

Criminal Justice Matters

Witch Hunt—Buzzwords, Not a Defense

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The baseless denigration of lawful criminal investigations and prosecutions erodes the rule of law in this country...

Arthur Miller's 1953 play "The Crucible" presents a semi-fictionalized version of the 1692 Salem, Massachusetts, witch hunts. The play chronicles tragic events from our nation's early history when over 200 women and men were accused of practicing witchcraft and 20 were executed in and around Salem based on gossip and even "spectral evidence," i.e., testimony about dreams and visions. Jess Blumberg, *A Brief History of the Salem Witch Trials*, Smithsonian Mag., Oct. 23, 2007 (updated Oct. 24, 2022).

Arthur Miller was motivated to write "The Crucible," as he later explained, in part by the reality that in the 1950s, "[t]he Red hunt, led by the House Committee on Un-American Activities and by [Joseph R.] McCarthy, was becoming the dominating fixation of the American psyche." Arthur Miller, *Why I Wrote "The Crucible,"* New Yorker, Oct. 21 & 28, 1996. At that time people were accused of being and branded as Communists and traitors with little or no evidence, only speculation and baseless assertions. Over 200 years after the Salem witch trials, McCarthy led a congressional "witch hunt."

Today in the United States, "witch hunts" still occur. But to determine what is and is not a "witch hunt," one must appreciate the criteria for such a label. Essentially, a witch hunt must be devoid of persuasive evidence of any wrongdoing and instead rely solely on speculation and biases against those accused. At present in this country, there are "witch hunts" being pursued by those in positions of authority, but there are also legitimate criminal investigations and prosecutions based on factual evidence that are intentionally mis-categorized and mislabeled as "witch hunts." Merely repeatedly calling an investigation or a prosecution a "witch hunt" does not make the endeavor a baseless or biased accusation or proceeding. Branding an inquiry a "witch hunt" may be an effective propaganda tool, but that rhetorical attack shrivels up under analysis when factual evidence justifies pursuing the charge.

More importantly, there is no legal defense in the judicial system that is entitled to or encompasses the "witch hunt" claim. The law does recognize the constitutional claim of *selective prosecution*. "A selective-prosecution claim is not a defense on the merits to the criminal

charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *United States v. Armstrong*, 517 U.S. 456, 463 (1996). "In order to prove a selective-prosecution claim, the claimant must demonstrate that the prosecutorial policy had a discriminatory effect and was motivated by a discriminatory purpose." *Id.* at 465. "In the ordinary case, 'so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'" *Id.* at 464 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)). Thus, the imprimatur of a grand jury's indictment evidences a lack of a prosecutorial discriminatory purpose.

The law also recognizes the claim of *vindictive prosecution*, but again this constitutional right does not mirror or otherwise encompass a "witch hunt" claim. "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.'" *Bordenkircher*, 434 U.S. at 363. "For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right." *United States v. Goodwin*, 457 U.S. 368, 372 (1982). "Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, 'the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Bordenkircher*, 434 U.S. at 364. A ceaseless chanting of the "witch hunt" mantra is not a basis for a vindictive prosecution claim, which requires evidence that the alleged perpetrator is being punished for doing what the law allows. "Spectral evidence," such as claims supported by only dreams and visions, will not be admissible in courts of law, even though allowed at the Salem witch trials.

Defendants are entitled to a trial free from *prosecutorial misconduct*, but this constitutional protection has no connection to a generic "witch hunt" lament. "[P]rosecutorial misconduct may 'so infec[t] the trial with unfairness as to make the resulting conviction a denial of due process,'" but "[t]o constitute a due process violation, the prosecutorial misconduct must be "'of sufficient significance to result in the denial of the defendant's right to a fair trial.'" *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Yet the Supreme

Court has "several times underscored the 'special role played by the American prosecutor in the search for truth in criminal trials.'" *Banks v. Dretke*, 540 U.S. 668, 696 (2004). Certainly, prosecutorial misconduct may infect the charging process, but proof of such a constitutional claim must be premised on evidence of prejudicial misconduct, not merely a nebulous claim that the charges are a mere "witch hunt."

The true "witch hunts" of today are promulgated by those who hurl from positions of apparent authority unsupported accusations based upon nothing more than factually barren conspiracy theories incessantly repeated and the vehement hatred of those suspected and accused. Conversely, charges backed by relevant factual evidence and preliminarily evaluated by citizen grand jurors will never qualify as "witch hunts" but are to be assessed in the tribunals of this country by citizens functioning as jurors and ultimately resolved in courts of law.

The true "witch hunts" of today are efforts by politicians from the nonjudicial branches of the government, whether federal or state, to interfere with or distract from authentic criminal investigations and prosecutions in a blatant breach of the separation of powers doctrine and the judicial independence requirement. The "Constitution unambiguously enunciates a fundamental principle—that the 'judicial Power of the United States' must be reposed in an independent Judiciary," "command[ing] that the independence of the Judiciary be jealously guarded." *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982). Those who brandish the denigrating label "witch hunt" against legitimate criminal investigations and prosecutions appear to be the ones today actually conducting true "witch hunts" devoid of any factual basis to justify their actions.

The Salem "witch hunts" were the product of extremism, paranoia, injustice, social tensions and cult-like adherence to unsupported theories, which appear to be the same factors supporting today's attempts to label legitimate criminal investigations and prosecutions "witch hunts." McCarthy's House Committee on Un-American Activities conducted "witch hunts" forged on those same ingredients. Today's actual "witch hunts" are the products of the same absence of evidence, a surplus of imagined wrongs and an extreme bias against individuals or groups.

As the Salem Witch Museum has posited, the generic formula for a witch hunt is fear plus a trigger targeting a scapegoat. *Witch Hunts*, Salem Witch Museum (2023), <https://tinyurl.com/42z5mpa7>. A scapegoat is universally recognized as one who is the object of irrational hostility. This equation reveals that where there is enough factual evidence

to constitute probable cause to investigate and/or prosecute one or more individuals for a crime or crimes, the government action is not a witch hunt, regardless of claims to the contrary.

Every defendant, regardless of the charges, is entitled to the presumption of innocence and guilt established only by either proof beyond a reasonable doubt or a guilty plea, as well as the right to make any nonfrivolous claim of selective prosecution, vindictive prosecution or prosecutorial misconduct. But no defendant has the right to escape investigation or prosecution by merely labeling the legal processes "witch hunts" with no evidence to support such a claim. The general public needs to understand that the phrase "witch hunt" is not a "get out of jail free" card for those being investigated and/or prosecuted on the basis of evidence constituting, at the minimum, probable cause to investigate or charge the alleged offenses.

The baseless denigration of lawful criminal investigations and prosecutions erodes the rule of law in this country, which is the basis of the social order and generates a lack of respect for the institutions of criminal justice, which will be difficult to restore. "Witch hunt" is not a talisman to protect those whose conduct should be legitimately investigated or prosecuted with the outcome to be determined in the judicial tribunals of this nation. Conversely, this country's legal system will not tolerate those who pursue true "witch hunts," based on nothing more than bias, paranoia, unsubstantiated conspiracy theories, intolerance and extremism.

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