Art cause for alarm!

Appendix II

Reflections on the Case by the U.S. Justice Department against Steven Kurtz and Robert Ferrell

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Many people have asked us why the Justice Department is pursuing this case.

> Meaning, when the Buffalo Health Department affirmed there was nothing dangerous in the Kurtz home and that Hope Kurtz died of natural causes, when the FBI saw that the possession of scientific equipment and materials in Kurtz's home studio was completely consistent with his practice as an artist and that his practice has a long, public, and institutionally validated record, then, why didn't they drop the case? When it became clear even through the Grand Jury investigation that this was not a case of bioterrorism, why did they pursue it? Couldn't they see that Critical Art Ensemble's work is art?

As often as not the questioners answer their own question, saying it must be a matter of saving face: the Justice Department (DOJ) now has to justify the time and money they spent on this case in the first few weeks and has to answer to the publicity the case has attracted.

An overview of prosecutions since 9/11 originating with suspicion of terrorism suggests the department has a different logic for evaluating its results than might first be apparent to the public. And "saving face" is not at the top of the list.

Bad Company

One can imagine that investigative agencies and U.S. attorneys are under enormous pressure to produce results in the "War on Terror." To put it crudely, in the last three and a half years, probably nothing has influenced promotions and funding more. Less crudely, there are no doubt many dedicated people in the Justice Department genuinely concerned to prevent more terrorist events large or small. But like most of the Bush administration, this department manages to account for itself by its own warped calculations, while a typically meretricious press and a complicit public have all but spared U.S. Justice the shame of its waste, incompetence, and brutal racism.

Numbers of such cases and their outcome are difficult to put together accurately for several reasons, most prominently that the Justice Department has ceased publishing its data. Also, after 9/11, for its internal record keeping, the department created many new categories of crimes it considered terrorist, most significantly an umbrella category called, confusingly

enough, "Anti-Terrorism," which is "intended to prevent or disrupt potential or actual terrorist threats where the offense conduct is not obviously a federal crime of terrorism."[2] This category includes immigration, identity theft, drug, and like cases. In short, the domestic version of preemptive strike. And then there is the problem that the DOJ may be distorting the figures it does release: In January 2003 the General Accounting Office reported that at least 46 percent of all terrorism-related convictions for FY 2002 were misclassified, and of cases alleged to meet the qualifications for international terrorism, a minimum of 75 percent did not. As a consequence one finds a variety of numbers published, for instance:

David Cole, legal affairs correspondent for *The Nation*[3] tells us that since 9/11, of over 5000 foreign nationals detained by Ashcroft's department on suspicion of terrorism, exactly none have been convicted of terrorism. Many detainees have been indicted for routine violations involving immigration, fraud, laundering, and identity theft. On the one hand it would seem that the Justice Department has devised some new tools to help the INS sweep for visa problems. On the other hand, it seems the INS and the Social Security Administration are becoming as important as the FBI in referring cases of possible terrorism to the DOJ[4].

Transactional Records Access Clearinghouse (TRAC), an independent analyzer of federal records based at Syracuse University, reports that in the two years following 9/11, Federal investigators (primarily the FBI) recommended 6,400 matters for prosecution by the government either related to suspicion of having committed terrorist acts or on charges that fit the new "Anti-Terrorism" category described above. By September

30, 2003, the government had processed 2,681 of these cases. A total of five had been sentenced to twenty years or more in prison. In the category of international terrorists, the median sentence was 14 days.[5] These kinds of punishments do not suggest that for all the people being investigated and dragged through the system, serious terrorists are being snagged.

At the March 2003 hearings before the Senate Judiciary Committee, Ashcroft boasted that his 9/11 investigations had led to 478 deportations. It was not mentioned that most of these were for visa violations, and that in fact the FBI must clear deportees of suspicion of terrorism *before* deporting them. Maybe some of these were illegal deportations to the offshore torture centers we have learned about since cases like that of Maher Arar have begun to surface. Arar, a Syrian-born Canadian citizen, was detained by U.S. agents at Kennedy Airport in September 2002. Without being charged, he was sent to Syria where he spent a year in prison being tortured and interrogated. He was released in October 2003 after Canadian authorities intervened on his behalf. He is now suing the U.S. government.[6]

What is going on here? Let's look at the kinds of cases we do know about.

If we were to group them loosely, we could make one class of cases that actually do bring quite a bit of evidence to accuse alleged terrorists of attempted acts or plots. An example might be Richard Reid, the "shoe bomber," who was caught in the act, pleaded guilty to attempting to blow up a plane, swore allegiance to bin Laden and denounced U.S. policy at his sentencing hearing, where he received a life sentence. Another might be Zacarias Moussaoui, the so-called "twentieth hijacker"

because he swears allegiance to al Qaeda, went to flight school in the United States and at one time received money from operatives who financed some of the other hijackers. His trial has been stalled for two years as he has fought to call key witnesses whom he claims could testify that he knew nothing of the plot. The potential witnesses, Ramzi Binalshibh, Mustafa Ahmed al-Hawsawi, and Khalid Shaikh Mohammed, designated "enemy combatants," are in custody in undisclosed locations in other countries, and the U.S. government maintains that their participation in Moussaoui's trial even via videotape would "cause irreparable harm to the war on al Qaeda." Because the same witnesses were also denied by the United States in the defense of Mounir el Mottasadeq, the only defendant tried as part of the Hamburg cell of the 9/11 hijackers, a German judge has declared his conviction invalid and called for a new trial.

The second group, by far the largest, is the notoriously abused company, mostly men of Arabic origin and/or Islamic faith, arrested or detained with what appears to be a complete lack of evidence or regard for civil rights, and ultimately a complete lack of a case related to terrorism. Most of these remain nameless to the general public but some became high profile bungles of U.S. Justice. Here we can include Brandon Mayfield, the Muslim Attorney wrongly accused of the Madrid subway bombing because of a grossly mismatched fingerprint, secretly investigated under provisions of the PATRIOT Act and jailed for two weeks. Or Jose Padilla, a Chicago ex-convict, convert to Islam, and al Qaeda wannabe,[7] held for almost three years without charges in a Naval brig. In February 2005, a judge in the 2nd Circuit ruled the President did not have the power to hold a U.S. citizen as an "enemy combatant" and ordered Padilla released, but on September 9, 2005, a federal appeals

court upheld the power of the president to indefinitely detain so-called enemy combatants, including U.S. citizens, without any charges.

Certainly there are more and longer stories to tell about the abuses against specific Muslim men, but for the purposes of this paper, it's the numbers and the general disregard for evidence of terrorist connections that make this category significant. This is where we find the domestic sweeps: over 5000 effectively random detainees, the prosecutions and deportations of men who have worked and raised families in this country for years. Then the international sweeps: the 600 uncharged and unrepresented men subjected to torture in Guantanamo after being picked up in Afghanistan or elsewhere.

In order to understand more about what is happening in the Kurtz-Ferrell case, we can identify a third class of cases, in which the rhetoric of terrorism and the expanded juridical toolbox for fighting it are being used to punish and intimidate critics of U.S. policy whether they are Islam-identified or not. In some cases this is accomplished by turning small infractions into crimes precisely because the defendant can be associated with beliefs very unpopular in a time of national hysteria. In other cases it's done by exposing a suspect to humiliating investigation and expensive legal defense over charges that finally come to nothing.

Here we might list Captain James Yee, the Muslim army chaplain charged with serving the detainees at Guantanamo Bay. When he advocated against their illegal and inhumane treatment, he was accused of espionage, but the outcome of a lengthy investigation and a legal battle that cost the defendant over

$160,000 was that the Army reprimanded him for downloading internet porn and committing adultery. Or we might look at the case of University of South Florida Computer Science professor Sami al-Arian. Because he ran an Islamic think-tank and a Palestinian advocacy group in the 1990s, the FBI pursued a 10-year investigation trying to assemble evidence that he provided material support to terrorist organizations. Even though the FBI raided his office and home, his university conducted a separate investigation, and a judge re-examined the charges in 2000, no incriminating evidence was found. In the post-9/11 frenzy to prove their diligence, the U.S. Justice Department renewed their investigation and indicted al-Arian for conspiracy in February 2003.[8]

Sherman Austin, leftist activist and founder of www.raisethefist.org, a website hosting a number of leftist groups' webpages, was investigated for having a link on his site to Reclaim Guide, which offers information on explosives. Though the information was minimal compared with what can be found in countless libraries and websites, notably white supremacist websites, Austin was sentenced for "distribution" of information about making or using explosives with the "intent" that such information "be used for, or in furtherance of, an activity that constitutes a Federal crime of violence." He served a year in federal prison. Under U.S. First Amendment protection, publishing, distributing, reading, thinking about, or talking about such information cannot constitute a crime. Under the current U.S. justice system, it can be construed as criminal if it is associated with beliefs critical of the government, in which case the perpetrator deserves a pre-emptive strike.

Manlin Chee, a naturalized American citizen and an immigration lawyer who represented many poor and muslim immigrants, was awarded the 1991 American Bar Association service award, presented to her by Justice Sandra Day O'Connor. When she became an outspoken critic of the USA PATRIOT Act, the FBI began an investigation of her practice. After a year of pouring through documents on three decades of her cases, interviewing her clients and employees, and constructing a sting operation with agents posing as needy Muslims trying to obtain papers on questionable grounds, the FBI had her indicted for immigration fraud. Under pressure, Chee pled guilty and on March 3, 2005 she was sentenced to a year in jail.

It's hard to know just how much the USA PATRIOT Act is being used in investigations because part of the power of "sneak and peek" is that the law never has to disclose the wiretaps, searches, surveillances, or DNA swabs they may have deemed necessary to determine suspicion.[9] But, at the level of the courts, we are seeing an earlier, less publicized law become a handy prosecutor's hammer. Among other provisions, "The Antiterrorism and Effective Death Penalty Act of 1996," signed by Clinton after the Oklahoma City bombing, renders it a crime for U.S. citizens to provide material support to the lawful political or humanitarian activities of any foreign group designated by the Secretary of State as "terrorist."

A tragic case delivering convictions in 2003 on the basis of the material support argument is that of six young Yemeni Americans from the defunct steel town of Lackawanna, New York. Low-income, working, first- and second-generation Americans, they were recruited by a religious fundamentalist to an al Qaeda training camp in Afghanistan in the spring of 2001 where some

of them actually met Osama bin Laden. Confronted with the reality of a jihadi organization, they returned home, ceasing ties with the man who recruited them (who was later killed by a U.S. Predator drone in Yemen). By all accounts they got on with their lives and never knew about, planned, or in any other way supported terrorists or terrorist actions. The travesty in this case was the severity of the punishment and the way it was won. The axe over the defense was the constant threat of being declared enemy combatants, which would deliver them to a military prison without access to lawyers, courts, or their families—possibly a life sentence by executive fiat. The prosecutors never offered evidence that the Lackawanna defendants intended to commit any act of terrorism, but under the pressure of loosing all legal rights, they pled guilty and received sentences ranging from 6-1/2 to 10 years. A condition of the plea was a waiver by each defendant of the right to appeal, even if the Supreme Court were later to find the law unconstitutional.

As the 9/11 report attests, in spring 2001 Ashcroft had taken terrorism off the list of funding priorities and Condoleezza Rice didn't have the time of day for the state department terrorism experts. Although people at the top level of government have not been held to account for being unable or unwilling to heed mounting evidence that al Qaeda would become the number one U.S. threat, six young men from Lackawanna should have known that they risked 25-year prison sentences by exploring the promises of radical forms of their religion.

With particular regard to the domestic sweeps and persecutions, even some pundits sympathetic to the "War on Terror" have pointed out that the government is violently alienating the community of U.S. Muslims whose cooperation might be

useful to them. Clearly, cooperation is not a priority. "Catching terrorists" may be the advertised objective, but what these policies demonstrate is that there is a broader goal, a more urgent necessity for a larger vision. What the terrorist attacks of 9/11 represented to their target, multinational capital, embodied in the World Trade Center, and its ally, the U.S. military, embodied in the Pentagon, is that the pan-Islamic independence movement is out of control and must be eliminated. For global capital to continue to integrate one "nonintegrated" region after another, especially those with valuable resources, the notion of Islamic independence, like any vigorous third world independence movement, is in the way and must be crushed. And this means that any potential sympathizers with such a movement must be set straight. In this case, people of Islamic identification everywhere must be disciplined, must be shown that the privileges of the first world, including democracy and basic human rights, are only theirs by the discretion of first world superpowers, the United States and the European Union.

Of the Lackawanna Six, Bush boasted that the government had broken up a terrorist sleeper cell. In 2003 John Ashcroft gave the Justice Department's highest award, "The Attorney General's Award for Exceptional Service" to the members of the Buffalo Joint Terrorism Task Force for the dismantlement of the Lackawanna terrorist cell. Many of the award recipients were part of the team that conducted the investigation of Kurtz. The award-winning prosecutor who presented the case against the Yemeni Americans, William J. Hochul, Jr., is now prosecuting Steve Kurtz and Robert Ferrell. Besides heading the anti-terrorism unit in the Western District of New York State, his specialty is the use of fraud and racketeering charges

in criminal cases against white collar, violent, and organized crime.

Referring to the Lackawanna case, Deputy Attorney General Larry D. Thompson said, "Terrorism and support of terrorists is not confined to large cities. It lurks in small towns and rural areas." An advantage of the Kurtz-Ferrell case is that it illustrates that U.S. Justice does not only prosecute the dark and the poor, but that it will also hunt the white and the professionally salaried. The enemy is not confined to those we easily recognize as other, but comes disguised as college professors in the arts and sciences. Justice is fair; the enemy is everywhere.

In this way, even as the architects of a privileged society wage war on a population they have deemed a threat or obstacle, they consolidate the loyalty of the included. This requires disciplining any serious criticism of the system being defended. Even in the best of times, the law is multifarious and discretionary, meaning that laws are generally enforced in an unequal manner, so that the more enfranchised, "valued" citizenry are less likely to encounter the law for the same actions that will trip the less enfranchised, generally suspected, disposable people. And this is always put to political ends, sometimes urgently when a "present danger" can be broadcast and other times more routinely. When the reigning defense moves from routine mechanisms of ideology and enforcement to broader operations of brutality, the tactics must be justified by vilifying more than just the outsiders, in fact by showing any class of detractor to be deviant and punishable.

It's easy to believe this ambitious prosecutor and his team find the content of Critical Art Ensemble's work, especially their

writings, so radically deviant from their own plan for America that they consider it criminal. Everything about the art group's activity has always been completely legal, and their ideas are protected by the First Amendment. As little respect as the Bush administration shows for the U.S. Constitution or any other inconvenient law, national or international, they have not yet been able to openly trump the First Amendment.[10] But the judicial trance induced by the mantra of terrorism currently gives the prosecution supraconstitutional powers, specifically end-runs around First Amendment rights. Unfortunately, the Kurtz-Ferrell case may follow the formula of the neutral infraction + leftist politics = inflation to terrorist proportions.

The Ownership Society

After the possible charge of bioterrorism against Kurtz, the charges of mail and wire fraud appeared to many as small and technical, but these are serious felonies. Two counts each of mail and wire fraud carry the same potential sentence as the original bioterrorism charge would have: up to 20 years. Charges of mail fraud and more recently wire fraud are designed to dismantle phony financial schemes that defraud the public out of money through mail, credit card, or internet. Because these laws are written very broadly, they are also used to nail figures in organized crime and, in the same way, have been used to put away social and political troublemakers such as Marcus Garvey.[11]

Exactly what transaction between Kurtz and Ferrell is alleged to be fraudulent? According to the indictment, Ferrell used his University of Pittsburgh agreement with American Type Culture Collection (ATCC) to obtain $256.00 worth of harmless

bacteria that he then sent through the mail to Kurtz. A federal offense? Here are the details of the context:

Research and educational labs obtain biological samples from companies like ATCC through formalized agreements called Material Transfer Agreements (MTAs). Some samples are regulated because they are lethal pathogens and their handling should by all accounts be tightly controlled, but all samples are regulated as intellectual property. ATCC handles the deadliest to the most benign bacteria used in high school biology labs. To purchase any of these, one has to be part of a research or educational institution and sign a contract forbidding the buyer to sell, share, mail, or reproduce the sample. In its generic form, this is basically an intellectual property agreement designed to control a product which, once in the hands of the consumer, is infinitely reproducible. Think of the licensing agreement you accept when you open new software or the copyright agreement you enter when you buy recorded music. Apparently, in the collaborative culture of biology labs, MTAs are about as routine. They are signed by the principal investigator of a lab at a university, while researchers and bench scientists in those labs do in fact share, save, reproduce, transport, and send samples through the mail all the time. Ask a biologist.

If the defendants did what is alleged in the indictment, they broke a contract. At most, this is a civil offense to be settled between the University of Pittsburgh and ATCC, but neither of these parties have brought any complaint against Ferrell or Kurtz. To our knowledge this is the first time the U.S. Justice Department is intervening in the alleged breach of an MTA of nonhazardous materials in order to redefine it as a criminal offense.

The U.S. Department of Justice publishes a *Criminal Resource Handbook* available online, in which it states a general "Prosecution Policy Relating to Mail Fraud and Wire Fraud" as follows:

> *Prosecutions of fraud ordinarily should not be undertaken if the scheme employed consists of some isolated transactions between individuals, involving minor loss to the victims, in which case the parties should be left to settle their differences by civil or criminal litigation in the state courts. Serious consideration, however, should be given to the prosecution of any scheme which in its nature is directed to defrauding a class of persons, or the general public, with a substantial pattern of conduct.*[12]

Is the Western New York Office of the U.S. DoJ pursuing yet another Bush line of legal activism, this one a strategy to criminalize the breach of MTAs? This is a very interesting question and unanswerable. I will speculate about it anyway, but first stress again that it's more likely that Hochul & Co. primarily want to publicly punish Kurtz and Ferrell for the ideas they represent, and to sustain the campaign of intimidation against dissent. But beyond this there are aspects of the case offering other gains consistent with neoliberal and neocon priorities.

For all the myths of creative genius, different drummers, posters of Einstein's wild halo of hair backlit under an injunction to "think different," careers in science are not made by stepping out of line. More than ever the line in question is the bottom line. Research universities are increasingly expected to perform as drivers of the economy by making discoveries that are patentable and marketable in short order. Written to move new technology into the marketplace faster, the 1980 Bayh Dole Act

made it easier for individual scientists and their institutions, whether public or private, to profit by patenting their own research. Add to this the 1980 Chakraborty decision legalizing the patenting of life forms, the boom in the pharmaceutical market, and twenty-five years later research universities have become the hubs of countless networks in which scientists, venture capitalists, and small companies float new technologies on the market. Many of the start-ups fail, but the successful ones are bought out by bigger companies, the whole system serving as a cost-free, R&D-to-market proving ground.

Increasingly, the universities themselves are growing dependent on the money made in their technology transfer offices where patents are handled. And corporate funding in the form of grants or partnerships is becoming a routine way to make up for shortfalls as state and federal funding shrink. This conforms neatly with the rightwing-since-Reagan agenda to privatize all activities once pursued as public stakes in a common welfare.

Privatization is clearly the shibboleth of the reigning Republican ideologues, but it's more than privatizing the military and hiring mercenaries to make possible an unpopular war, or borrowing trillions to privatize a perfectly healthy social security system. The privatization of information is now at the heart of capitalism.

In some industries this has made the difference between routine and enormous profits. In particular, the life sciences have achieved an importance well beyond the U.S. research institution. Pharmaceutical block-busters that treat the "crotch to cranium" ills and complaints of the first world as well as the gene rush in both plant and animal forms have made the life sciences the meeting ground of multinational profiteers,

global treaty disputes, and rioting farmers in the global south. Proprietary advances under what we used to call biology have become an investment frontier second only to petroleum in the waging of national security. This is an integral part of U.S. foreign policy, exercised through multi- and bilateral trade agreements insisting on conformity to intellectual property regimes granting commercial control over biodiversity, as well as over agricultural methods and resources.

What does this have to do with Critical Art Ensemble and the case against Kurtz and Ferrell?

In the direct sense, the work that has clearly made the artist so reprehensible to the U.S. Attorney's office has been dedicated to critiquing this situation for several years. In addition, the alleged breach of contract that is here being transfigured into a criminal offense is only one of the rapidly proliferating legal instruments that regulate property in our lives, especially intellectual property. An MTA may seem remote and technical, a tic in the bureaucracy of science, but it represents a growing category of actions that make the individual increasingly vulnerable to authoritarian interference in the name of property.

The more our resources, needs, pleasures, and experiences are socially and legally defined as "property," the more the state is authorized to infiltrate our lives and regulate disputes of ownership. This is happening in the realms of leisure, work and, as stated earlier, international relations. Current consumer technologies of music and image make reproduction inevitable so, as we see when high school kids are busted to make an example, legal and repressive measures are the only way to enforce ownership. In the case of transgenic seeds, farmers sign contracts

foregoing the right to reproduce, save, sell, share or give away any of a product which, if used as directed, will reproduce itself. The leading holder of patents in agriculture, Monsanto, has investigated and harassed over 500 farmers in the United States for breach of this property agreement which is very similar to an MTA but with much more draconian consequences.[13] A fundamental tenet of membership in the WTO and of all U.S. and E.U. trade agreements with developing nations insists that the trading partner establish and enforce intellectual property regimes consistent with those in the global north. One of the reasons that the United States is so eager to help multinationals get transgenic agriculture rooted in the extensively rural global south is that it is practically a one-step process to drive patents and intellectual property regimes into the most basic register of their lives and economy.

The ethos of CAE's work, its process, content, and rhetoric runs counter to the elitist protection of knowledge, whether as property or as privilege. CAE assumes the role of the amateur, the energetic, engaged nonprofessional approaching a specialization such as genetics or biotechnology to expose its uses to public scrutiny. The preferred way to do this is collaboration with someone from within the field, although this is not always possible. What is happening in the legal elaboration of intellectual property is that we are either able to find a collaborator or we are forced to become thieves. In this case the implication is that even with a reputable and willing collaborator, we will be named as thieves.

At this moment, the charges are no longer related to bioterrorism, but as far as the prosecution goes, the trial will probably not be much about MTAs or the culture of biology research or

the legitimacy of the amateur. The prosecutor will do his best to make it about the perversity of the saboteur. The courtroom is not so much about the law as it is about persuading the jury by any means necessary. No doubt Kurtz will be dramatized as reckless and anti-American: a combination tantamount to terrorist. Since Ferrell is a venerable scientist in his sixties currently undergoing treatment for cancer, hopefully he will not be so direct a personal target, although scientists have at least as much at stake as artists in this case.

Capital Defense

Scientists have had their own problems with the Bush administration. Some of this is evidenced in a report by the Union of Concerned Scientists called "Scientific Integrity in Policy Making" signed by over 6000 scientists, including 48 Nobel Laureates, 62 National Medal of Science Recipients, and 127 Members of the National Academy of Sciences. It lists the many overrides of independent scientific advisories by ideology in the last four years.[14]

Another document more relevant to this case is the letter from 758 scientists to the director of the National Institutes of Health protesting the shift of tens of million of dollars in federal research money from major public health diseases to obscure pathogens the government has designated as bioterrorist threats. The scientists say that, since 2001, grants for research on the bacteria that cause anthrax and five other diseases rare or nonexistent in the United States have increased fifteenfold, while grants to study bacteria not associated with bioterrorism have decreased 27 percent. The underfunded class includes common serious

germs such as tuberculosis and syphilis. The February 28, 2005 letter is posted on the website of the magazine *Science*.

This is especially germane to the case because CAE was developing projects critical of U.S. biodefense policy when the FBI raided Steve Kurtz's home. The harmless bacteria allegedly obtained under Ferrell's MTA was for a project criticizing the history of U.S. bioweapons development and testing. Many of the books the FBI confiscated were on the history of bioweapons. On Kurtz's computer, also confiscated, was part of a manuscript on the subject. What was CAE's critique almost a year ago? In many ways it was similar to that of the letter referred to above. As in all of CAE's work, the artists were investigating a chain of decisions highly relevant to the public, but from which the public had been largely excluded.

In the United States since 2000, there has been a six-fold increase in annual spending for biodefense. A lot of this money is going toward the construction of several new biosafety level 4 labs in different parts of the country. Because these facilities are built for research into deadly infectious pathogens, they are capital-intensive complexes with high tech security systems that have to be maintained around the clock. All the people working in these labs from the scientists to the janitors have to be restricted, their backgrounds checked and their daily routines subject to intense surveillance. In addition, the major public funding opportunities for research in universities are becoming severely skewed towards biodefense so that labs in educational institutions will also be subject to high security restrictions, affecting the culture of the entire institution, making it more hostile to the free and open sharing of research materials and information.

CAE's work would point out that the threat of bioterrorism is actually very unlikely because, from a weapons point of view, with the exception of anthrax,[15] biological agents are unstable, hard to work with, and a lot more trouble than explosives and chemical toxins. We should also know that the problem with an aggressive biodefense program is that it is essentially indistinguishable from an aggressive bioweapons program; that the new biosafety level 4 labs will actually be developing new deadly pathogens in order to figure out how to defend against them and that these facilities may actually increase the likelihood of previously unknown lethal microbes; that in the only bioterrorism scare in the United States, the anthrax anonymously sent through the mail was traced back to one of the government defense labs studying bioweapons, and three years after that discovery the government still can't locate the perpetrator.[16] And as concerns the signatories to the letter cited above, increased biodefense spending comes at the expense of research into common infectious diseases that kill millions of people every year. What if we started thinking about the militarization of public health and the corporatization of all things military? What if we looked at who is gaining from contracts to build and maintain these high security facilities?

Most scientists who criticize the Bush administration's science policy are taken off committees, have their recommendations rewritten, are denied access to policy boards and funding, or are just ignored. (Please see the Restoring Scientific Integrity website for specific examples at http://www.ucsusa.org.) Scientists who criticize the direction favored by corporate science risk losing funding or having their careers ruined.

In CAE's case the FBI stumbled onto the materials of a group of artists preparing a very thorough and knowledgeable critique of policy that relates to capital, science, politics, terrorism, and the mother of all four, the military techno-security cineplex. But couldn't they see that what they found was art?

Legibility And Legality

Sometime last year I saw a picture of Boston College student Joseph Previtera staging a protest outside a U.S. Armed Forces Recruiting Office. The image's effect was immediate because Previtera had donned a sack-like shift that came to his knees and a pointed cloth hood that covered his face and head. He stood on a crate with arms outstretched and dangled a couple of stereo wires, thus silently impersonating the tortured prisoner of Abu Ghraib for over an hour before the Boston police arrested him for disturbing the peace. By the time he got to the station the charges were two felonies: false report of the location of explosives and a hoax device. In other words, the wires coming from his sleeves clearly indicated a false bomb threat. Fortunately these charges did not hold up to an indictment.

For a split second I joked to myself, "The government needs to go to art school. Don't they get it?"

But of course they get it. They get it all too well. "They" understand that an expressive means, in this case performance, is being engaged to make a statement critical of U.S. policy and actions abroad. They refuse to recognize there is a difference between the use of an expressive means to make a critical statement and the use of a substance or technology to pose a

threat. This illiteracy is not simply a matter of ignorance or a misunderstanding that can be cleared up after an earnest discussion. This is a willful dysfunction that is serving the government, not only in ratcheting up the number of terror-related suspects it can report busting, but in clearing the public sphere of ungovernable reality.

If the developing legal framework defines terrorism and its support as any thought or expression that might undermine the U.S. government and the transnational capitalist functionaries it fronts, even if only by dissenting from it, art as a category is not protected. Ideas, expression, and communication, as categories, are not protected. Artists, academics, intellectuals, activists, clergy, anyone—hopefully everyone—who lives the premise that they are free to openly speak their beliefs and pursue their questions has reason to take this issue as their own.

One reason the First Amendment becomes moot in the current legal cosmos is that the realm of the symbolic is not recognized as distinct. For the Bush administration ideology is reality. Just as "reality-based" science, or evidence against weapons of mass destruction, or realistic assessments of a war in Iraq are not recognized as phenomena with imposing significance, symbolic adversaries may be prosecuted to the full extent of the law—and to the full extent that the law can be distorted and mangled.

A series of very unfortunate events bestowed on the FBI a reason to investigate Steve Kurtz. They found material critical of corporate capital and its uses of science, and, where relevant, of U.S. policy. Like most politically motivated people, for

Kurtz the point of producing such material was to publish it; the FBI could have found the same material in many places had they been looking, because its legality is a cornerstone of our society. We don't know if CAE was already being monitored, but circumstances put them under the government's scrutiny as could happen to any of us. Given the excuse and the complete authority to investigate every aspect of Kurtz's life, the U.S. Justice Department found a minor, noncriminal irregularity on which, as has become the form, they pinned criminal charges. It is not conspiratorial to say that the charges also serve the right wing agenda, including the maintenance and enforcement of divisions of knowledge and everharsher penalties for intellectual property violations, because these things become endemic to a system. The prosecution does not have to articulate the goals of the system even to itself; everything is already in place.

Of course it's about the art. It's about representation. The individual cases, the kinds of cases, the facts of the cases, the arguments related to the cases, the numbers of cases and the distortions of those numbers, these too are very much matters of representation. The case against the Palestinians, the case against Islam, the case against pacifists, the case against independent science, the case against rural people who don't conceive of their knowledge as property, the case against all people who are in the way of the cannibalistic machine of global capital cannot only be won by force. It has to be fought in the field of representation, because we know too much. And because our legal system and ideals actually provide vigorous correctives to abuse of power—but only if we fight for them. What is clear is that those correctives, the right to free speech, to open and collective knowledge, to equality of

race and religion, and to accountability and transparency of power, have to be actively reclaimed as a matter of daily life. And they have to be reclaimed in every arena where proto-fascism infests governance: in the police and the courts, in the establishment of racialized hierarchies, in ethnic and financial exclusions from education, in the restriction of creative endeavor, in the criminalization of curiosity, and in the monoculture of private property as the single medium of meaningful human exchange.

[1] The opinions in this paper are those of the author and not necessarily of the CAE Defense Fund. However, I would like to acknowledge the invaluable collective input of all of the defense team in developing these analyses.

[2] *Department of Justice Data Manual*

[3] Cole, David, "Taking Liberties," *The Nation*, October 4, 2004

[4] Gourevitch, Alexander, "Body Count, How John Ashcroft's Inflated Terrorism Statistics Undermine the War on Terrorism," *The Washington Monthly*, June 2003

[5] *Criminal Terrorism Enforcement Since the 9/11/01 Attacks, A TRAC Special Report*, December 8, 2003

[6] See Jane Meyer's "Outsourcing Torture," *The New Yorker*, Issue February 14, 2005, http://www.newyorker.com/fact/content/?050214fa_fact6

[7] Both Richard Reid and Jose Padilla tried to be part of al

Qaeda, but true to its notorious insularity, the network gave these foreign converts a generic training and sent them back to the west. It was Padilla's idea to make a dirty bomb, but they never gave him a plan.

[8] In December 2005, Sami al-Arian was acquitted on 7 of 15 charges. On the remaining 8 charges the jury was deadlocked. The future of this case is still uncertain.

[9] Brandon Mayfield is suing the U.S. government for violating his rights and also contending that the USA PATRIOT Act is unconstitutional. His attorneys have requested the Justice Department disclose exactly what secret searches were made in the investigation and have received a letter acknowledging that the PATRIOT Act was used. This may be the first time a citizen has secured such information about the PATRIOT Act.

[10] Sami Omar Al-Hussayen, a Saudi Ph.D. candidate in computer science, was acquitted by an Idaho jury in June 2004 of terrorism charges for setting up and running web sites that prosecutors said were used to recruit terrorists, raise money, and disseminate inflammatory rhetoric. The jury deadlocked on other counts of visa fraud and false statements. These nonterrorism charges were dropped when Al-Hussayen and his family agreed to deportation.

[11] Marcus Garvey was convicted of mail fraud relating to the finances of the failed Black Star (shipping) Line. By most accounts, his enemies were not just the government, but prominent black businessmen who had decided his cause was not in their interests. He served one year in the Atlanta penitentiary and was then deported to Jamaica.

[12] US DOJ, *United States Attorneys Manual, Title 9, Criminal Resource Manual*, http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/43mcrm.htm

[13] On January 13, 2005, the Center for Food Safety published a comprehensive report on Monsanto's lawsuits and threats against farmers. The 84-page report is available at http://www.centerforfoodsafety.org/Monsantovsusfarmersreport.cfm

[14] Please see http://www.ucsusa.org/scientific_integrity/

[15] While the organism itself can be stabilized in spore form, it is still very difficult to work with. Normally it lives in the ground at a very low density. To increase density to a military grade (of around a billion spores per gram) and keep it moving through the air is difficult. Moreover, the natural instability of weather conditions make it impossible to predict how it will move once released. Of the two field releases—October 2001 in the United States and in Russia in 1979—casualty rates were exceptionally low, certainly not even close to WMD potential.

[16] For examples, see Judith Miller, "New Germ Labs Stir a Debate over Secrecy and Safety," *The New York Times*, February 10, 2004; Dan Vergano and Steve Sternberg, "Anthrax Slip-Ups Raise Fears about Planned Biolabs," *USA Today*, October 13, 2004; and "What Exactly Is the Army Up To?" *Deseret Morning News*, July 25, 2004; and especially: Rick Weiss and Susan Schmidt, "Capitol Hill Anthrax Matches Army's Stocks," *The Washington Post*, December 6, 2001.