriter Alvah Bessie, out of work and facing mounting bills (he had refused to testify before HUAC and was blacklisted), approached his long-time friend, actor Lee J. Cobb, for a \$500 loan.¹⁵⁶ Cobb, who would go on to immortalize the character of Willy Loman in Arthur Miller's *Death of a Salesman*, had a full studio contract at the time, but he also had a radical past as a Party member.¹⁵⁷ Cobb was nervous about helping a friend cited for contempt of Congress and on his way to jail. Bessie begged him for the loan, but Cobb refused.¹⁵⁸ He gently escorted Bessie to the door, telling him, "You're a revolutionary, you know. Go *on* being a revolutionary. Go on being an example to me."¹⁵⁹ Such ostracism supplements the penalties of state and civil society, demonstrating how social snubs and stigmas track the acts of repressive elite power rather than those of democratic majorities.

It was Joseph de Maistre, France's preeminent theorist of counterrevolution, who first explained how rumors could crush a revolution and restore the old regime.¹⁶⁰ A cabal of counterrevolutionaries, he wrote in 1797, dispatches couriers to the provinces announcing that the king has taken back his throne.¹⁶¹ Then "[r]umour takes the news and adds a thousand impressive details."¹⁶² Defenders of the revolution are confused, uncertain whether the news is true. The cabal circulates more disinformation, preying upon the revolutionaries' confusion and their distrust of each other and their leaders.¹⁶³ While this would seem thin gruel for anything as grand as a counterrevolution, Maistre believed it was all that was required for the return of the old regime. With everyone in the revolution suspicious of everyone else, "pru-

155. COGLEY, *supra* note 116, at 12 (quoting *Counterattack* 1947) (alteration in original).

156. ALVAH BESSIE, *INQUISITION IN EDEN* 243-45 (1965).

157. *Id.* at 243-45.

158. *Id.* at 244-45.

159. *Id.* at 245.

160. JOSEPH DE MAISTRE, *CONSIDERATIONS ON FRANCE* 77-79 (Richard A. Lebrun ed. & trans., Cambridge University Press, 1994) (1974).

161. *Id.* at 77.

162. *Id.*

163. *Id.* at 78-79.

dence inhibits audacity.”¹⁶⁴ Knowing that their opponents are saddled with indecision, the counterrevolution swoops into the capital and takes back the throne. “Citizens!” Maistre proclaimed. “This is how counter-revolutions are made.”¹⁶⁵ “Four or five persons,” he prophesied, “will give France a king.”¹⁶⁶

It’s highly improbable that J. Edgar Hoover ever read Maistre; he didn’t have to. Hoover understood, almost intuitively, how rumors circulated within civil society could immobilize movements of radicalism and reform, particularly if those rumors were specially crafted to appeal to the particular values of different groups. Rumors had to be differently tailored to members of the movement, their parents and families, or the movement’s liberal allies. “[C]areful attention must be given,” explained a 1967 FBI memo, “to insure the targeted group is disrupted, ridiculed, or discredited through the publicity and not merely publicized.”¹⁶⁷ Within the civil rights movement, the FBI circulated rumors, some of them true, of Martin Luther King’s extramarital affairs.¹⁶⁸ When those rumors failed to turn his followers against him and King was awarded the Nobel Prize, the Bureau made a tape allegedly proving that King had been involved in “‘orgiastic’ trysts with prostitutes” and decried “the depths of his sexual perversion and depravity.”¹⁶⁹ It threatened to send the tape to the media unless King committed suicide before he received the Prize, and it unsuccessfully attempted to have Benjamin Bradlee, then Washington bureau chief at *Newsweek*, publish its contents.¹⁷⁰ In Oakland, the Bureau supplied a steady stream of rumors to the Bay Area press about the fancy apartments owned by leaders of the Black Panthers, their alleged venereal disease, and affairs with teenage girls.¹⁷¹ The Bureau sought to sever the links between black radicals in New York and prominent liberals by circulating accusations of black anti-Semitism and anti-Zionism.¹⁷² Among more radical groups, especially in the counterculture, rumors of sexual promiscuity had little force. So the Bureau relied on something it called “bad-jacketing,” where student leaders like Tom Hayden or black militants like Stokely Carmichael were accused of being government informants.¹⁷³ “One method” of circulating rumors about Carmichael, according to a 1968 memo,

would be to have a carbon copy of an informant report supposedly written by CARMICHAEL to the CIA carefully deposited in the automobile of a close Black Nationalist friend. . . . It is hoped that

164. *Id.* at 79.

165. *Id.*

166. *Id.* at 77.

167. Churchill & Vander Wall, *supra* note 56, at 92-93.

168. *Id.* at 97.

169. *Id.*

170. *Id.*

171. *Id.* at 146.

172. *Id.* at 135-37.

173. *Id.* at 126, 181-82.

when the informant report is read it will help promote distrust between CARMICHAEL and the Black Community. . . . It is hoped that the informants would spread the rumor in various large Negro communities across the land.¹⁷⁴

And when all else failed, the FBI could prey upon the homophobia within these movements and the nation, circulating accusations that individual leaders were involved in same-sex affairs.¹⁷⁵

III. LIBERALISM AGONISTES

Our perennial misunderstanding of repressive fear in the United States has much to do with the schizophrenic qualities of American liberalism. Politically repressive fear has been both the doing and undoing of American liberalism, but few of our writers seem willing to acknowledge—or able to recognize—this fact. Drawing on Montesquieu and Tocqueville, intellectuals possess a liberal diagnosis of political fear and a liberal prescription for its cure. Political fear, they argue, is caused by a centralized, lawless state pulverizing civil society into atomized dust, to which the Constitution is supposed to provide the perfect antidote: separation of powers, federalism, and the rule of law. Though neither the free market nor a pluralist society is mentioned in the Constitution, they are often invoked as prescriptions against fear, reflecting the vision, formulated by Madison, of a complex freedom growing between the cracks of a richly textured society. If political fear does arise in the United States, leading writers claim that it cannot be the result or even unanticipated side effect of these liberal remedies. It must emerge from outside the fragmented state or from some forgotten outpost of civil society.

That is the theory. The practice, as we have seen, is altogether different for political fear in the United States has been both the fulfillment and betrayal of liberalism, in ways that few writers realize. American liberalism is a double-edged sword—on the one hand, promising and sometimes delivering a society of free and equal men and women, on the other hand, defending a set of arrangements, like the fragmented state and social pluralism, that routinely betray that promise. At its best, liberalism has liberated slaves from bondage and second-class citizens from Jim Crow, given women the vote and workers the right to unionize, and generally made the United States a more humane society. But with its suspicion of strong, centralized states, its wariness of social movements that seek to overcome the enervating pluralism of American life, and its commitment to moderation, liberalism has also lent support to the forces of fear. As Martin Luther King noted in 1963:

174. *Id.* at 126.

175. *Id.* at 185-86.

I have almost reached the regrettable conclusion that the Negro's great stumbling block in the stride toward freedom is not the White Citizen's Council or the Ku Klux Klanner, but the white moderate who is more devoted to "order" than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says, "I agree with you in the goal you seek, but I can't agree with your methods of direct action" ¹⁷⁶

Reckoning with American political fear demands a more honest account of liberalism's contradictory inheritance and a greater skepticism toward some of its dearest faiths. I say this neither to discredit liberalism nor to recommend that we discard it. The protections it affords are real and not to be dismissed. A meditation on this doubleness of American life, in which liberalism and fear are so closely tethered, need not be taken as a sign of illiberalism. It is instead, it seems to me, the merest prerequisite of maturity, of the wisdom that should come to a nation after several centuries of constitutional rule.

176. Martin Luther King, Jr., *Letter from Birmingham City Jail*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 289, 295 (James Melvin Washington ed., 1986).