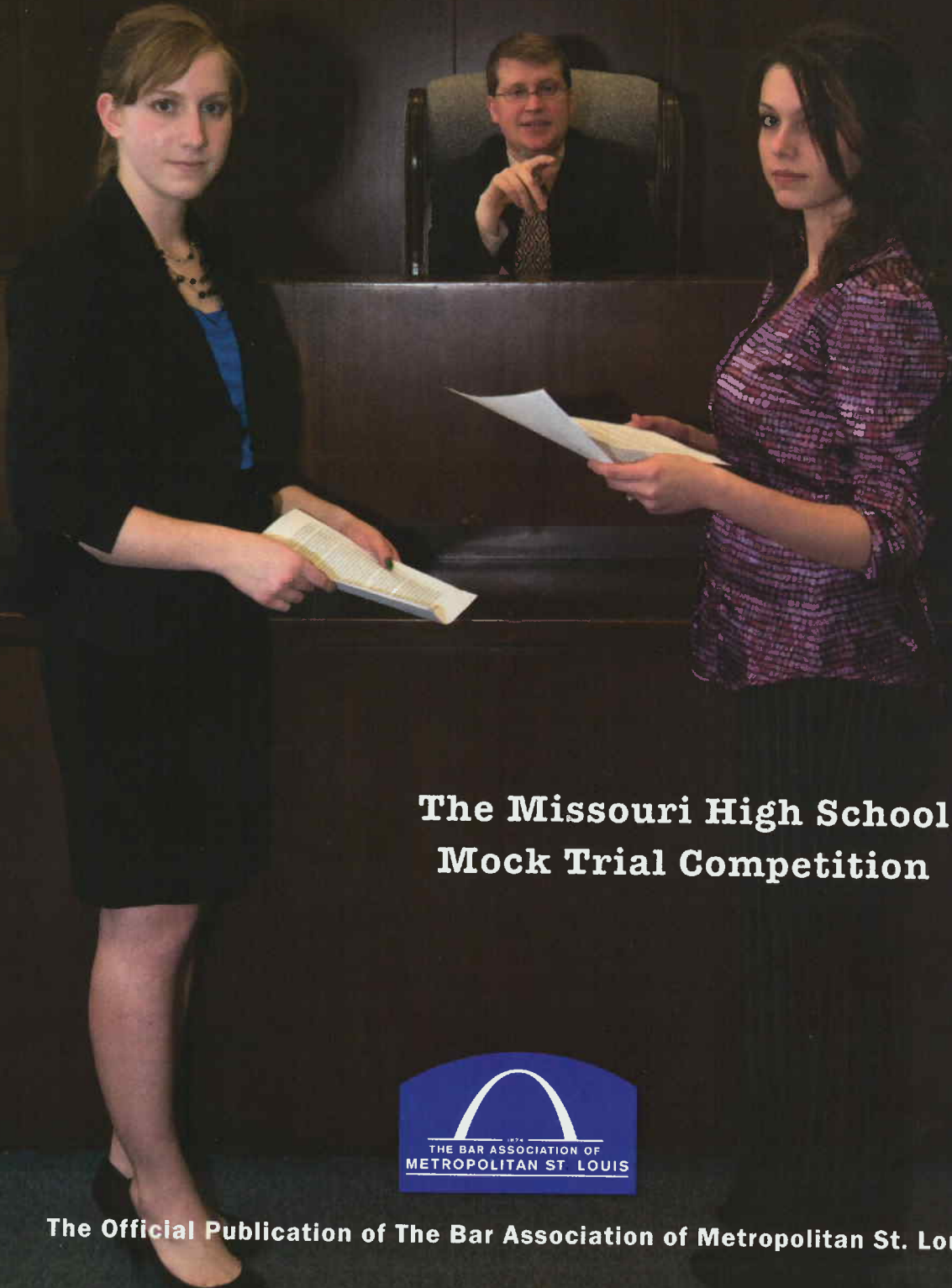


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Balancing safety versus liberty.



by Thomas G. Glick
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On the morning of September 11, 2001, I was chairing a meeting of the Probate & Trust Section of the Bar Association of Metropolitan St. Louis. At the time, we didn't really understand the nature of the news that was filtering in to us from the wait staff, but over the course of the next few days and weeks we all came to realize that the world had changed forever. With 10 years of hindsight, we realize that in the wake of September 11, 2001, the country overreacted and sacrificed liberty for the sake of security. In many ways, this was the larger tragedy of September 11; certainly, the tremendous loss of life and property was tragic, but the terrorists behind the attacks did not attack us because they

“Those who would give up Essential Liberty to purchase a little temporary safety, deserve neither liberty nor safety.”

– Benjamin Franklin, A Historical Review of the Constitution and Government of Pennsylvania. (1759)

had any particular vendetta against the lives or buildings they destroyed. Instead, the message was one of opposition to our government and our freedom, to the extent that we made societal decisions based on fear, and we traded our liberty for security, this was something of a victory for the terrorists.

The risk of reactionary decision-making based on fear was learned well before those days after the 2001 terrorist attacks. Clearly, it was on the mind of Benjamin Franklin since before the founding of our country. The difficulty with the question of liberty or security is that one side has an unfair advantage, because it gets to use fear – fear of a life with inadequate security. Placing a value on liberty is a more ephemeral project. We know that even the most esteemed decision-makers in the world can be lured by false threats about weapons of mass destruction into erroneously authorizing a war.

It's not appropriate to blame the guardians of security-over-liberty for their position, though. As lawyers, we work as advocates and know the difference between a zealous advocate and an impartial decision-maker. Often the defenders of security are law enforcement. They should never be blamed for forsaking liberty in pursuit of security: it's their job and we hired them to do it. But it is important to

recognize their bias in the argument and evaluate it appropriately.

This debate is not unfamiliar to us on a smaller scale in our law practices. Every attorney that has considered the concept of “anticipatory breach” either in a courtroom or in drafting a contract has also wrestled this particular demon. A principal part of our profession as counselors for the rest of the citizenry is to take current fact patterns posed by clients and explain how others in the past have balanced the same decision

in similar – but never identical – situations. Despite the abundance of precedent and other law, there will always be people who feel

that someone else has inappropriately determined the liberty versus security question. Sometimes it's in a civil context, and sometimes it's in a criminal context, but when the balancing involves individuals or groups smaller than the whole country, they end in our offices, and later, in court. In order to have a neutral governmental official evaluate a case when a citizen feels their liberties have been inappropriately sacrificed for security, they come to the courthouse. But first, they must first pass through the courthouse security checkpoint. In Missouri's Twenty-First Judicial Circuit, that means they must pass through a more stringent security check than at any other place I know.

Security in the St. Louis County Courthouse is a particularly sensitive topic, because that very courthouse was the site of a shooting by Kenneth Baumruk in 1992. A great many of the attorneys, clerks, judges, and security officers who were in the courthouse on May 5, 1992, still work in the Courthouse. I appreciate that this leaves an indelible mark on them, especially those who were injured. I know that some of those who were direct victims are members of BAMSLS and, I presume, readers of this column. However, it is unclear to me why this incident, almost twenty years ago, justifies not just a higher level of security than every other

Courthouse in the area, but also higher than that of airports. Moreover, the St. Louis County Courthouse enjoys not just a high level of security, but a continually increasing level of security.

Certainly the Baumruk shooting brings home the need for security, but it cannot independently justify any and all security measures that could possibly be contemplated. The reductio ad absurdum version of this argument would suggest that perfect courthouse security is readily obtainable by merely locking the courthouse doors, and granting police officers and the more physically powerful civil litigant the authority to mete out justice as they see fit without any time wasted in the courthouse. Ironically, that seems like Kenneth Baumruk's version of a justice system.

Many members have sought me out on this issue. They didn't need to. Much of my practice requires me to attend court in St. Louis County, and from 1995 to 1999 I was employed there. Over that time, the security level in the circuit has increased several times. It seems crazy now, but when I first started working at the courthouse I still carried a Swiss Army Knife. For the first years I worked at the court, I continued to carry that pocketknife. Every morning and every afternoon after lunch, I would put the bright red knife in a dog bowl and hand it to an officer. One morning, when I was late for work, I was told I could not bring it in. Frankly, by then that made pretty good sense to me, but courthouse parking was scattered to distant corners of Clayton while the new Justice Center was being constructed. So, I vowed to the officer that I would stop carrying the knife pursuant to the new rule. But I inquired with the office if it would be possible to enforce the new rule proactively since I had credentials as a courthouse clerk, had carried it for the prior two years without incident, and was parked several blocks away. I informed him that I was also overdue in my office upstairs, which, incidentally, contained a court-issued scissors and a letter opener, each of which was about double the size of

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my knife. Well, rules are rules, especially when they are explained to you by a person with a firearm on their hip, and your best defensive weapon is a knife that is also an eye-glass screwdriver, bottle opener, and toothpick. But what resonates with me about the incident is that the officer and the other officers present all maintained that there had been no change in the rules. I could not, and cannot, figure out why the officer felt the need to lie even though I had on many occasions handed my dog dish to him with that very knife in it. I guess I'm old-fashioned in believing that the police should not lie, since the U.S. Supreme Court seems to have no problem with it. *Frazier v. Cupp*, 394 U.S. 731, 739 (1969).

When the level on the metal detectors changed in the County, the initial response by the officers at the checkpoint was once again to disavow knowledge of any change. I knew pretty well what, amongst my clothing and accessories, would trigger the metal detector, and it was obvious when that changed. Eventually the officers came to acknowledge the change, but that has not reduced its impact.

Even before this most recent change, I had given up wearing shirts with French cuffs, obtained mostly-plastic eyeglasses, and learned to store my nice metal pens in my briefcase instead of my breast pocket. But after the recent change I discovered that I could no longer get through without alerting the metal detectors if I was wearing regular men's dress shoes and/or a belt with a simple loop of metal for a buckle. So I went shopping on the internet. I purchased shoes without a metal support, and a plastic belt buckle that was made to look like a regular metal belt buckle. (I also noted the irony of the number of websites I turned up in my search that sold non-metallic ceramic hunting knives.) On my next trip to the courthouse, after one failed attempt when I neglected to remove my wafer-thin wristwatch with a leather band, I have now achieved the desired goal of access to justice with a single pass through the metal detector. (The shoes are easy to find on the internet; the belt was difficult -- try www.rx4scrubs.net.)

I'd like to think that even at the previous detection levels, still used by all the other area courthouses and airports, guns and metal knives are detected, I'm not sure exactly what threatening objects were not filtered before, that are now. I guess it is not the underwire brassiere worn by a prospective juror that I watched set it off recently. I have now adapted to the new rules. I wear what the policies of the state require. If I'm in trial and want to separate a portion of a piece of paper from the rest, I rip it. If my plastic eyeglasses break while I'm in the courthouse, I squint. But I am beginning to wonder if we have traded too much liberty for security. Plaintiff's lawyers have told me that jurors are grumpier after each recess that is long enough to leave the courthouse.

The second half of my year as president I focused on "Access to Justice," but I was talking about "access" in an abstract way for disenfranchised people. Do we now have a more literal access-to-justice issue that Legal Services of Eastern Missouri is not set up to address? I know the refrain: "innocent people have nothing to fear," but is it possible to imagine that there are people who gritted their teeth and expended the money to access justice, located and hired counsel (hopefully), found parking on the streets of Clayton, and overcame all the other barriers to justice only to give up because they had to remove their shoes and risk indecent exposure by removing their belt? And if there is a civil litigant out there like this, do you imagine that they are the CEO of a corporation in a contract dispute, or a landlord scraping out a living with a couple of four-family apartment buildings? And when that landlord gives up on the courthouse will he a) scour the Internet for plastic shoes and a belt; b) sell his buildings and find another occupation; or c) hire a locksmith to obtain self-help because he knows his tenant faces the same access to justice issues to file a forcible entry action as he did for an unlawful detainer action? How do we balance the security of the courthouse against the very rights the building was constructed to protect? Maybe we don't need to question our courthouse security at all, but instead ask why are there so many citizens trying to subvert it? ■

This is the final column of my year as president; I have foregone the tradition that dictates I use it to tell you all about the many great things I have accomplished. I am proud of what the Association has accomplished this year, but if you want them listed, please contact my mother, Eleanor Glick, elgram9@aol.com: it's her job to brag about me.

I am grateful to my wife, Brenda Guynes Glick, and two dear friends, Byron Kerman and Bart Zuckerman, who in various combinations each month have served as my personal volunteer-editors for these columns, as well as most everything else I have ever written for publication.

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