September Eleventh, A Citizen's Responses ( Continued ): Introduction.

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SEPTEMBER ELEVENTH, A CITIZEN'S RESPONSES
(CONTINUED FURTHER)

George Anastaplo*

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INTRODUCTION

This Article is a law review sequel both to the two-hundred-page series of responses to the September Eleventh crisis published by me in the Oklahoma City University Law Review in 2004 and to the subsequent thirty-page series of responses published by me in the Loyola University Chicago International Law Review in 2006. All of these materials offer (in a somewhat Thucydidean mode) periodic assessments of momentous events as they have developed since September 2001—sometimes inevitably repetitive assessments that have drawn in part on texts and events from other times and places, ancient and modern. A decade-long collection of these materials should be published in book form in 2011, for which it is anticipated that a Foreword will be supplied by Ramsey Clark (a law school classmate whose remarkable career includes service as Attorney General of the United States).

Among the consequences of our ambitious Iraqi Intervention of March 2003 is the putting to a grim test the extent to which effective international law, as well as our domestic law, may depend on mutual respect and a shared ethical sense. The dependence of law upon moral standards grounded in nature, and not only in power, is questioned, in effect, by such judicial pronouncements as Erie Railroad Co. v.
The current problem here is illustrated by the last conversation I had with the late David P. Currie, an eminent constitutional law scholar; a conversation which consisted only of this exchange:

G.A.: Does anyone, besides me, believe that *Erie* was wrongly decided?
D.P.C.: No!
G.A.: No one?!
D.P.C.: No one!!

However this may be, we have been obliged (seven decades after *Erie*) to assess, morally as well as strategically, the preemptive war launched by the United States seven years ago that has cost the Iraqis (a "country" one-tenth the size of our own in population) perhaps fifty thousand (if not even many more) lives and two million refugees and the United States four thousand lives and hundreds of billions (if not even several trillions) of dollars—with the future of the "country" thus taken over by us still left much in doubt. Also left very much in doubt, partly because of our Iraqi diversion, has been the eventual outcome of the NATO operation in Afghanistan, which had once seemed vital to our national interest. (Publication of this 2010 collection has been expedited by the efforts made by the editors of this law review to develop all of the footnotes for these materials.)

1. **THE MORAL ELEMENT IN FOREIGN POLICY DELIBERATIONS**

   September 20, 2004

I.

Any serious effort to describe the career of Abraham Lincoln, either as aspiring politician or as President, has to recognize the limitations he faced in the policy to be developed respecting the continued existence of slavery in the United States.

The aspiring politician—if he was to remain, during the first half of

the nineteenth century, a serious contender in the political process of this country—had to concede to the South its constitutional right to retain slavery. Not to concede this was to seem to incite immediate dismemberment of the Union, undermining thereby one's credentials as a reliable politician.

Even so, this concession by the Republican Party was not enough in the 1850s to satisfy the "fire-eaters" among the Southerners. It was evident to Southerners, as it was to the country at large, that the insistence of the Republican Party that there should be no new Slave States emerging from the territories of the country anticipated, and would likely lead to, the eventual elimination of slavery everywhere in the United States.

Related constraints limited what Lincoln could do as President. He knew that there were many more men willing to risk their lives to save the Union than there were men willing to risk their lives to emancipate slaves, however immoral they might consider slavery to be. It took almost two years of brutal war to move Northern public opinion to the recognition that the emancipation of the slaves held by the Secessionists would be useful, if not even necessary, for a successful effort to save the Union. It was only then that Lincoln's carefully crafted Emancipation Proclamation could be issued (as of January 1, 1863).  

This proclamation is, in effect, a summary of the Lincolnian position with respect to slavery, an institution which he regarded as simply incompatible with the regime established pursuant to the Declaration of Independence. There are, in an essay by Hans Morgenthau (a distinguished political scientist), on Lincoln, indications that the reasons for, and the reasonableness of, this Lincolnian position are not adequately appreciated.  

II.

On the other hand, there was the case developed by Professor Morgenthau against the intervention by the United States in the Vietnam War. It is particularly to be noticed how much he personally sacrificed, of that standing with Washington officialdom which he very much 

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enjoyed, in taking the position he did on Vietnam. In this, he attempted to restore moral concerns in the conduct of foreign policy.

This was a position that could, properly enough, be distinguished by some from the American intervention, under United Nations auspices, against the invasion of South Korea in June 1950. The critical problem there, it turned out, was not with the initial intervention but rather with our failure to recognize when we had indeed accomplished our proper and attainable objective, that of driving the invaders back across the thirty-eighth parallel.

Particularly to be noticed is how various predecessors of the so-called neoconservatives of our day fiercely condemned Hans Morgenthau as a shocking defector.

III.

It has been both dismaying and instructive to see some of the very same people who had been simply wrong about Vietnam repeat their mistakes by urging our 2003 intervention in Iraq. One can even suspect that there is considerable support in such developments for the ancient observation that one's character is one's fate.

Particularly striking during the past two years has been the remarkable incompetence of those directing our Iraqi operations. All this is justified by some as essential to our "War on Terror," even as it becomes more and more likely that we are thereby strengthening, in the Muslim world, would-be "terrorists," something that evidently did not happen because of our intervention in Afghanistan three years ago.

We are properly troubled by the steady losses we have suffered in Iraq since "Mission Accomplished" was proclaimed last year. But how should we regard our now-routine killing there of dozens, if not sometimes even hundreds, of "them" (combatants and noncombatants alike) for every soldier we lose? Little if anything is said in the press or by responsible leaders among us about this aspect of our incompetence. All this is deeply irresponsible, as well as obviously unjust. Matters are made even worse when it can be suspected that partisan political considerations sometimes encourage measures which risk the lives of our service personnel.

IV.

I have been intrigued to watch, as the development of the current
neoconservative foreign policy has been exposed as lamentable, how Leo Strauss, a University of Chicago colleague of Hans Morgenthau for a decade, has been attacked as somehow responsible for the Iraqi Debacle.

This is hardly the Leo Strauss I knew—and I was privileged to audit his courses regularly for more than a decade, both as a graduate student and thereafter (early in my teaching career). There is one lesson he taught, which the neoconservatives substantially responsible for our Iraqi adventurism evidently never took to heart—the lesson conveyed by the Dutch grandmother (whom Mr. Strauss liked to quote): “You will be surprised, my son, to learn with how little wisdom this world of ours is governed.” The so-called Straussians who have hijacked American foreign policy in recent years are on the fringe of those properly drawn for years to a great teacher.

Perhaps the most telling criticism one can make of Hans Morgenthau, as a student of philosophy (not as an obviously important student of international relations), is that he should have associated as long as he did with Leo Strauss without perceiving how clearly superior Mr. Strauss was to others whom Mr. Morgenthau knew, extolled, and cherished. Among those others were Hans Kelsen, Reinhold Niebuhr, and Hannah Arendt, all obviously talented people, but none of them—I presume to suggest—of the enduring rank of Leo Strauss.

V.

But then, it is not Hans Morgenthau’s opinions about philosophy and philosophers upon which his enduring reputation depends, but rather his judgments about the sensible conduct of foreign policy. Those judgments included the counseling of a proper respect for “the Opinions of Mankind,” something which has been woefully neglected, if not even disparaged, by our imperialistic unilateralists who are evidently not troubled by the destructive “polarity” they have provoked not only around the world but also in the United States, squandering thereby the goodwill that the United States was the beneficiary of after the September Eleventh attacks.

And yet, any sustained campaign against worldwide “terrorism” depends upon a general and deeply held recognition of what is decent,

honorable, and simply good. People have to be confirmed in their natural inclinations to regard various barbaric acts as simply “unthinkable,” even if they are said to be dedicated to a worthy cause.

For example, we are sending “the wrong signals” when we talk about developing for ourselves more refined nuclear weapons. Some countries have evidently come to believe that the only way they can be safe from our overwhelming power is if they have, or if they are believed to have, nuclear weapons of their own, however primitive such weapons may be.

I have referred to the casualties we routinely inflict in Iraq as “deeply irresponsible.” This carnage is hardly likely to endear us either to the Iraqi people or to other vulnerable peoples elsewhere. Among those who can become even more hated than they already are, partly because of the way we have conducted ourselves in Iraq, is the State of Israel, a gallant (if at times misled) country whose destruction would be a moral disaster for the United States. Here too, our presumptuous neoconservatives are playing with fire, however high-minded their objectives.

VI.

I return, albeit briefly, to the Morgenthau reflections on the greatness of Abraham Lincoln, reflections perhaps inspired in part by the Morgenthau recognition in Lincoln of someone who had (like himself) done remarkably well despite the personal disadvantages he faced at the outset of his career in this country. The point of departure for those Morgenthau reflections was the Ralph Waldo Emerson essay, Uses of Great Men.

The Emerson reference to “uses” should alert us to a problem with the Morgenthau essay. To speak of great men as Emerson did is to point to something beyond the great men themselves, if not even beyond their greatness. That is, great men are thereby subordinated by Emerson to a grander whole of which such men may be particularly conspicuous parts. In short, they are to be “used”—and may even need to be used in order to be complete.

That grander whole encompasses much more than either political life or the relations among nations, however important these no doubt are.

This should be evident to us upon noticing the exemplars of greatness collected by Emerson in his celebrated (and celebrating) essay. Only one-third of these great ones are political leaders. The remainder, in the five dozen persons extolled by Emerson, include (among others) artists, mystics, philosophers, scientists, and inventors.

Works of the mind obviously rank highest among human accomplishments for Emerson, however important a proper political order may be for the best development of the human soul. Although I reserve for another occasion a discussion of Emerson’s own accounts of Lincoln, I should at least record here my questioning of the Morgenthau thesis that Lincoln would have been no less great if he had failed in his political program.11 There is something curiously sentimental about such a suggestion.

However this may be, one notable feature of the Morgenthau appreciation of Lincoln is what is said by him about Lincoln’s compassion.12 I was startled therefore to learn, during a Morgenthau Conference, of the vigorous, indeed even harsh, Morgenthau public rebuke—almost a tirade—against a foolish young academic who had been exposed as a participant in a “fixed” television quiz show. (It happens that I have known personally, in this instance, both the rebuked and his rebuker.) I cannot imagine Lincoln talking thus in public about a young man who was bound to suffer considerably because of his folly in an obviously contrived show-biz melodrama.

Here, it seems, our critic was not sentimental enough in his insistence upon law, order, and personal responsibility. Morgenthau’s “piling on” response is particularly difficult to understand, considering (as we heard again and again during this Morgenthau Conference from his friends) that our critic did not trouble to present himself as conventionally “moral” in the way that he, in his mature years, openly conducted his own personal relations. Perhaps there were good reasons for the way he conducted those relations—but that way was hardly a public endorsement of that “sanctity of moral law” which the foolish young man and his impetuous champions were vigorously condemned for undermining.

However this, too, may be, our much-battered young man, befriended by Mortimer Adler, recovered his balance sufficiently to edit, among other things, a twenty-volume set of documents, The Annals of

11. Morgenthau, supra note 7, at 254.
12. See id. at 269–72.
America, in which the seriousness and integrity, as well as the limitations, of two centuries of our political and moral discourse are usefully testified to.

VII.

Particularly to be noticed among the greatest thinkers should be those who come to know themselves—and who are able to help us know ourselves in turn.

One must wonder how well our Abraham Lincoln truly knew himself. His repeated self-disparagement can suggest significant limitations, perhaps even another form of sentimentality, rather than the realism we should prefer. Why was Lincoln not able to recognize, more than he ever let on, how remarkably successful he had been throughout his life?

On the other hand, it should be noticed, Lincoln did spend considerable time, during his one term in Congress, studying Euclid’s Geometry. Also, his longtime law partner, William Herndon, recalled that Lincoln once devoted two full days in their office thoroughly caught up by the ancient challenge to square the circle.

Thus, one can see in these episodes, and perhaps even more in the sermon-like Second Inaugural Address, how Abraham Lincoln yearned for a much more elevated and enduring understanding of things than is likely to be needed for, and available in, a conventional political career.

15. Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), in INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 142 (1989); see also ANASTAPLO, LINCOLN, supra note 14, at 243–49 (commenting on Lincoln’s Second Inaugural Address).
November 16, 2004

I.

We began, early in this Jurisprudence course, with a discussion of John Ford’s 1944 article on the ethics of obliteration bombing of Germany during the Second World War.17 This can be linked, fortuitously enough as this term draws to its close, to an Air Power seminar this past week with a former Chief of Staff of the United States Air Force, a University of Chicago seminar to which I contributed slightly.

The retired general, a former fighter pilot, described the remarkable developments in air power during the twentieth century. He was particularly concerned about the risks run by airmen, recalling for example the high casualty rates in our bomber fleets during the Second World War. (The 50% flight pay for flying personnel was not limited to those in combat.) He also recalled that the Army Air Corps (as it was known before it became the Air Force after the Second World War) lost 95% of “aerial kills” to “six o’clock (that is, unobserved) shots.”

The effort to protect flying personnel, bomber crews as well as fighter pilots, has proved remarkably successful. There are now major campaigns by the United States Air Force during which few flying personnel are lost. This has been pretty much the experience in our two Gulf Wars.

II.

I was moved to intervene briefly in the discussion upon hearing the general describe the extraordinary effectiveness of American air power during the Korean War.

I prefaced my remarks by noticing that I myself had ended up in B-29s during the Second World War, adding that I do not now recall having heard then among ourselves (as air crews) any discussions about what

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would be acceptable casualties to be inflicted by us in any targeted areas we attacked. The limited accuracy of our bombsights made it difficult to be as precise as air crews have evidently become in recent years—but that did not seem to bother us. In fact, it was not until recently, when I happened upon Father Ford's article in an obscure New England theological journal, that I became vividly aware of any contemporary criticisms of the sort of thing we were doing to both Germany and Japan.

I mentioned these things, I explained, lest my comments on what the general had said be taken to be offered in the wrong spirit. Certainly, I could sympathize personally with his constant concern about the safety of air crews. A close call here and there—something that is inevitable if one does much military flying (even if one does not join the Caterpillar Club)—can make one endorse efforts to ensure the safety of flying personnel.

III.

I then explained that I had been startled to learn during our seminar how massive the damage had been that our Air Force had inflicted on North Korea during a couple of years of the Korean War. We were told, that is, that virtually every structure of significance was leveled in that country—and that more than a million North Koreans had died—as a result of our air attacks. What made this report particularly troubling was that there had been the hope early in the twentieth century that the use of air power would have the effect of civilizing warfare somewhat. This hope, the general recalled, was partly nurtured by the horrific trench warfare to which much of conventional fighting had been reduced during the First World War.

It would be astonishing, it seemed to me, if the devastation that we were responsible for on the Korean peninsula has not affected attitudes of the North Koreans toward the United States and its allies ever since. One can be reminded of the bitter attitudes still found among the Mainland Chinese because of the way they were massacred by the Japanese in the 1930s (that is, some seventy years ago).

IV.

My intervention in the Air Power seminar was primarily with a view to expressing the regret that there had evidently not been at the time any serious discussion about the devastation we were inflicting upon a
helpless people in North Korea.

To all this the general was moved to respond that what “you people” did in the attacks on Japan—not just with nuclear bombs but also with the routine firebombing of Japanese cities—was also quite destructive. Yes, I responded, I was aware of this. And I could, at the time, even feel almost sorry that I could not personally contribute to that—something which my own crew was gearing up to do even more of when the war ended. Later, I added, I came to be thankful that I had never been obliged to do that.

Of course, it was obvious to us that the “perfidious” Japanese had “asked for it.” But to think about such matters thus is to suggest that the young should not be given the decisive say here. Aerial combat is a young man’s “game,” reinforced by the glory associated with it, which makes it even more important that the young (and the young in spirit) be kept in their proper place—that is, in a clearly subordinate station—when war plans are developed, applied, and evaluated.

V.

But unfortunately, it is not only the young who cannot be relied upon to balance accounts sensibly. We are still left with the problem of properly assessing disproportionate costs. This, by the way, did not seem to be something that the other participants in this Air Power seminar were concerned about. They were much more intrigued, if not even mesmerized, by the technicalities elaborated by the general.

Almost four thousand Americans were murdered by the September Eleventh attacks. What should we want to do, and to whom, in retaliation? What responsibility did most of those who have been killed by us since then bear for what happened in New York, Washington, and Pennsylvania on that fateful day?

Have we not made far too much of our casualties—not only in the retaliation we have resorted to but also in the self-defeating anti-“terrorism” measures we have imposed upon ourselves since September Eleventh? In short, do we truly know—have we properly thought about—what we are doing? Such a question is at the heart of any serious study of jurisprudence.

VI.

We do run the risk of corrupting, and otherwise crippling, ourselves
because of the responses we have made, especially (but not only) in Iraq in recent years. It was from this perspective that I directed my intervention in our Air Power seminar. I observed that it was troubling to hear, as we did a few weeks ago, that there have been a hundred thousand people killed in Iraq since our intervention last year. This report has yet to be reliably confirmed—but it does suggest that our judgment about such matters may be deeply flawed.

We are properly disturbed because of our own thousand-plus military casualties in Iraq. But one hundred thousand Iraqi dead would be equivalent (when populations are compared) to more than a million dead among us—with all this done to a people who have yet to be shown either to have threatened us in any serious way or to have contributed significantly to the monstrous September Eleventh attacks.

What do we think we are doing? And what do we expect the long-term effects to be, especially at a time when enduring security from "terrorist" attacks does depend in large part upon the goodwill and hence the sincere cooperation of other countries?

VII.

Questions are left upon considering the development of air power during the past century. The perpetrators of violence from the air become ever more effective, even as they become practically invulnerable personally. (We can be reminded here of one problem with the designated hitter rule in American League baseball, immunizing as it does the aggressive pitcher from personally risking retaliation in the batter's box.)

Particularly illuminating here—and somehow troubling—are the reports of the bombing missions flown by air crews from their bases in the United States. They can fly to the Middle East (with the aid of in-air refueling), drop their bombs, and then return home. Indeed, they are able to sleep in their own beds both before and after each mission.

Our thoughtlessness, if not even our callousness, about such matters may be seen in how we threaten those who seem inclined to develop or acquire nuclear weapons, purportedly as "insurance" against unilateral intervention in their affairs by the United States. Such insurance is sought, more or less clandestinely, by some unsavory characters. At the same time, however, we talk openly about developing a new generation of "bunker-busting" nuclear weapons, weapons which are not for deterrence but rather for use by us as part of a conventional military
campaign. It is not only the unsavory characters around the world who wonder if the United States can continue to be trusted with the immense power it has accumulated.

It is thoughtfulness about the use and abuse of power that the proper approach to jurisprudence should both study and promote.

3. SELF-RESPECT AND CITIZENSHIP: WORDS OF COUNSEL

May 11, 2005

Ye are the salt of the earth: but if the salt have lost his savour, wherewith shall it be salted?

My remarks this evening, for an audience of judges, lawyers, law professors, law students, and their companions, are dedicated to the memory of Fred Korematsu, the hero of the 1944 Japanese Relocation Case. I had occasion to say to him when we met in Chicago in 1993: “Some say that Justice Black wrote one of his worst opinions in your case and one of his best in mine. Unfortunately, the opinion he wrote about you was for the majority while the opinion he wrote about me was a dissent.”

I.

Most of my remarks on this occasion are not addressed to anyone who might someday be challenged as I first was by the Committee on Character and Fitness of the Illinois Supreme Court. That was in Chicago fifty-five years ago this fall when I had just turned twenty-five.

Anyone who finds himself facing the kind of challenge that I believed I did—a challenge bearing both on what this country needed and on how I should personally conduct myself—should be able to figure out what to do, how to do it, for how long, and why. This includes assessing the good to be accomplished—what the need is and what the costs are. That is, one should be able to figure out what is truly needed and whether one should be the citizen to supply it.

If some guidance should be needed here, my published discussions

19. Matthew 5:13 (King James).
of how it all developed in my matter can be consulted. Such discussions are readily available, most recently in the reprinting (thirty-three years after its original publication by the Southern Methodist University Press) of my first book, *The Constitutionalist: Notes on the First Amendment*.  

Still, it is likely that anyone who needs considerable guidance from the likes of me, as to whether to face up to the kind of challenge that I believed I confronted, probably should not try to act as I did a half-century ago. The challenges that one should respond to, and how, do depend in large part upon one’s temperament and circumstances. It was a temperament in my case which has permitted me (by and large) to enjoy myself hugely ever since my childhood, an enjoyment which is apt to be terminated in the near future, of course, by radical changes in physical health (if not also in fortune).

However all this may be, my remarks this evening *are* primarily for the benefit of the Many whose significant tests and opportunities come in the form of their responses to the Few destined to be engaged by the critical challenges of the day. It is the Many—the Others—who are most in need of guidance here, not only for their own good personally but also for the good of the community at large.

II.

The Others that I have personally had to deal with—those people who had to decide how to respond to the “embarrassment” I have become from time to time—my personal Others, have included (1) the people in the Southern Illinois town where I grew up; (2) my University of Chicago Law School teachers and classmates; and (3) the faculty of the law school where I teach today.

I have profited considerably from all of these associations. Critical to my shaping was the small town I grew up in after having been born in St. Louis in 1925. It was a town where I could observe, close-up, what we now call religious fundamentalists, solid people that my family was on good terms with despite our known Greek Orthodox affiliations.

Then there was the law school I attended, where I did well and where I got along with its top-flight faculty and classmates. Thus, over those three years, a considerable number of those classmates had unlimited

access to the detailed class notes I got into the habit of typing after each class. The only "difficulty" with the faculty I recall from those days came when one of them (Harry Kalven, Jr.) summoned me to his office to inquire why I, although one of the top students in my class, was not competing for the law review. He was satisfied with the explanation that I was too busy auditing courses in other parts of the university, something that was particularly important to me because I had managed to get my B.A. with only a year or so of undergraduate classes.

Finally, there is the quite respectable law school faculty of which I have been a member for two decades. It had been that law faculty which hired me (after I had served as chairman of a political science department elsewhere) when no other law school in this country would venture to do so. That appointment was initiated by a then-new member of that faculty (William T. Braithwaite) who had, as a lawyer, been a member of an adult education University of Chicago seminar I had conducted in downtown Chicago, a seminar which continues for me to this day. That appointment was encouraged by the president of the university, a Jesuit, who wanted someone with a proven "track record" for publications.

By and large, my troubles with the bar led to my alienation both from my small-town associates and from my law school associates. Of course, there were a few in the town and also among my faculty and classmates who were sympathetic—but, for the most part, I was "abandoned." Much the same happened, a decade ago, at the law school where I now teach, when I turned out to be the only faculty member publicly to criticize as unfounded and unfair some reckless "racism" charges brought by a few students who simply did not know what they were talking about. It was my published responses to this controversy in the South Dakota Law Review that the late Gerald Gunther of the Stanford Law School faculty acclaimed as "a real service to the profession."

Such "spiritual" separations as those I have just described can mean that all sides in a controversy can be deprived—but, usually, more so the Many than the Few. For the Many are usually more in need of challenges and independent-minded advice; they particularly need to be helped to see what contributes to self-respect, something that is critical for a self-governing people. The Few, on the other hand, can find

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23. ANASTAPLO, CONSTITUTIONALIST, supra note 21, at xxiii.
support and sustenance in those of like mind and like temperament in other times and places. Thus, one need never be alone, even when one seems most abandoned by one’s immediate associates.

III.

Of course, it should be recognized that there is a sound instinct at work when the Many tend to shun the aberrant. That is, there is a good deal to be said for maintaining and respecting the well-established conventions of one’s time and place. After all, most resistance to salutary conventions comes from cranks, exhibitionists, and the like. Such irresponsible defiance should not be encouraged.

The useful, and truly interesting, challengers will usually appear as a surprise. They are not “professional” rebels or outsiders; they are not automatic naysayers. Anyone who is chronically rebellious is not likely to be either substantial or truly instructive. The Many should be on guard against any Negativity which is not properly disciplined.

My own credentials, upon first encountering the Committee on Character and Fitness in 1950, were respectable enough. I was, as a twenty-five-year-old, the father of a six-month-old daughter (two more children were to be born before my litigation was done and still another thereafter, who now practices with a prominent Austin law firm). I had been a good enough student to be recognized by Phi Beta Kappa and the Order of the Coif. (If I had never applied for admission to the Illinois bar, I might well have had from the outset a conventional academic career at a top-flight university.)

Earlier, beginning as a seventeen-year-old volunteer for the Air Corps, I had served three years, which included being commissioned as a navigator and flying in the Pacific, Europe, North Africa, and the Middle East. Indeed, I was still in the Air Force Reserve when the Character Committee began to question my credentials, a committee made up mostly (if not entirely) of men who had been too old to serve during the Second World War.

That I have not been a perpetual rebel—whatever my run-ins with the authorities in the Soviet Union (in 1960) and in the Colonels’ Greece (in 1970) may suggest—is testified to by my career, for almost a half-century now, in the adult-education program at the University of Chicago. That career has been recognized by an annual lecture established in my name at that university. Recognition of my obviously productive scholarly career has included the publication by the Ohio
University Press in 1992 of a two-volume *festschrift* in my name, *Law and Philosophy*.\(^\text{24}\) (The "ambivalence" of my *alma mater* toward me is recognized in a talk of mine, on the Hyde Park Historical Society website, entitled "*If You're As Good As You Look, Why Aren't You a University of Chicago Professor?*"\(^\text{25}\))

Already in 1950—and certainly during the decade of litigation which followed—my credentials were such that the authorities, and the better opinion in the community (especially in my law school), simply should not have permitted the Character Committee to do what it did to my career, however imprudent and even presumptuous I may have been in my conduct. That presumptuousness probably contributed to the somewhat perverse recollection years later by one of the most distinguished members of the Character Committee who explained to my wife (upon finding himself seated next to her at a banquet) that I had always conducted myself with the Committee as if I was better than they were. ("He held our feet to the fire," she was told.) It *should* be recognized, however, that one is not truly superior (or, at least, not as superior as one could be) if one cannot, when appropriate, conceal one's superiority.

IV.

I have already noticed that there is something to be said for the workings of a "herd instinct" in a community. Such an instinct can sustain both piety and patriotism. A healthy sense of community can be promoted thereby, making the everyday lives of people more meaningful than they might otherwise be. And, I have suggested, the would-be Dissenter is properly put to tests which can discourage frivolity and mere contrariness.

Of course, conventions and respectability can become crippling. They may even undermine the foundations of a healthy community life. Consider, for example, what is happening in our better universities, where it has now become conventional (especially among the younger


faculty) to be a careerist. This means that one’s standing and rewards depend far more upon how one is regarded worldwide in one’s discipline than upon how well one serves the institution where one may be for the time being. Thus, the very best are remarkably mobile these days. Much the same, I gather, has been happening in the “better” law firms in this country.

The threat to solid community life these days comes far more from a respectable self-centeredness than it does even from the violence of outsiders. It is such self-centeredness that makes much of hedonism and mobility as “liberty” and resents community supervision of tastes and morals as “tyranny.” Much is still to be said, it seems to me, for shutting down completely all television in this country, something I first advocated at a mass-media conference in 1972. All this means, of course, is that I have long been accustomed to not being listened to, no matter how sensible I am when I talk about television, guns, state-sponsored gambling, tobacco, or the designated hitter rule in the American League.

V.

The primary concern in considering how the Many should conduct themselves should not be with how the occasional Critic (or Dissenter) is treated. Rather, the primary concern should be with what the community allows to be done in its name.

Consider, for example, the responses by the United States to the monstrous attacks of September 11, 2001, in New York and Washington. It was understandable, once those attacks were traced back to elaborate operations in Afghanistan, that it was widely believed that the Taliban regime there would have to be demolished. But it has become ever more difficult to understand and justify what has been done the past two years in Iraq, a long-oppressed country whose tyrant evidently had little if anything to do with the September Eleventh attacks.

Particularly to be lamented in judging such matters is the lack of a sense of proportion. Four-thousand Americans were slaughtered in the September Eleventh attacks. But it has been said that more than one hundred thousand Iraqi civilians have died because of our intervention there, to say nothing of the hundreds of thousands who may have died theretofore partly because of the sanctions we promoted for a decade. It remains to be seen whether a devastating civil war can be avoided in Iraq, as well as how many thousands of service men and women we lose
Also to be lamented—and especially by those dedicated to the rule of law—is what the way that the United States went to war in Iraq has done to the rule of law both at home and abroad. What should a community allow to be done in its name?

One curiosity about our recent national adventures is that so many untested leaders at the highest levels of our government should be permitted to send young men into combat—those very leaders who, in their own youth, had deliberately (even shamelessly) avoided combat in an ill-conceived war which they were willing to have other young men conscripted to fight in. Would not a self-respecting community refuse to tolerate such a double standard? Or is this also too old-fashioned a response to be taken seriously today? (One can be reminded here of the shamelessness of a president who remained in office, to the detriment of his party and hence of his country, after his campaign of deliberate and sustained deception of the American People had been unfortunately exposed. I suggest, in passing, that all this has made the resulting “conservative” upsurge seem stronger, nationwide, than it is apt to be in the long run.)

Another curiosity is that we should sound as fearful as we do when more than one-half of the resources devoted annually to armaments worldwide should be used by the United States. One can wonder about how much goodwill and serious cooperation in curbing “terrorism” might be secured by the diversion of a small fraction of those resources to campaigns against disease, poverty, and genocide. Here, as elsewhere, questions can be raised about our sense of proportion in assessing our risks and using our resources.

Certainly, an undue fearfulness can be unbecoming as well as debilitating. But this is an old story. Thus, it was apparent to us—to my wife and our children during a six-month, seventeen-thousand-mile camping trip across Europe in 1960—that the Russian economy we could see in action, as we drove from Minsk to Smolensk to Moscow to Leningrad (as it was then), was remarkably primitive compared to what we were familiar with in the United States and what we had observed in the rest of Europe (and even in the other Iron Curtain countries). Thus, it was no surprise to me that the Soviet Union collapsed when it did. My only surprise was that it had not collapsed much earlier. In some strange way, in fact, it may even have been sustained as long as it was because of the passions of the Cold War to which we contributed mightily.
VI.

Such questions as these—both about personal conduct and about community action—when properly put, can help the Many sense what they should want—and what they should require of others. It is sometimes the duty of a Few among us to remind the Many of the best to which they naturally aspire.

Indeed, it is in the interest of the Many to encourage the talented Few to take risks on behalf of the Good. After all, the Few often find it personally advantageous to remain on the fringes of a community's activities. The Many, on the other hand, depend much more than the Few do upon a decent community for a meaningful existence, even as that decency is more dependent on the insights and sacrifices of a Few than is likely to be generally recognized.

In short, it is essential for the well-being of the Many that they be challenged by a troublesome Few among them—not by the Few who are criminal in their orientation but rather by the Few who remind the Many of that which they truly long for.

VII.

Chance can play a part in determining what influences the community and how. In my own case, for example, much has depended on circumstances.

Thus, my difficulties with the bar very much depended on the chance composition of the Character and Fitness subcommittee before which I was scheduled to appear for half an hour or less, a subcommittee composition which determined what questions would be asked and how one's answers would be responded to. Various of my classmates encountered quite different subcommittees. In no instance that I know of was any hostile questioning of an applicant dependent upon what was known, or suspected, about him before his initial appearance before the subcommittee.

Things could very easily have gone otherwise for me. Certainly, it was highly likely, indeed almost certain (when I showed up for what was usually a pro forma hearing), that within three months I would be working with one of the top-flight Chicago law firms where I had been interviewing. Instead, I (along with my wife and infant daughter) was on the Queen Elizabeth on the way to France, where I was signed up for a course at the Sorbonne, using up what was left of my G.I. Bill.
All this eventually meant as well that I was able to study, for a decade, with Leo Strauss, one of the great teachers of the twentieth century; a scholar who has been mistakenly identified by some as the guru of the presumptuous neoconservative adventurers of our day. This meant, among other things, that I was able to contribute to Mr. Strauss’s 1964 festschrift an essay on Plato’s Apology of Socrates, which he spoke well of.\textsuperscript{26}

VIII.

The overriding concern for the Many should be not with the seeming threats of the Few who challenge them, but rather with the character of the whole. Thus, a critical problem for Americans is what is to be done with our considerable wealth and hence leisure.

Particularly to be guarded against are the much-publicized threats of “terrorists.” I find intriguing such responses as that last month by the attendant at a university library in Chicago: “‘After 9/11 you have to be very particular. You want to know who’s coming in, who’s going out . . . .”\textsuperscript{27} A reliable sense of proportion is obviously called for here, as elsewhere.

But then, much the same can be said about the tremendous resources devoted these days to, say, airport security. The critical effort there should be with denying access by passengers to airplane cockpits. It is the use of airplanes as manned missiles, not the downing of an occasional commercial airliner, which should be an overriding concern in regulating air transportation in this country.

The resources devoted to airport security could better be directed to curtailing uses anywhere in this country of a “suitcase bomb,” whether of the nuclear or biological variety. But security itself should not be dramatized as it is, lest what we “have” to do at home as well as abroad corrupts our people and our institutions.

Lawyers, for example, should insist upon the sanctity of the writ of


habeas corpus, the statutory provision which William Blackstone called a second *Magna Carta*. Those of you interested in what I have had to say recently about these matters can consult a collection of mine in the *Oklahoma City University Law Review, September Eleventh: The ABC's of a Citizen's Responses*. There can be found there, among many other things, my initial responses to the September Eleventh attacks. Thus, I gave on September 12, 2001, a talk at the Loyola School of Law entitled *A Second Pearl Harbor? Let's Be Serious*. The same day I faxed a memorandum to the FBI which presumed to offer this counsel:

> Permit me to make a suggestion about your inquiry related to the hijacking of the four commercial airliners, a suggestion which your Bureau has probably already considered. But I offer it, just in case it has not been thought of.

> It seems to me possible that additional planes may have been targeted by the group responsible for the hijacking yesterday—but, for one reason or another, those planes were not used. I would check, therefore, to see what planes from the same airports of origin (or nearby), and at about the same time, might have been cancelled. The prospective passenger list for those planes could then be checked carefully. I would also check similar planes which did fly—planes which had three or four or five men fail to make the flight (because of an accident en route to the airport, or second thoughts, or whatever).

> This line of inquiry might possibly turn up names of people who did survive the plot and who might be readily available in this country.

This (Walter Mitty-like?) memorandum was supplemented the next day in this way by another memorandum faxed to the FBI (September 13, 2001):

> I should like to add to the suggestions I made yesterday about your hijacking inquiry. Again, I suspect that you have already thought of this.

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28. 3 *WILLIAM BLACKSTONE, COMMENTARIES* 135–36.
30. *Id.* at 175.
The records of American and United Airlines might usefully be checked to discover who had, at any time, made reservations on the four fatal flights—and what the circumstances were of those who, for any reason, did not fly on those planes last Tuesday morning.

In short, is it not highly unlikely that everyone who was ever part of the group destined for Tuesday’s missions actually ended up on one of the four fatal flights?32

To sum up, one should do what one can to help out in an emergency—and helping can take the form both of encouraging and of restraining.

Bearing on all this is a third memorandum sent by me to the FBI a week later (September 17, 2001):

I supplement hereby my memoranda to you of September 12 and 13 about the inquiry related to the hijacking last week of the four commercial airliners. Again, I suspect that you have anticipated the following suggestions:

The records of American and United Airlines might usefully be checked to discover who had, in recent months, made reservations for or flown on the same flights which eventually proved to be fatal flights. It is possible, that is, that “test runs” were made to see how things were done on those flights. It is also possible that not all those involved in the plot who can be identified as having been on the “test runs” were also on the fatal flights—and those additional passengers might be worth talking with. In addition, innocent passengers on those “test runs” might have noticed odd conduct worth looking into.

I continue to believe that various people might have indicated, before last week, their involvement in this sad matter.33

My September 12th “Pearl Harbor” talk had as its epigraph a passage from Plato’s Republic, which has Socrates saying (in his famous conjecture about The Cave:

32. Memorandum from author to the Federal Bureau of Investigation (Sept. 13, 2001) (on file with author); see Anastaplo, September Eleventh, supra note 2, at 174.
33. Memorandum from author to the Federal Bureau of Investigation (Sept. 17, 2001) (on file with author); see Anastaplo, September Eleventh, supra note 2, at 174–75.
Imagine men in a cavelike underground dwelling . . . The men have been chained foot and neck since childhood. The chains keep them in place and prevent them from turning their heads, so that they can only see forward . . . Do you think such prisoners would ever see anything of themselves or each other except their shadows thrown on the facing wall of the cave by the fire burning at a distance above and behind them.  

IX.

These remarks have been, as I anticipated, addressed more to the Many than to the Few. But the Few who find themselves in my circumstances might be encouraged by my assessment of the alternative careers I might have had.

There have been only five generally known careers by my law school classmates that I might even consider trading for mine: these have been the careers by classmates (1) as Attorney General of the United States; (2) as a Member of Congress; (3) as a United States Appellate Court Judge who was nominated for the United States Supreme Court; (4) as a Member of Congress and thereafter as a United States Appellate Court Judge; and (5) as a Professor of Law at one of the great law schools in this country. But any one of these careers, as well as a successful career as a practicing lawyer, probably would have required the sacrifice of the diverse reading and writing I have done—and the dimensions of such a sacrifice seem to me quite sobering.

But this kind of assessment is quite speculative, both for the Few and for the Many. A more reliable assessment is as to the lengths one should go in responses to challenges and how. The how, in my matter, consisted in proceeding pro se throughout my litigation, which proved most productive—and this I have described in Appendix B of my recent book, *On Trial: From Adam & Eve to O. J. Simpson*.  

As to the lengths one should go: my instinct was sound, in 1961, not to proceed any further with efforts to secure admission to any bar once the United States Supreme Court ruled against me, five to four. This freed me to secure


my Ph.D. and pursue the quite instructive academic career that I have had.

The soundness of my instinct to retire from the practice of law at that time was ratified, so to speak, by what happened to a California applicant in a companion bar admission case before the United States Supreme Court. He kept trying, for decades thereafter, to secure admission, finally succeeding not long before he died. His constant yearning for vindication in this form seemed, at least to me, to keep him from developing and enjoying alternative pursuits. I mention, in passing, that I contributed to his eventual admission to the bar: I was, during a West Coast conference, urged by some lawyers to reconsider applying for admission to the bar; they indicated that they very much wanted to support such an effort on my behalf; I directed them to the Californian who yearned to be admitted, something they were not aware of—and they evidently proved helpful to his effort. Thus, it is well in these matters to quit when one is ahead—but this does require that one can know “in one’s bones” when one is indeed as far ahead as one is ever likely to be.

I observed about my Air Corps service, in the 2004 Preface for the recent reprinting of The Constitutionalist, that “a good war can... spiritually confirm[] in [his] citizenship” someone who is born of immigrant parents. Further on in that Preface, I recalled my “legal” career in this fashion:

I have suggested that my military service confirmed my credentials as a citizen, deepening my ties with the country in which my parents had settled. My service thereafter as a litigant meant, in effect, that the principles of the regime became decisively mine, especially since others (the great majority all around me) had abandoned if not even repudiated them. Thus, whereas the Air Corps had helped me become fully a part of this country, the bar admission controversy left me invoking a patriotism that most others no longer recognized. The United States became thereby, ever since the 1950s, more my country than it was theirs, which is a remarkable state of affairs for someone who (I am told) did not know any English before he

38. Anastaplo, Constitutionalist, supra note 21, at xix (internal quotation marks omitted).
began grade school in St. Louis. (We moved to Carterville, Illinois, when I was in the fifth grade, after I had barely survived a bout with diphtheria and its debilitating aftermath.)

Although I came to feel that it was “more my country than it was [that of the great majority all around me],” this has not kept me from attempting to persuade my fellow citizens to reclaim the glorious heritage provided all of us by their inspired and inspiring forebears.

4. A Hellenic Retrospective

April 19, 2007

I.

I am naturally intrigued by the spectacular Hellenic Bar Association of Illinois announcement, in the current issue of The Greek Star, of “An Evening with George Anastaplo, Esq, PhD[,] Prof. of Law, Loyola University of Chicago.” Readers of that quite useful newspaper of the Greek-American community in Illinois are directed to “check out In re Anastaplo, 366 U.S. 82 (1961).”

Particularly intriguing is the invitation, “Come find out why this Hellene, a historical figure and singular scholar, is called the ‘Socrates of Chicago.’” One can properly question not only the “Socrates of Chicago” designation, but also the assessment of me as “historical figure” and a “singular scholar.”

If there is anything sound about these assessments, it may only testify to how modest our standards in such matters have come to be. This is not to suggest, however, that I do not think well of myself, despite my truly lamentable failings from time to time.

There is, after all, something valid about the evaluation of my public career, as of 1972, by a past president of the American Political Science

39. Id. at xx.
40. Id.
43. Id.
44. Id.
Association. This is to be found in the opening paragraph of his review (in the California Law Review) of my first book, The Constitutionalist: Notes on the First Amendment (1971).45

C. Herman Pritchett introduced his 1972 review of The Constitutionalist in this engaging fashion:

On April 24, 1961, the Supreme Court of the United States, by a vote of five to four, affirmed the action of the Illinois Supreme Court which, by a vote of four to three, had upheld the decision of the Committee on Character and Fitness of the Illinois bar which, by a vote of eleven to six, had decided that George Anastaplo was unfit for admission to the Illinois bar. This was not Anastaplo's only such experience with power structures. In 1960 he was expelled from Soviet Russia for protesting harassment of another American, and in 1970 from the Greece of the Colonels. As W.C. Fields might have said, any man who is kicked out of Russia, Greece and the Illinois bar can't be all bad.46

II.

It could be useful to say more about what happened in each of these encounters—with the Illinois bar authorities, with the Soviet regime, and with the Greek Colonels.

My difficulties in Russia came in the course of a six-month, seventeen-thousand-mile camping trip that my wife, our children, and I took across Europe, beginning in February 1960. We had picked up a Volkswagen Microbus in Paris, after which we visited Spain, Italy, Greece, Yugoslavia, Austria, Germany, Poland, Russia, Finland, the Arctic circle region, Sweden, the Low Countries, France, England, and Scotland. It was in Moscow that I got in trouble with the authorities. But it was not "another American" that I had tried to help, but rather a couple of English tourists (one of whom was a notably dressed niece of the then-Archbishop of Canterbury). I mention in passing that it was quite apparent to us during our time in Russia that the country was far

46. Id. (footnote omitted).
weaker than our Cold War fearfulness made it out to be. Many in our
country were surprised when the Soviet Union collapsed when it did. I,
on the other hand, was surprised (especially after our 1960 visit) that it
lasted as long as it did. The world would probably be safer today if we
had anticipated properly the collapse of a regime that controlled
thousands of nuclear weapons.

My difficulties in the Greece of the Colonels came because of the
articles I had published in this country about the failings of that regime
(which had installed itself in 1967). What made matters worse in the
Colonels’ eyes was that two of my law school classmates (Patsy T. Mink
and Abner J. Mikva) entered, as Members of Congress, several of those
articles in the Congressional Record. I tried, in those articles, to help
not only the Greeks, but even more the United States, which had
foolishly gone along with the Colonels who hijacked the government of
their country forty years ago this week. Our State Department’s folly
was promoted by influential Greek-Americans. This folly contributed to
that fiasco by the Colonels which has permitted the Turkish occupation
of part of Cyprus for three decades now. Be that as it may, I believe I
own the distinction of having been the only American to have been
publicly declared persona non grata by the Greek Colonels—and this
was done twice (that is, both in 1969 and in 1970).

My difficulties with the Illinois bar began in November 1950, three
days after my twenty-fifth birthday. I was finishing my law school
training that quarter and was being interviewed by prominent Chicago
law firms. (One consequence of my difficulties with the bar was that my
wife, our six-month-old daughter, and I sailed, in January 1951, on the
Queen Elizabeth (with General Eisenhower) for France, where I was to
use up the rest of my G.I. Bill by studying at the Sorbonne.) I have, on
several occasions, described in some detail the somewhat accidental
character of how my troubles with the Illinois bar began. I will say more
further on about that—but it suffices, for the moment, to notice that
character subcommittees were asking applicants, on an evidently hit-or-
miss basis, somewhat provocative questions. The question I happened to
encounter (along with others) was as to whether members of the
Communist Party should be admitted to the bar. When I indicated that I
did not know why they should not be admitted, I was informed that
communists believe in the right of revolution. When I suggested that we

all believe in that right, one of the subcommittee was moved to ask whether I myself was a member of the Communist Party. That proved to be, when I questioned the propriety of such an inquiry in these circumstances, the beginning of the end of my career as a lawyer.

III.

Of course, I did have a legal career of sorts: this was during the decade of litigation that followed. There were two principal rounds in that litigation. The first ended with a unanimous opinion by the Illinois Supreme Court (in 1954) in favor of the Committee and the refusal thereafter of the United States Supreme Court to take the case.\footnote{48. \textit{In re Anastaplo}, 121 N.E.2d 826 (Ill. 1954).} It was apparent by then that I should get myself a Ph.D., with a view to another career.

The second round saw the Illinois Supreme Court ruling against me four to three in 1959\footnote{49. \textit{In re Anastaplo}, 163 N.E.2d 429 (Ill. 1959).} and the United States Supreme Court ruling against me five to four in 1961.\footnote{50. \textit{In re Anastaplo}, 366 U.S. 82 (1961).} After that, I announced my retirement from the practice of law, even as I told the Illinois Supreme Court to let me know if I could ever be of any further service to them. (A curious footnote to any account of my dealings with the Illinois Supreme Court is that I happened to pick up in my taxicab one day, at the old Palmer House here in Chicago, the Justice (from Peoria) who had written the first opinion against me by the Illinois Supreme Court. He predicted, in the course of our conversation, that I would be admitted some day. That is, he was wrong again.)

During my litigation, I prepared my own briefs and argued personally both in the Illinois Supreme Court and in the United States Supreme Court. It is obvious, from the fate of companion and related cases in the United States Supreme Court, that it did not matter who the parties or the lawyers were on either side of First Amendment cases in those days.

IV.

There was, in 2005, a reprinting of my 800-page \textit{Constitutionalist} treatise (which includes an account of my taxicab encounter with a
I prepared for that occasion a preface which recorded various features of my career since that book was originally published in 1971, a preface upon which I draw considerably on this occasion. (I have already quoted from the Pritchett review of the book, a review that was quite generous.) I continue to teach courses in constitutional law and jurisprudence at the Loyola School of Law and conduct "Great Books" seminars in the adult education program of the University of Chicago.

The assessments in print by others of my bar admissions efforts have been generous, for the most part, especially after the first decade or so. Critical to how those efforts have come to be regarded has been the dissenting opinion in 1961 of Justice Hugo L. Black. It was immediately apparent to my wife and me upon reading it that I had "really won." Consider, for example, what could be said about the Black dissenting opinion by Harry Kalven, Jr., one of the few members of my University of Chicago Law School faculty who supported me:

In the end, what is moving about Justice Black's dissent is its special generosity toward Anastaplo personally. He comes very close to embodying Black's idea of what a lawyer should be. Black quotes at length and with evident approval Anastaplo's statements to the [Character and Fitness C]ommittee about the proper role of the bar in American democracy. Black sees [Anastaplo] as rejected in reality because he believed too much in the principles of the Declaration of Independence. His final praise is put ironically: "The very most that fairly can be said against Anastaplo's position in this entire matter is that he took too much of the responsibility of preserving that freedom upon himself." Thanks to the dissent of Justice Black, the Anastaplo case has in a very real sense a happy ending, although Anastaplo is still not a member of the Illinois bar. He earns the distinctive reward of being enshrined in the pages of the United States Reports in a living opinion by one of the most cherished of justices.

51. ANASTAPLO, CONSTITUTIONALIST, supra note 21, at 338-40.
52. In re Anastaplo, 366 U.S. at 97 (Black, J., dissenting).
This Kalven response is in marked contrast to that of most of my other law school teachers, who were anything but friendly to my cause. That led to this dedication for my book, *On Trial: From Adam & Eve to O. J. Simpson*: “To the Memory of my Law School teachers (1948–1951), who, with a few noble exceptions, preached (and hence taught) far better than they could practice.” (My most recently published book, *Reflections on Freedom of Speech and the First Amendment*, includes a dedication to Harry Kalven.)

The “Socrates of Chicago” title came from a veteran lawyer and independent-minded politician, Leon Despres, who has been aptly called by Abner Mikva, “Everybody’s alderman.” This is somehow related to Justice Brennan’s comment to Justice Black upon seeing the Black dissent in my case, “You have immortalized Anastaplo.” Such comments, reassuring as they sound, may not recognize what both Socrates and immortality truly mean. Even so, such comments can have a salutary effect upon the unduly fearful, as can the surprising comment by Leo Strauss, my political philosophy teacher (and a man widely regarded as eminently “conservative”) who wrote me (in June 1961), after the Supreme Court ruled against me, a two-sentence letter: “This is only to pay you my respects for your brave and just action. If the American Bench and Bar have any sense of shame they must come on their knees to apologize to you.”

V.

Of course, there is always the question of just what is seen by others when a controversy is observed from the outside. It has been instructive for me to learn how my case is described by others. Key facts are often misconceived, even when the spirit of the description is sound. Sometimes a single sentence stands for the entire controversy. This is what has happened with Justice Black’s dissenting opinion in my case, from which others have taken the injunction, “We must not be afraid to be free.” Justice Black directed that the passage in which this sentence is to be found should be read at his funeral.

This sentence is even scheduled to provide the title of a book on free

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55. *George Anastaplo, Reflections on Freedom of Speech and the First Amendment*, at v (2007) [hereinafter *Anastaplo, Reflections*].
56. Letter from Leo Strauss to author (June 22, 1961) (on file with author).
speech in America by Ronald K.L. Collins and Sam Chaltain, to be published (early in 2011) by the Oxford University Press. This exhortation is also drawn upon in the astonishing conclusion of a talk twenty years ago by Ramsey Clark, a former Attorney General of the United States:

As individuals we can find ways to pursue justice, to share justice, to spread justice among people for whom it has been a rare quality. In doing so, we find freedom for ourselves as well.

Fear will be the enemy, as it is of every human act that defies cultural norms. I would leave you with Justice Black's admonition from a glorious case we should all remember, In re Anastaplo: "We must not be afraid to be free."  

I say "astonishing" partly because it is worthy of note that Mr. Clark, still another law school classmate of mine (along with Robert Bork), identifies himself here as profoundly moved by Justice Black's exhortation. This is particularly noteworthy when it is realized that if Mr. Clark's father had been as much moved in 1961 by the Black sentiments as his son later revealed himself to be, I might well have gotten my fifth vote among the Justices of the United States Supreme Court in 1961. But, on the other hand, that would have deprived Justice Black of the occasion for a magnificent dissenting opinion. (I note, for the record, that I do not recall that Ramsey Clark and I ever discussed my bar admission controversy.)

The uses made of one's career and related matters, such as judicial opinions, can be instructive. One can get some idea thereby of what it is to be dead. This was brought home to me a few years ago when I heard from a scholar in Spain who reported on publications there of discussions of my work by authors I knew absolutely nothing about. I gather from the materials sent to me that those discussions are somewhat respectful—but perhaps I would think otherwise if I knew Spanish better than I do.

VI.

Of course, there have been discussions in English of my bar-admission case which leave no doubt about the authors' animosity. Particularly striking is the correspondence that I was rash enough, in my youth, to initiate (in 1952) with a distinguished philosophy professor, Sidney Hook. The most troubling thing about his letters, which I had occasion to look at recently after many decades, was the unrelenting (and, I dare say, disturbing) scorn he exhibited toward a naive youngster who had presumed to question the patriotic pieties of the day. (Our correspondence is listed in the Sidney Hook Archives at, I believe, the Hoover Institute.)

My law school teachers were much more guarded in their responses, at least in my presence. The sad thing about their "hands-off" response, even though I had served as a flying officer during the Second World War and still held, in the 1950s, a commission in the Air Force Reserve, was that their intervention on behalf of a good (however misguided) student would probably have moved the character committee to be sensible (even if I was not).

Curiously compromised by all this was the then-new dean of the University of Chicago Law School, Edward H. Levi (who eventually became President of the University of Chicago and thereafter Attorney General of the United States). I say "compromised" because his partisans again and again have had to "explain" what he did "about Anastaplo." Thus, a recent book by a competent Baltimore lawyer (George W. Liebmann) about the common law devoted a chapter to Mr. Levi—but it could not do so without devoting several pages to my relations with this man. The author even presumes to regard as an "ethnic slur" what I had said (drawing on Leo Strauss) about the inability of some emancipated Jews today to appreciate the dignity, if not even the superiority, of pious Jews across the centuries. Much the same can be said, by the way, about the inability of cosmopolitan Greeks today to recognize the merits of their peasant forebears. I will have to say more elsewhere about the author of this recent book, who does seem to me to be in need of correction here and there (which may be true, of course, of most of us as well). (I will also have to say more elsewhere about the monstrous "ethnic slur" modern Jews have really been subjected to in

when I prepare for publication my 600-page manuscript, *Simply Unbelievable: Conversations with a Holocaust Survivor.* But I should not leave Mr. Liebmann without noticing that he does quote from a public tribute I paid to Edward Levi at his death:

“[T]he more eminent and seasoned [Mr.] Levi became, the more sensible and humane he was in the exercise of power. . . . [I]t was his congenital apprehensiveness, informed by his considerable intelligence, which contributed to making Mr. Levi as respectful as he obviously was of the law, including of the ‘technicalities’ of a legal system. This informed respectfulness served him and his country well.”

However all this may be, I have reason to believe that (eventually) some of my law school teachers were not proud of the way they responded to my foolishness. Indeed, one of these men, a leader of faculty efforts to discourage other students from being as foolish as I had been, could (not long before his death) speak of me in public as one of the most distinguished alumni of the law school. He was probably as far off the mark then, however, as he had been decades before with his original hostile assessment of me.

VII.

In coming to a close in these remarks, I draw (as earlier on this occasion) on the Preface for the 2005 reprinting of *The Constitutionalist.* My awareness of the challenges confronting my parents, and many others with origins abroad, may be seen in the dedication for my second book, *Human Being and Citizen* (1975): “To MY PARENTS, who discovered as Immigrants from Greece how difficult it is for one to become a Human Being where one is not born a Citizen.”

Then there came for our family the Second World War and the

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63. ANASTAPLO, CONSTITUTIONALIST, supra note 21, at xv.
64. ANASTAPLO, HUMAN BEING, supra note 26, at v (1975).
immediate post-war period, which did include service for me in the Pacific, Europe, North Africa, and the Middle East. I had somehow managed at age seventeen to persuade a flight surgeon at Chanute Field to disregard my apparent physical disabilities. My instincts were sound: my Air Corps service proved to be a profoundly liberating experience. (As for my health: I have not had to miss a class because of illness since my earliest grade school days in St. Louis.)

The widespread disregard for the principles of the American regime during the Cold War was due, at least in part, to an unbecoming fearfulness among us. This can be seen again in the aftermath to the monstrous attacks of September 11, 2001. There has been on display at times among us that fearfulness which has made us less effective than we should be in protecting ourselves. Particularly to be nourished and relied upon in these circumstances is a sense of proportion, something which I hope I have displayed on this occasion.

5. Our Iraqi Follies and the Perhaps Inevitable Search for Scapegoats

July 8, 2007

I.

Simcha Brudno, to the end of his long life, persisted in attempts to see, in the light of enduring standards of good and evil, past the triumphs, illusions, and miseries of the moment. This was evident during the yearlong conversation about his Holocaust experiences that I recorded with him in 2000–2001, a conversation that ran to a thousand double-spaced pages in its unedited form.

The challenges that he (as a Jew) encountered, close-up, included first the Russian and then the German occupation of his native Lithuania, his experiences in the Stutthof and Dachau concentration camps, and the struggles thereafter to establish the State of Israel.

He was, as a mathematician of distinction, determined to figure things out as best he could in the circumstances that he confronted. These circumstances included, eventually, the United States, of which he became a devoted citizen. Ours is, he recognized, a country which

contributed significantly to the creation and thereafter to the perpetuation of the State of Israel. The intimate relations between these two nations have been exposed for all to ponder, it has been argued by some observers, in what is happening these days in Iraq.

II.

More and more Americans have been lamenting the follies of the current American involvement in Iraq. This is in marked contrast, thus far, to the typical assessment in this country of the American intervention in Afghanistan shortly after the September Eleventh attacks. Those 2001 attacks, it is generally believed, were deliberately developed by a conspiracy that had been permitted by the Taliban government to operate out of Afghanistan.

Questions do exist, of course, about what the proper American response should have been in Afghanistan—whether a “police action” alone had been called for, not a “war” with long-term political reconstruction thereafter under military auspices. But there has been no serious public questioning in this country of the critical contributions made by the Afghan government of that day to the September Eleventh atrocities.

On the other hand, there does not seem to be available much, if any, reliable evidence these days that the bestial Saddam Hussein tyranny in Iraq had anything at all to do with the September Eleventh attacks. In addition, the arguments that have been made by the current American administration about threats to the United States and others from Iraqi weapons of mass destruction have been shown to be gravely mistaken. The only serious question here seems to be as to whether our administration knew in advance that its WMD arguments were as flawed as they have since then been generally exposed to have been. Thus, our Iraqi Intervention has come to be regarded as a measure not called for as a proper response either to the September Eleventh attacks or to perceived threats to the United States and its friends. And it is a measure which has come to be regarded by more and more Americans as both misconceived and poorly executed. Particularly troubling in this country has been an awareness of the steady cost both in lives and in treasure incurred by the United States; an awareness made even more troubling by the recognition both that a dreadful civil war is developing in Iraq and that the standing of the United States worldwide has been seriously compromised, that standing which is considered vital for the help other
peoples *can* provide against the development of future murderous plots against us.

If our Iraqi mission had been an obvious success, various groups among us and abroad would no doubt be competing for recognition as primarily responsible for what has happened. Instead, there has had to be a debate about who has "really" been responsible for what has happened in Iraq, especially as it has become obvious that American intervention had been neither adequately assessed beforehand nor properly conducted thereafter.

III.

Much is made, in assigning responsibility for what has (and has not) happened in Iraq, of the neoconservative movement in this country, especially because of its Wilsonian inclination to democratize the rest of the world, and especially the Middle East with its apparently vital oil supplies. Neoconservatives have come to be seen by some analysts as having imprudently suppressed those elements in the Republican Party that are obviously more cautious about "nation-building" around the world.

The neoconservative impulse has come to be regarded by some experienced observers of military affairs and politics among nations as reinforced in its crusading aggressiveness by other influences. Particularly notorious, during the past eighteen months, has been the argument that our Iraqi Intervention was substantially promoted in Washington and elsewhere by "the Israel Lobby," an argument most dramatically made by two internationally respected American academics in a long article that appeared in the *London Review of Books* (March 23, 2006). This 2006 article (it is recalled in the July 30, 2007 *New Yorker*) charged that the Israel Lobby promoted the "subordinat[i]on of American policy to Israeli interests and, by doing so, radicaliz[ed] public opinion in the Arab world." The overall *London Review* argument is reinforced for some by the prominence of Jews in the neoconservative movement in this country. (It should be noticed, however, that one indication of a *limited* Israel Lobby influence in recent years has been the

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68. *Id.*
tendency of our current administration to involve itself far less with Israeli-Palestinian relations than had been the practice of previous administrations in this country.)

Many responses to the provocative *London Review* article (both in the journal itself and elsewhere) have been fierce, with a few respectable critics even attacking the article as equivalent to that notorious forgery of a century ago, *The Protocols of the Learned Elders of Zion.*\(^6\) We can be reminded thereby of the deadly "instinct" of some to blame "the Jews" for the principal ills of the world. This tendency was infamously displayed by Adolf Hitler who could blame "the Jews" both for predatory capitalism and for anticapitalist Bolshevism.

Thoughtful citizens among us, both Jews and Gentiles, recognize that Jews are indeed human, which means that they too are capable of making serious mistakes. These mistakes can include misapprehensions about the threats posed in recent years by Iraq, Iran, and others to the continued safety, if not to the very existence, of Israel. One concern that I myself expressed, as the campaign developed against Iraq in this country, was that Jews would eventually be blamed for the foreign policy and military disasters that seemed to be developing for the United States in the Middle East. The "Israel Lobby" argument may say more, therefore, about the dubious policy that took us into Iraq than it does about any decisive influence of Jews (or of Israeli sympathizers), either in this country or in Israel, in promoting our Iraqi follies.

IV.

The most respectable advocates of the importance of the "Israel Lobby" in Washington's dreadful miscalculations—the authors of the *London Review* article—are scholars generally acclaimed as leading practitioners of a "realist" approach to foreign policy.

These critics of the "Israel Lobby" do seem to recognize, and to respect, the concern that many have about the enduring security of Israel. Such critics should now be challenged to describe both what they consider the long-term "situation" of Israel to be and what a sensible diplomatic/military policy could be for the maintenance of a truly Jewish state in the Middle East.

What do these *London Review* critics, whose goodwill toward Israel

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should be readily acknowledged, believe that Israelis can properly do to secure their legitimate interests? What should the United States be asked to do for and with Israel? And what can the United States decently do in that worthy enterprise of helping Israel survive and prosper as a secure state populated, for the foreseeable future, mostly by Jews?

Certainly, Israeli strategists should be discouraged from relying, if they ever did, on such ill-conceived measures as our Iraqi Intervention. On the other hand, the Israelis should not expect to be as safe, for the foreseeable future, as the United States obviously is, no matter what Israel does to protect herself.

V.

After all, one sad fact has to be reckoned with here: many (if not even most) Arabs, who far surpass the Israelis in both population and natural resources (but not yet in discipline and technology), would simply destroy the State of Israel if they could safely do so. This is a sobering fact, unavoidable for Israeli statesmen of whatever political party, a fact which has its import reinforced by the recollection of an awesome statistic, that one-half of the Jews alive in 1935 had been deliberately slaughtered by 1945—and with little protest, before 1945, from “world opinion.”

Do not the Jews need to hear from responsible critics what Jews may usefully endeavour to do in order to protect themselves from systematic atrocities? Let’s assume that the “Israel Lobby,” whoever that may really be, miscalculated as to what should have been done by the United States in Iraq. However serious its miscalculations, they did not match those of the United States, a country that can far better afford to run the sometimes considerable risks of self-restraint.

The American miscalculations were reinforced by those of the Tony Blair administration in Great Britain with respect to Iraq. And whatever the supposed influence of the “Israel Lobby” in the United States, it does not seem to be seriously alleged to have had a like influence on Tony Blair and his supporters, who nevertheless tried to conduct themselves in Iraq much as our Administration did.

This, then, is a salutary challenge for the more competent critics of the “Israel Lobby”: what may the Israelis properly do to secure the safety and well-being of an independent, truly Jewish state in the Middle East?
VI.

Realists should be reminded of something that the more thoughtful among them seem to concede, that there is a sound moral (if not even theological) case to be made for the Jewish State of Israel.

It should also be recognized that the collapse of Israel would be serious, if not even disastrous, for the United States, leading to at least a generation of demoralizing recrimination among us. This would be so partly because of the vital importance of Jews in the artistic, intellectual, and commercial life of the United States, the country in which one-third of the world's Jews can now be said to live.

Of course, there are dubious features in how Jews acquired and managed what they have developed in the Holy Land. But what they did has been far less questionable than what our European forebears did in acquiring and developing that vast territory we know and respect as the United States. And Israelis, especially with the help of Americans, should be able to compensate somewhat those Palestinians who have had their property interests in the Holy Land adversely affected during the past six decades by the measures considered necessary for the secure establishment of the State of Israel.

However all this may be, Jews do have a far better claim on some part of the Holy Land than Europeans had (in 1492 and thereafter) to any part of the Western Hemisphere. If the historic Jewish interest in the Holy Land (grounded ultimately in vivid recollections of divine allocations) should be repudiated completely, would not Christianity and Islam themselves both be seriously called into question thereby? Many Christians acknowledge this. We do need to hear from thoughtful Muslims who recognize how tiny is the claim being made by Jews with respect to the territory of modern Israel, especially when compared to the immense territory controlled by Arabs from the Atlantic Ocean to the Persian Gulf.

VII.

The perceived precariousness of Israel is reflected in the dubious measures that a fundamentally humane people have sometimes resorted to both in Lebanon and in the Occupied Territory. It is also reflected in the profound apprehensiveness exhibited by many Israelis at the prospect of the development of nuclear weapons by Iran, challenging thereby the longstanding Israeli nuclear-weapons monopoly in the region.
The *London Review* realists who have been most publicized as serious critics of the “Israel Lobby” (scholars who are, after all, conscientious teachers) can do both the Israelis and us (as well as the world at large) a great service by publicly advising the Israelis how they should regard, and respond to, the various threats they are likely to encounter in the decades ahead. Certainly, Israelis should be discouraged by their true friends from resorting to desperate measures that are likely to make matters far worse for everyone involved than they need be. In short, the Israelis should be counseled against making the kinds of mistakes that we Americans have seemed determined to make in Iraq during the past two decades.

I presume to offer these observations and suggestions in the spirit I associate with Simcha Brudno, a friend of both Israel and the United States who yearned to be clearheaded about deadly miscalculations by those for whom he most cared.

6. VICTORY, DEFEAT, AND NATIONAL MORALE

July 20, 2007

I.

Two critical naval encounters can be said to have been decisive in shaping the souls of many, if not even of most, Spaniards in recent centuries. The first is the Battle of Lepanto (1571), in which the Ottoman fleet, considered to be bent on conquering Europe, was repulsed by Spain and her allies. The second is the Campaign of the Spanish Armada (1588), which saw the Spanish fleet substantially destroyed when it attempted to subjugate England.

The repulse of Islam at Lepanto (in the Gulf of Corinth) can be said to have been anticipated by the celebrated (eleventh century?) story of the career of Roland, which eventually led to the expulsion of the Moors from Europe. And Lepanto was reinforced by the repulse of the land forces of the Ottomans outside Vienna in 1683. Thus, embattled Europeans had been obliged to establish, across a millennium, what their relations with Islam would be.

A further anticipation of all this can be found in the classical Greek,

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70. Remarks prepared for G.A.’s seminar on Cervantes’s *Don Quixote* at Lawrence University’s Björklunden Center, Baileys Harbor, Wisconsin, July 20, 2007.
and especially the Athenian, response to the Persian invasions. The Athenians particularly distinguished themselves in the land battle of Marathon (490 B.C.E.) and the sea battle of Salamis (480 B.C.E.). Then, too, it was believed, the West was saved from Asiatic imperialism.

II.

The Athenians, so critical in organizing the Greeks to repel the Persian assaults, also had thereafter their “Spanish Armada” venture. This can be seen in their assault on Sicily in the course of the Peloponnesian War (415–413 B.C.E.). The Athenian disaster in Sicily can be understood to have contributed to the eventual political domination of Europe by the Romans, not by the Greeks.

Miguel de Cervantes (1547–1616) was involved both in the Lepanto battle and the Spanish Armada campaign. He fought at Lepanto, where he was severely wounded. And he helped collect the resources needed for launching the Spanish Armada.

His “involvement” with the Armada evidently included the making of two poems (discovered in 1899), verses which dealt first with the ominous early reports about, and then with the confirmed disaster that overtook, the Armada. The American traveler in Southwest Britain today can be surprised to encounter workaday Englishmen very much aware of what “we” did to the Spaniards “just over there” (giving a visitor the impression of a fairly recent encounter). The effect of the Armada’s fate was critical as well in Spain, marking the beginning of the end of Spain as a world power, a sobering awareness that may underlie the Don Quixote stories.

III.

Cervantes himself was very much aware, personally, of the challenge of Islam for Spaniards. He had not only fought at Lepanto but he had been, for several years thereafter (1575–1580) (but not because of the battle), a prisoner of Barbary pirates in North Africa. He made several memorable attempts to escape while being held for ransom, anticipating

71. For a detailed explanation of the assault on Sicily, see Russell Meiggs, The Athenian Empire 345–47 (1972) and Donald Kagan, The Fall of the Athenian Empire 1–2 (1987).
72. See Miguel de Cervantes Saavedra, Don Quixote de la Mancha (Peter Motteux trans., Random House 1941) (1605, 1615).
in this way the spectacular attempts that his Don Quixote was to make to control his own destiny.

The Moorish influence in Spain was something that Spaniards had to be aware of. This may be seen in the language, architecture, and spirit of Spain (in addition to whatever blood ties there may have been). That influence is reflected in how and why Spain is different from other nearby Roman Catholic countries such as Italy and France.

Consider, for example, the annual (April) pageantry in Alcoy (near Alicante, Spain) commemorating the struggles between the Christians and the Moors. The days of pageantry culminate with the Christians recapturing the palace from the Moors. Americans can be reminded of reenactments of critical Civil War battles.

IV.

Cervantes seems to recognize that Islam had been critical for what Spain had become and for what Spain means. This is in addition to what Islam had meant to the philosophical renaissance in the West. We can also be reminded of what Islam has meant for us whenever we use the Arabic numbers evidently so critical for the development of modern mathematics.

The struggle with the Moors continues in the Spanish soul and was evident in Cervantes's day. That struggle included the buildup to the formal expulsion of the Moors in 1609–1614. The tensions here are reflected in a remarkable feature of the Cervantes presentation of Don Quixote's adventures, his insistence that he as author is merely transmitting an account originally provided in Arabic by a Moorish historian.

That “author,” Cid Hamet Benengeli, is otherwise unknown. There have been many scholarly speculations as to who “he” is, including (of course) an identification of him simply as Cervantes:

Benengeli (Cid Hamet), the hypothetical Moorish chronicler from whom Cervantes pretends he derived the account of the adventures of don Quixote.

The Spanish commentators . . . have discovered that cid Hamet Benengeli is after all no more than an Arabic version of the name Cervantes himself. Hamet is a Moorish prefix, and
Benengeli signifies “son of a stag,” in Spanish Cervanteno.\(^{73}\)

At the very least, the “reliance” on an “Arab” source (even if all Arabs are supposed to be “liars”) testifies to a recognition by Cervantes of the Moorish elements in the Spanish soul.

V.

Is it sensed by Cervantes that a decisive decline has set in for Spain? It can no longer reasonably expect to remain the emerging world power that it had seemed to be not long before. It need not be said that the defeat of the Spanish Armada necessarily led to this decline, but rather that it at least foretold it.

Spain would, thereafter, live much more in the past than it had before. It was during the decade after the Spanish Armada that Cervantes wrote the first half of *Don Quixote*, the novel about a Spanish gentleman who yearns to revive a glorious past. It is this single-minded campaign which makes him both noble and ridiculous.

The story of Don Quixote includes accounts of how reports of his career are received in Spain. That story is presented in two stages—the first volume in 1605,\(^ {74}\) the second in 1614.\(^ {75}\) The first volume made Don Quixote famous throughout Spain, so much so that the fame affected how he was responded to and even exploited in the second volume.

VI.

An illustrious contemporary of Miguel de Cervantes is William Shakespeare. They are said to have died on the same day, April 23, 1616. It is also said that neither was ever aware of the other’s existence.

But both are aware of the same vital events, such as the fate of the Spanish Armada. Shakespeare, in the Age of Elizabeth, can sense that England is very much in the ascendancy. He does not seem to require Quixote-like heroes who long for the revival of a glorious past.

Rather, Shakespeare can be said to have been more concerned to caution against the risks that confront the powerful. Although he, like

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75. Id. at 331.
Cervantes, can provide remarkable comedies, he is capable also of memorable tragedies. Tragedies do provide salutary cautions for the powerful and ambitious—and this can be done by Shakespeare without concerning himself much with the exploits of such English predecessors of Don Quixote as King Arthur and his Knights of the Round Table.

VII.

It can be considered a matter of chance that someone with Cervantes’s temperament and talents was confronted by post-Armada Spain. Chance may be seen as well, perhaps, in what is found in Cervantes’s second volume. If a volume written in the spirit, and with many of the incidents, of the second volume had been published first, Cervantes’s immediate effect throughout Spain would probably have been more modest.

Much in the second volume depends on the recognition that Don Quixote had become a household name in Spain. This contributed in turn to various exploitations of Don Quixote by others. One consequence of this is considerable tediousness for the ordinary reader, however meaningful some of that material may be for the scholar.

Most of the more memorable adventures of Don Quixote are found in the first volume, beginning with the celebrated windmills encounter. Indeed, the most memorable event in the second volume is something that is not likely to be remembered by most readers. That is the repudiation by the dying hero of his adventures as a knight-errant and his return to Christian orthodoxy, a development which may reflect Cervantes’s own awareness of the hopelessness of the deepest Spanish yearning for worldly success.

VIII.

The French counterpart to Cervantes’s visionary may be Joan of Arc. She, too, wants to restore her country to its proper greatness. Charles de Gaulle has been taken by many to be her twentieth-century descendant.

The critical twentieth-century manifestation in the schism within the Spanish soul can be taken to be the ferocious Spanish Civil War in the 1930s. One can be reminded of an enduring question among the Spanish as to what the Spaniard ultimately owes allegiance. Is it to Spain, the Church, or an aggressive virtue?

Don Quixote brings all of these noteworthy objectives together in a
quest for glory which is illuminated by his devotion to Dulcinea. He
draws thereby on the Church’s devotion to the Virgin Mary. And he can
sense, in his campaign to right the wrongs of the day, an enduring
Spanish soul.

IX.

It can be instructive to notice how the Quixote story is responded to,
and transformed, by other peoples. A recent illustration is the
commercially successful American musical, Man of La Mancha (1965).76
Particularly significant is what is done there with Dulcinea.

She, unlike Cervantes’s Dulcinea, is aware of Don Quixote’s
worship of her. Much of the La Mancha musical has her protesting to
Quixote against what he is doing with, and expecting of, her. Eventually,
however, she (a fallen woman) is redeemed by Quixote’s vision of her,
something which is ratified by their meeting of minds at his deathbed
(where there is no explicit return by him to conventional Christianity).

The American version of the story, it seems, has to be primarily
concerned with the fulfillment of the Individual, which suggests that for
Americans there is no desperate political problem to be solved, at least
once the Civil War was resolved the way it was. The European response
to Don Quixote’s story is apt to be closer to the original than the
American response, as may be seen in Richard Strauss’s symphonic
poem (of 1897).77 The disastrous effects of the First World War
probably disposed some sensitive Europeans to be as desperate as the
sensitive Spaniards of Cervantes’s cast of mind.

7. SEPTEMBER ELEVENTH, SIX YEARS LATER:
ON DIAGNOSING AN ADDICTION78

September 11, 2007

I.

The addictive power of war, if not of violence generally, was very
much in evidence as the sixth post-September Eleventh year drew to a

76. DALE WASSERMAN, MAN OF LA MANCHA (1965).
77. See HENRY T. FINK, RICHARD STRAUSS: THE MAN AND HIS WORKS 190–91 (1917).
78. Remarks prepared for G.A.’s Jurisprudence Seminar, Loyola University School of
close. It seemed to be generally sensed that “we” were enmeshed in expectations and activities that we could neither control nor abandon. It also seemed, at least to some observers, that whatever happened, especially in Iraq, had to be somehow interpreted by those “in charge” both to entitle and to enable them to continue the Mission they had set for themselves.

The power of addiction is suggested by the ingenuity resorted to in order both to justify the Mission that one may be trapped by and to discover new resources to devote to its accomplishment. Questions were raised during the Sixth Year about the sensibleness of our intense involvement in Iraq since early 2003. Such questions were particularly pressed by those who believed that dealing with criminals in Afghanistan should have been our primary post-September Eleventh mission abroad.

A front-page article in the Sunday New York Times of August 12, 2007, made the argument, How the ‘Good War’ in Afghanistan Went Bad. This article was followed by a New York Times editorial of August 20, 2007, The Good War, Still to Be Won, which opened with these observations:

We will never know just how much better the fight in Afghanistan might be going if it had been managed more competently over the past six years. But there can be little doubt that American forces—and Afghanistan’s government—would be in far stronger positions than they are today.

How different things might be if the Bush administration had not diverted needed troops and dollars into the misguided invasion of Iraq, nor wasted years discouraging needed NATO military assistance, nor pulled its punches rather than pressuring a Pakistani dictator with, at best, mixed feelings toward the Taliban.

Those are some of the questions raised in a devastating Times account earlier this month of how Afghanistan’s “good war” went bad. The battle against Al Qaeda and its Taliban allies is still winnable, and it is vital to American security. But victory will require a smarter strategy and a lot more attention

and resources.\textsuperscript{80}

Thereupon the \textit{New York Times} editors provided this grim assessment of the relations between Afghanistan and Iraq:

In the first months after Al Qaeda’s 9/11 attacks, the world, the Afghan people and Washington’s most important allies were all on America’s side. Now, a resurgent Taliban army operates from Pakistani sanctuaries. It wins Afghan hearts and minds every time an errant American airstrike kills innocent civilians, and it gains even more whenever an aid-starved Afghan government fails to deliver on its promises of better governance, economic development and physical security.

America has never had enough troops in Afghanistan, not in 2001, when Osama bin Laden was on the run in the caves of Tora Bora, and not today, when much of the country is still without effective authority. Too few ground troops have meant too much reliance on airstrikes, leading to too many innocent civilian casualties.

Since the Iraq buildup began in 2002, it has drawn away the resources that could have turned the tide in Afghanistan, including the military’s best special operations and counterinsurgency units. Afghanistan, larger and more populous than Iraq, now has 23,500 American troops. Iraq has about 160,000.\textsuperscript{81}

II.

Critics responded, of course, to this \textit{New York Times} assessment, especially those observers who considered Iraq the key to the enduring stability of the Middle East. It remained to be seen, as the Sixth Year drew to its close, whether Iraq could be salvaged as a more-or-less united “country.” Opinions differed as to whether the American intervention in 2003 had been beneficial for Iraqis at large.

Thus, it was debated whether the Iraqis regarded Americans as “liberators” or as “occupiers,” with polls (conducted by the BBC and others) now emphasizing the latter appraisal. Perhaps the most


\textsuperscript{81} Id.
significant "poll" is that implied by the flight from their homes in Iraq of three to four million persons (and this in a "country" which is only one-tenth the size of the United States). This displacement, it could be said, was far greater than had been prompted even by the brutal Saddam Hussein regime.

The debate among us during the Sixth Year included differences as to whether Iraq was caught up in a sectarian-based civil war—and if not yet, whether such a war was made more likely eventually either by the American military presence or by its removal. The Sixth Year also saw the beginnings of a reassertion of Congressional authority over the conduct of American foreign policy. It saw as well intense maneuvering in preparation for our 2008 presidential election, which (it was anticipated) would be in large part a nationwide referendum on the Iraq War.

III.

One odd turn of events during the Sixth Year was with respect to how the Vietnam War was used to bolster arguments. It had been a public concern, as the Iraqi Intervention was anticipated, that it not become "another Vietnam." American army generals, who had been young officers in Vietnam, were particularly sensitive about getting "bogged down" once again, thereby "wrecking" the army for another generation.

Assurances were given about the adequacy of this intervention for effective "nation-building." Also, it was insisted that the United States had vital interests in the Middle East, far more than it had ever had in Southeast Asia. And yet, the Sixth Year found more and more Americans regarding Iraq as "another Vietnam."

Such apprehensiveness contributed to a strange turn of events late in the Sixth Year. This was the insistence, in August 2007, by the President that the critical mistake in Vietnam had not been our involvement there but rather our premature departure, which opened the way (it is recalled, perhaps not altogether accurately) to dreadful atrocities, especially in Cambodia. This was perhaps the most dramatic argument in favor of "Staying the Course in Iraq," an argument advanced by a man who (in his youth) had been able to use family influence to avoid having to go to Vietnam himself.
IV.

Our obvious difficulties in Iraq even led to further questioning of our reliance upon a “War on Terror” as the proper response to the September Eleventh atrocities. Did the “war” talk make too much of those perpetrators? Did it not make more sense to regard their leaders as criminals, to be exposed and apprehended with the help of other law-abiding nations?

Such help (from NATO countries and others) was obviously available with respect to our initial responses in Afghanistan. But the Iraqi Intervention has had, except for the British, no substantial support worldwide. And even the British indicated, during the Sixth Year, that they should no longer be counted on in Iraq.

But then, it was always hard to show any connection between the Iraqi regime of Saddam Hussein and the September Eleventh crimes. It had been far easier to show such connections with the Taliban regime in Afghanistan. Indeed, it can be argued, the Saudi Arabian and Pakistani regimes had contributed far more to Al Qaeda and the September Eleventh assaults than Iraq ever did.

V.

Growing complaints were heard during the Sixth Year about Congress attempting to “micromanage” the war in Iraq. Related complaints were heard about “politicizing” the conduct of the war. But is not that precisely what is needed, especially whenever it has to be decided whether what is being done truly serves the interests of the United States?

Authorization for an Iraqi Intervention was provided by Congress in 2003. It now appears to critics of that war that a critical mistake had been that Congress did not require periodic renewals of whatever authorization was given. The American precedent for such caution may be seen in the automatic expiration date for the Sedition Act of 1798.82

The need to keep the executives thus in check may be seen in the Constitution itself. Power is granted to Congress to “raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.”83 Misuses of the army by the Commander in

82. Sedition Act, ch. 74, 1 Stat. 596, 597 (1798) (expired by its terms in 1801).
Chief could thus be effectively curbed by Congress "doing nothing."

VI.

It is not good for those in power that they do not have substantial limits to reckon with. Thus, a general freedom of speech for the public at large is something our officials depend on to help them steer sensible courses. After all, "others" may notice things that the powerful may not be either in the condition or in a position to see.

Freedom of speech, since the September Eleventh attacks, has been robust in this country. It was such freedom which permitted the questioning of unexamined detentions by us of persons (for years at a time) both in this country and abroad. The importance of the "Great Writ" of habeas corpus was recalled by critics of our Administration.

Much was made of the designation by the Administration of "enemy combatants," which could make those thus held seem like "prisoners of war" to whom habeas corpus need not apply. But, then, there is, on their behalf, the guidance provided by the Geneva Conventions. Those Conventions draw, furthermore, upon a general awareness of what is naturally right, which would seem to preclude, for example, any routine reliance upon torture even in good causes.

VII.

Of course, whatever post-September Eleventh torture was resorted to on our behalf has been concealed. This suggests our recognition that there is something deeply questionable about such measures. Of course, also, whatever we have secretly done with prisoners has been far less brutal than that done by the ferocious Saddam Hussein regime.

Particularly sobering for us was the display of systematic savagery by Iraqis now engaged in their incipient civil war. Perhaps this reflects the brutalization of those people by the Saddam Hussein regime. To some extent, what happened in Iraq after 2003 may have been due to how we chanced to conduct ourselves as "liberators/occupiers."

Also serious and perhaps corrupting as well was how we conducted ourselves during the decade between our two Gulf Wars. It is said that the United Nations sanctions that we insisted upon in the 1990s evidently contributed significantly to the death in Iraq of hundreds of thousands, if not even a million, with children being particularly vulnerable. It is hard to believe that the American public would have permitted this if it had
seen what was happening.

VIII.

It seems to have been generally believed, at least until recently, that the interests of the United States were served by the measures resorted to in dealing with Iraq for two decades. Much milder, of course, were the measures relied upon on behalf of security in this country. Even so, it should not be hard to demonstrate that most of the resources devoted to our domestic security could be more effectively employed in other ways.

We have been repeatedly instructed, “If you see something, say something.” But, it seems, we have not seen how wasteful much of the screening we routinely rely upon truly is. Even more distressing is that we passively submit to the security excesses that we do.

Still, we have not relied as much as we should upon the kind of security properly called for in our circumstances. Such is the security evident in effective police work, which is likely to be far more useful than any “war on terror” in anticipating and dealing with the demented and the deluded. To be properly anticipated should include those who are so desperate as to resort to “suitcase dirty bombs.”

IX.

The addictive power of war could be seen at work as the Sixth Year drew to a close. One more “surge” had been touted, as if that “fix” would open the way to fulfillment and even release. Related to such reliance upon military power was the growing talk among us about an attack on Iran as part of the effort to secure Iraq.

This aggressiveness may have been due, in part, to the uncomfortable awareness among our leaders that the principal beneficiary of our Iraqi Intervention and sacrifices seemed to have been the Iranian despots. An attack upon Iran, however, would invite immediate retaliation that would put American troops at even greater risk in Iraq. It would also jeopardize even more the standing of the United States worldwide, and not only among Muslims.

I ventured to predict in my initial public response to the September Eleventh attacks—this was in a talk on September 12, 2001—that most of the economic damage we would suffer because of those attacks would be self-inflicted. It will long be debated whether the Iraqi Intervention was truly in the American interest. Essential for a proper response to the
September Eleventh challenges has been the Sense of Proportion likely to be put at risk in dreadful circumstances.

8. THE PRESIDENT AND THE CONSTITUTION IN “WARTIME”

September 24, 2007

I.

We are accustomed to hearing protests from time to time, by Administration spokesmen in this country, that Congress is improperly interfering with what our “wartime President” is trying to do on behalf of the National Interest. Such dubious Congressional efforts can be referred to in various ways. We have noticed that a phrase which has become somewhat fashionable, to disparage unwanted legislative interventions, is “micromanagement of a war.”

Perhaps the most fateful instance, in the history of this country, of a general acquiescence in what the President considered himself obliged to do in the National Interest (no matter what the Constitution was believed to say) was during the Civil War. President Lincoln, in the early months of the war, had exercised, in effect, some of the powers usually regarded then as Congressional. Thus, for example, he had not waited on Congress, which was not even in session at the beginning of the Lincoln administration, to issue a call for volunteers to defend the Union which seemed to be on the verge of permanent dissolution.

Among the President’s other questionable measures was the suspension, in specified locations, of access to the writ of habeas corpus, thus exercising a power that had been considered a Congressional prerogative. The President, upon addressing thereafter (on July 4, 1861) a special session of Congress, justified the unilateral actions he had considered himself obliged to take soon after his Inauguration on March 4, 1861. And so (in the course of asking for retroactive legitimation of what he had done) he could put to Congress this memorable question, “[A]re all the laws but one to go unexecuted, and the government itself

Perhaps no serious student of politics would deny the possibility of a need for emergency, perhaps even apparently unlawful, action if "the government itself [is about to] go to pieces" otherwise. But, it can be hoped, those are rare instances for a properly conducted community, instances which can be readily remedied when a proper stability is restored. But, it should be added, ready resort to unlawful action may itself eventually help make a government permanently "go to pieces."

A sensible Congress can properly provide for many of the emergency actions that may have to be resorted to by the President and others (including private citizens?) in extreme circumstances. This has long been done, for example, with respect to the suspension of the writ of habeas corpus. Most critical here is an enduring understanding of the proper relation between Congress and the President.

Not enough attention is paid to the fact that the President is entrusted with (and largely limited to) the "executive Power" authorized by the Constitution. He is to have as well some power in the enactment of laws, but Congress can legislate (when two-thirds of each House may choose to do so) without his approval. Thus, the laws that Congress can provide may lay down (in an authoritative manner) the policies of the country both at home and abroad, including with respect to the wars that are to be fought by the United States, how they are to be fought, with what resources, and for how long.

What Congress may decide to do, and not to do, is likely to depend ultimately on what the people of the United States may believe they want. The power of the people extends, of course, even to the shaping, and the reshaping, of the Constitution itself. Among the directives provided by the people in the Constitution is that Congress shall "declare War."

We the People depend on our freedom of speech to instruct ourselves

86. Id. at 354.
87. Id.
88. U.S. CONST. art. I, § 8, cl. 11.
about how the issues of the day, as well as the Constitution itself, should be regarded. This can include an inquiry into what it is sensible to regard as a “war.” Some uses of that term may be suspect, such as in the phrases “War on Poverty,” “War on Drugs,” and “War on Terror.”

Consider, for example, how things would have looked if the terrible September Eleventh assaults had been generally regarded from the outset as “crimes” rather than as “acts of war.” It was inevitable, of course, that those who ran and harbored the gang believed to be responsible for those crimes would have to be disciplined by our government. But it was not necessary that such criminals should be glorified, in effect, as serious enemies of the United States, thereby helping them to recruit others of like mind and temperament for their criminal enterprises.

IV.

One risk of relying as much as we have on the language of war, especially when the focus of attention is abroad, is the temptation to look for enemies to attack. Once the immediate source of the September Eleventh assaults was believed to have been severely (even if not completely) dealt with in Afghanistan, it was “natural” for some in our Administration to “remember” their pre-September Eleventh concerns about Iraq. The cautions against going to war in Iraq, repeatedly expressed by many of those who had been our allies in Afghanistan, were brushed aside as inconsequential.

We were properly shocked by those September Eleventh assaults which cost more than three thousand American lives. How should we (as well as others) regard, therefore, the loss of at least thirty thousand Iraqi lives since our March 2003 invasion—in a “country,” that is, which (we should remind ourselves) is one-tenth the size of ours in population? All this could be particularly disturbing when it was recognized that the principal justifications publicly insisted on by our administration for its Iraqi Intervention came to be generally regarded as unsound not only worldwide but also in this country.

This was but one aspect of our general response to September Eleventh, a response that exhibited a woeful lack of a sense of proportion, or prudence. That could be seen in the unseemly fearfulness that was promoted among us. It could be seen as well in the remarkably wasteful use of resources for Homeland Security, however careful we should always be about the use among us of such infernal devices as “suitcase dirty bombs.”
V.

And yet the most dedicated, and no doubt sincere, partisans of the Administration could be much disturbed by the prospect of Congressional interference with what was being done year after year in our name in the Middle East. On the other hand, partisans of the Congress could insist that it is a “coequal branch” of the national government. In this insistence upon such equality and the related doctrine of “the separation of powers,” however, the Congressional partisans have been seriously mistaken.

The Framers of the Constitution had good reason to establish, as they did, the Congress as the ultimately dominant branch (not merely a “coequal branch”) of the Government of the United States. This was anticipated by what a “legislative body” (the Continental Congress) had done in issuing the Declaration of Independence. There is enumerated in that founding document how the British executive had usurped the constitutional rights and powers of Colonists grounded in such principles as those recognized by the Magna Carta and the English Bill of Rights.

One lesson that should be learned from the Iraqi Intervention and its disturbing aftermath is that Congressional authorizations for Executive action should rarely, if ever, be open-ended. It was a curious state of affairs that Congressional majorities could not undo in 2007 what Congress had done in 2003 with respect to Iraq. That is, an open-ended authorization can strengthen unduly the power of a President who can veto whatever a “mere majority” ordains thereafter, something he could not readily do if he depended on periodic reauthorizations (not only financing) in order to be able to continue what he was determined to try to do.

VI.

Some provisions of the USA PATRIOT Act of 2001 do require periodic reenactment by Congress. This is in accordance with the prudence exhibited upon the enactment of the Sedition Act of 1798. But this precaution does not seem to have been taken in whatever

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90. Sedition Act, ch. 74, 1 Stat. 596, 597 (1798) (expired by its terms in 1801).
Congressional authorization may have been provided for the 2003 Iraqi Intervention, perhaps partly because it had been ballyhooed as "a cakewalk" that would not take long.

The intended ultimate dominance of Congress among the branches of the national Government is indicated in various ways in the Constitution. The most dramatic way, of course, is the power Congress has, in appropriate circumstances, to impeach and thereafter remove from office (literally overnight, if need be) any officer in the executive or judicial branches of the Government. Far less dramatic, but routinely relied on, is the Congressional power to authorize and finance activities of the other two branches of the National Government, a power which permits (perhaps even sensibly requires) Congress to superintend how all officers of government are exercising their powers.

The President is designated by the Constitution as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." But the military resources, including personnel and equipment, available to the Commander in Chief depend upon Congress, so much so that if Congress fails to act there would be neither an army nor a navy for anyone to command. Severe limits can be placed by Congress, whenever it chooses to do so, upon where and when the military resources it does provide may be used—and by "Congress" we should usually mean a majority of each House, except where the Constitution otherwise provides.

VII.

All this is not to deny that the office of the President of the United States can be quite powerful, no matter who the incumbent chances to be. He is singled out, among the political actors in this country, and much has long been naturally made of him worldwide. Because of this, he and his men may even seem to know more than do others in government.

Much may be made within the upper echelons of an Administration of fidelity to the Cause for which it chances to stand. Such loyalty can, at least for awhile, promote an impressive discipline. But it can also mean that the leaders within an administration may be prevented from learning what "everyone else" knows and relies upon.

This can mean, in turn, that an administration may come to seem

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simply incompetent, something which the apparently inept official responses to the 2005 Katrina devastation suggested to the public at large. Once it seemed obvious that the leaders of the National Administration simply could not see what “everyone else” saw, that may have strengthened the hand of those who argued that the Iraqi Intervention had been foolishly conceived and incompetently managed. And this, in turn, could make more and more people wonder whether there had ever been any necessity for such action.

VIII.

The unilateral character of American conduct with respect to Iraq became more troubling, for ever more of the public here, once the overall competency of the Administration did come to be doubted. In such circumstances, the very discipline that an Administration may have can prove crippling. For there does not seem to have been among those in the highest echelons of the Administration the serious debate usually needed to guard against a line of action that may never have been properly examined.

A National Administration does have access to intelligence reports and other information that may not be generally (or, at least, immediately) available to the public at large. But its disciplined single-mindedness may keep it from assessing properly the divergences that may be implicit even in such privileged reports, to say nothing of other reports that it does not encourage or receive. When this happens, an Administration may simply not know what “everybody else” does.

This could be seen during the crippling Cold War of the 1950s and thereafter. Too many people, in our government and out, were surprised when the Soviet Union collapsed in 1991. But the surprising thing was that that regime had lasted as long as it did, considering the remarkably dysfunctional economy it had had to put up with for decades along with stifling political repression—a general debilitating condition that should have been obvious to any visitor to Russia in, say, 1960.

IX.

The inhibitions upon freedom of speech in this country during the first decades of the Cold War kept us as a community from seeing what should have been obvious—and hence kept us from preparing properly for the risks following upon the political collapse of a great nuclear
power. We can be thankful that there has not been a like inhibition of a
general freedom of speech in this country since September 11, 2001.
This has meant, among other things, that Congress was better equipped
than the Administration to examine what was being done by the United
States in Iraq and elsewhere in prosecution of the "War on Terror."

The Framers of the Constitution were aware of the tendency of those
endowed with monarchical powers to be considered, at least by some, to
be somehow divinely ordained. This awareness by the Framers is
reflected in the many ways that the President is hedged in by the
Constitution, something that is anticipated by the parliamentary
supremacy long evident in the British Constitution. It is appropriate,
therefore, that Article II, the Executive Article, should close with this
solemn provision: "The President, Vice President and all civil Officers
of the United States, shall be removed from Office on Impeachment for,
and Conviction of, Treason, Bribery, or other high Crimes and
Misdemeanors."92

Members of Congress, too, are subject to discipline aside from what
their constituents may do, for it is provided in Article I, the Legislative
Article: "Each House may determine the Rules of its Proceedings,
punish its Members for disorderly Behaviour, and, with the Concurrence
of two-thirds, expel a Member."93 But there is also provided for
Members of Congress protection not made explicit for any others in the
Government of the United States, when Members are assured that "for
any Speech or Debate in either House [of Congress], they shall not be
questioned in any other Place."94 This guaranty anticipates that freedom
of speech and of the press which is recognized in the First Amendment
for the People at large, a freedom which every Congress should also be
encouraged to exercise in a responsible manner by examining the
principles and programs of the National Administration of the day,
however inspired and confident the President and His Men may at times
seem to be.

92. Id. art. II, § 4.
93. Id. art. I, § 4, cl. 2.
94. Id. art. I, § 6, cl. 1.
I was unexpectedly reminded last night, during the performance of the Aeschylus play in our weekend Herodotus study program, of memorable events of forty years ago this summer. That was the summer after a “junta” of Greek Army Colonels, using the tanks at their disposal, seized power in Athens on April 21, 1967. A more or less democratic regime, which had been conducting itself somewhat irresponsibly for three years (if not even longer), was suppressed. A military government was installed, which included among its repressive measures a system of comprehensive censorship throughout the kingdom.

Among the “publications” permitted that summer of 1967 was an evening performance of Aeschylus’ *The Persians* (in a modern Greek translation) in the huge ancient open-air theatre at Epidaurus. The Colonels had evidently anticipated no problem with this play, especially since it celebrated a great Greek victory over foreign threats, and especially over Asian barbarism. This is how the Colonels liked to see themselves as well, having intervened as they did (they insisted) to head off Slavic (if not even “Asian”) Communist threats to Greece. Aeschylus, a mere decade after the epic Battles of Salamis and Plataea, could be generous in portraying the Persians, thereby enhancing the accomplishments of the Greeks (and especially those of the Athenians, who had taken the lead at Salamis as well as, earlier, at Marathon). Such generosity was not exhibited the summer of 1967, or at any time thereafter, by the Colonels toward their enemies.

It was, the evening of the *Persians* production that lovely summer 1967 evening in Epidaurus, a gala occasion. Special buses and limousines (and perhaps some boats) had brought thousands of us down from Athens that afternoon. Prominent members of the new Greek government were there, men who were placed in the front row where priests or other dignitaries would have been seated in antiquity. They made a conspicuous entrance—and were duly greeted by their supporters in the audience. But much (perhaps most) of the audience must have been the kind of people who would have been dubious about the

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Colonels' forcible usurpation of the government the preceding April. These were people who were not likely to be enthusiastic in receiving their new "leaders," however glad they were to view the particular play so conspicuously available that night.

Indeed, there was an "incident" that night at Epidaurus which I have never observed elsewhere and of which I was reminded last night when I heard the report (in response to a Persian question) of what the victorious Athenians were like. What despot ruled them, it had been in effect asked, to which the electrifying response was given (in the modern Greek translation on that occasion) that no despot ruled them, that liberty prevailed among them. I say "electrifying" because many in the audience were eagerly waiting (in high anticipation) for this exchange, some even wondering perhaps whether this explosive exchange had been censored out of the script for that evening.

The Colonels' censors had evidently not considered it necessary to waste time and effort on an ancient play. For many in the audience, it seemed, this exchange may even have been the principal reason for attending this particular play that night in Epidaurus (something that, so far as I could tell, was not being openly talked about among the audience as the fateful moment approached). It was evident, at least to me (and I suspect to many others), that spectators had waited in high anticipation of these lines. I say "evident" because when the lines were uttered, the audience simply went wild with loud and sustained cheering.

The audience response that I have described, deeply felt and prolonged, was truly prophetic. It should have been evident to all who had ears to hear and souls to interpret that the Colonels' regime was doomed to failure—that it would never receive (during the coming decade) even the grudging acquiescence of that more knowledgeable part of the population upon which a successful modern state depends. Instead, the Colonels so conducted themselves that they even made their irresponsible predecessors look good, something that the Colonels' champions in the Greek-American community (quite influential with our State Department) were slow to recognize.

Thus, Aeschylus' *The Persians* (like the Herodotus text we have been studying this weekend) can remind us of how different, perhaps even of how incomprehensible, other peoples may be. And that summer 1967 performance of *The Persians* testified to the deepest longings, and hence to the immediate future, of a troubled people. I return to what can be learned in these matters (especially in times of triumph) from
Herodotus, and from Thucydides as well, by recalling a lesson adapted from Montesquieu:

Great successes, especially those to which the people contribute much, [can] make them so arrogant that it is no longer possible to guide them. Jealous of the magistrates, they become jealous of the magistracy; enemies of those who govern, they soon become enemies of the constitution [itself]. In this way the victory at Salamis over the Persians corrupted the republic of Athens; in this way the defeat of the Athenians [in Sicily] ruined the republic of Syracuse.96

Thus, we have the lessons of the Battle of Salamis drawn by Aeschylus a decade later and then drawn by Montesquieu two millennia later. Included now for us is the lesson about all this suggested by the inability of the Greek Colonels, in the summer of 1967, to understand what they had been privileged to witness at Epidaurus. One enduring sad consequence of the Colonels' chronic incompetence was their 1974 disaster in Cyprus which has seriously disrupted critical international relations in the eastern Mediterranean for four decades. We can well wonder, of course, what lessons of our own day we ourselves have failed to take to heart, partly because we have allowed ourselves (during the past decade) to be improperly intimidated.

10. WAR & PEACE IN THE CLASSROOM97

November 17, 2007

I.

How, we are asked, should responsible teachers deal today in the classroom with “the highly divisive topics of the war on terror and the war in Iraq?” That is, how, if at all, should academics take and defend controversial positions in the classroom? It is often suggested that students should be taught how to think rather than what to think: that is,

they should be offered “both sides of an issue” so that they can assess usefully what they may happen to be interested in.

It is difficult, perhaps impossible, to provide obviously useful guidelines for how to address in class the controversial issues of the day. One objective of the responsible teacher is to help students become aware of serious issues, especially issues of an enduring character. Another objective is to make it more likely that students will become aware, as well, of the critical contending positions with respect to each such issue.

In these and like matters, no hard-and-fast rules are available, especially when war is brought into the classroom. Rather, the dictates of prudence have to be relied upon, that prudence depended on, for example, in the Declaration of Independence to hold in check harmful invocations of the sacred right of revolution.

II.

How a teacher of controversial subjects goes about serving the proper pedagogical objectives here can very much depend on circumstances. This may be illustrated by recalling here episodes, four decades apart, in which I was personally involved, far less assertively in the first case than in the second.

The first of these episodes was during our Vietnamese Intervention. It was then that I served (in 1967–1969) as a six-times-a-semester commuter from Chicago to conduct a series of intensive weekend seminars in the Politics Department at the University of Dallas (in Irving, Texas). I offered, in my four semesters during those two years, courses on Plato, Aristotle, Machiavelli, and Hobbes.

These political science seminars were for graduate students who had been recruited nationwide by Willmoore Kendall, a distinguished conservative scholar. When Professor Kendall died unexpectedly, in June 1967, I was persuaded to fill in until a permanent replacement for him could be found.98

I intended to discuss with those “ultraconservative” students (forerunners of contemporary “neoconservatives”?) only the four authors I have mentioned. Even so, I came to expect that there would be,

 sometime during the four or five seminars during each fortnightly weekend visit to Dallas, a challenge by the students to the position I was known to hold on our Vietnamese Intervention. My position was recognized by them to be very much at odds with what most, if not even all, of these “hawks” passionately espoused at that time.

Such a challenge from these students could not be dismissed by me as obviously irrelevant to the political philosophy of the masters we were studying. The students’ determined interventions would lead during each visit by me on the Dallas campus to one lively discussion which found my challengers taking me to task for what I presumed to say about Vietnam (however respectful they somehow remained of what I said about Plato and his successors).

If I had not made the arguments I did about the unfortunate American foreign policy of that day, they would not have been made in a somewhat plausible fashion by anyone else in the seminar (or indeed, by anyone on that campus, it seemed), so aggressively dedicated were those talented students and most of their teachers to our Vietnamese Intervention and other dubious Cold War adventures. I was told, decades later, by veterans of those Dallas seminars, how important my arguments had been in at least exposing impressionable students to politically unpopular arguments being made by someone they had otherwise come to respect.

My second illustrative episode followed upon the recent much-publicized event at Columbia University which had the university president condemning unreservedly, in his introductory remarks, the irresponsible president of Iran who had somehow been invited to speak at Columbia. This incident was brought up by students in my Loyola law school seminar on War & Peace and the Constitution.

Several students in my seminar vigorously endorsed what the Columbia president said in denouncing his Iranian guest. They endorsed as well both the timing and manner of his saying what he did.

It was left to me, it became obvious, to suggest criticisms not of the university president’s assessment of the oppressive Iranian regime, but rather of the timing and manner of the delivery of that assessment. Only after I had said what I did were two students in the seminar emboldened to voice critiques of the propriety of what the Columbia president had done in his capacity as presiding officer on that occasion. It seemed to me salutary that law students should especially be reminded thus of what is seemly in “confrontations” of this sort.
In both of the "situations" I have just recalled, the principles I espoused (which I had applied, that is, to our Vietnamese Intervention and, in effect, to our often misconceived "War on Terror") had been already quite apparent to the students in my seminars both in Dallas and in Chicago.

I do believe that it has been good for my students over the years to hear the challenges to received opinions that I posed, challenges which probably would not have "gone anywhere" (in most instances) if I had limited myself (in the time available) merely to posing questions. It is not generally noticed, by the way, that the Socrates of "the Socratic method" devoted (as in the Platonic dialogues) considerable time and effort to the exposition of controversial positions, including (when he considered it useful) positions he himself did not fully accept.

III.

However this may be, it is probably fortunate for my psychic well-being that the positions I have found it useful to press in class have usually been positions that I personally preferred, positions which have included much-needed reminders of what "war" passions can do to the sense of proportion in the community at large. Particularly disturbing, it seems to me, is the unbecoming fearfulness promoted and exploited among us from time to time.

I illustrate all this further by noticing that I have also considered it useful, in my law school constitutional law classes over the years, to suggest, and sometimes even to insist upon, the serious arguments to be made against widely acclaimed "landmark" rulings by the United States Supreme Court, such as those in *Marbury v. Madison* (1803), *Schenck v. United States* (1919), *Erie Railroad Co. v. Tompkins* (1938), *Cohen v. California* (1971), and *Roe v. Wade* (1973).

Certainly, it seems to me, if I do not make the more critical arguments against most such cases in class, they are not likely to be heard by our law students. I am prepared, of course, to say more about these and like matters if it should be deemed useful for me to do so on this occasion as well. I myself remain personally grateful, decades later,

for the decidedly controversial positions unapologetically espoused by William Winslow Crosskey and Leo Strauss, my own primary teachers in constitutional law and in political philosophy, respectively, teachers who welcomed vigorous questions from their students, questions that would promote an informed and hence peaceful meeting of minds.

11. FREEDOM OF SPEECH IN “WARTIME”\textsuperscript{104}

February 21, 2008

I.

Champions of the First Amendment are properly concerned about what can happen to freedom of speech in wartime. They recall, for example, what happened during the First World War. The self-defeating suppressions of that era were ratified, in effect, by Justice Oliver W. Holmes’s disastrous opinion for a unanimous United States Supreme Court in \textit{Schenck v. United States} (1919).

Observers recall as well what happened during the Cold War. There were criticisms that needed to be made of public policies, criticisms that it could prove dangerous to careers (if not also to one’s liberty) to make. Public discourse during the Second World War had been more open, perhaps partly because of the serious reservations that had been expressed (before the attack on Pearl Harbor) about whether the United States should ever get into that war.

I had occasion to observe, on November 10, 2005 (in a talk entitled, “The Unseemly Fearfulness of Our Time”):

It can be instructive to recall from time to time how the People of the United States allowed themselves to be misdirected and misused as they were during the Cold War. But it is also instructive to notice a critical difference “this time around”—and that is the fact that the freedom to discuss and criticize governmental measures remains substantially unabridged, except perhaps for some people in this country identifiable as Middle Easterners. Vigorous criticisms can be, and are, leveled against all aspects of the way we went to war in Iraq and of how that

\textsuperscript{104} Author Event, Seminary Co-op Bookstore, Chicago, Illinois (discussing Anastaplo, \textit{Reflections on Freedom of Speech and the First Amendment} (2008)).
Intervention and the subsequent Occupation have been conducted.105

"These criticisms," I went on to say

can include observations about the scandalous unwillingness of "the elites" who have taken us to war to devote either their sons or much of their treasure to the current campaign. Criticisms at this time can even include reminders of how some of our most "hawkish" leaders today were able to avoid combat service during the Vietnam War, a dubious war that they and their families were in favor of only if other people's sons were conscripted to fight it. So long as such, and even more serious, criticisms can be made, the deeply-rooted good sense of the American people can eventually be expected to assert itself properly in assessing what is being done and why.106

I then added the suggestion:

It is this type of good sense that can consider properly how human mortality is to be understood. This consideration both encourages and permits us to identify what kind of life is truly worth having and how it might best be secured. It is thus, with a minimum of unbecoming fearfulness, that we can put to the best possible use our natural desire for genuine self-preservation.107

II.

So, how do things stand today among us? The "War on Terror" continues, with its uncritical, and hence misleading, assessment of what "Terror" means and how it may best be dealt with. An undue fearfulness, among many, about what "They" might do to us is matched, at least among a few, by a concern about what "We" are doing to our essential freedom of speech.

These apprehensive few are quite articulate—and so we can hear all around us laments about what has happened to Freedom of Speech in this

105. Anastaplo, Citizen's Responses, supra note 3, at 151.
106. Id.
107. Id.
country. Sometimes well-attended assemblies in respectable places protest what is happening. And yet, unlike what sometimes prevailed during the Cold War, are we not still able to express a wide range of opinions about what is going on in the prosecution of the “War on Terror”?

Of course, as I have noticed, men among us with Middle Eastern names or associations may sometimes be suspect. But the rest of us do remain free to speak even on their behalf. The enduring problem among us may be, these days, not with respect to what is improperly suppressed, but rather with respect to that general lack of restraint in language and sensibilities which can undermine the capacity of a people for responsible self-government (something that is addressed in an obscenity-related appendix in my Reflections on Freedom of Speech and the First Amendment).

III.

To argue that there is, these days, remarkably little official suppression of the general freedom of speech in this country is not to assume that that freedom is being used as it should be. Such follies as the Iraqi Intervention of 2003 have been soundly denounced. It now seems to be generally recognized that the Bush Administration has been seriously flawed in the way that that operation has been conducted, if not also in the decision to go in at all.

It is not yet generally recognized, however, how seriously flawed, if not even “counter-productive,” various domestic “security” measures have been in this country. Particularly misguided have been the considerable measures employed in regulating access to airports, public buildings, and other such institutions. Here, as elsewhere, one critical concern should be with whether the immense resources thus used might be better devoted to other uses (especially if, for example, airliner cockpits are as secure against forcible entry as they should now be).

Another concern should be about whether an undue fearfulness is developed among the people at large by our security rhetoric and its attendant measures. Still another concern should be about whether people may come to mistrust “instinctively” the judgment of those in power. Both those who attempt to secure too much (or in the wrong way) and those who decry unduly what has happened to freedom of

108. See ANASTAPLO, REFLECTIONS, supra note 55, app. N.
speech in this country share one serious flaw: both of these factions lack an essential Sense of Proportion.

IV.

These two forms of insecurity—that concerned about domestic safety and that concerned about civil liberty—do have to be taken seriously. Thus, there are various ways for the misguided to attempt to do us harm, especially in the complicated world that we have to depend upon. But the most enduring harm here is apt to come, in our circumstances, from the measures resorted to if we are too apprehensive, something anticipated by my talk of September 12, 2001, entitled A Second Pearl Harbor? Let's Be Serious.109

Thus, there are also various ways that civil liberties are threatened. Particularly distressing is what has been done to the ancient writ of habeas corpus, especially by invocations of the term “enemy combatants.” Making matters worse has been the national disgrace of systematic reliance upon torture (either directly (at Guantánamo perhaps) or indirectly (by “outsourcing” our dirty business)).110

The substantial freedom of speech we still have recourse to has not been sufficiently exercised here. A proper exercise would include a questioning of our undue concern with security and (related to this) our reliance upon indefinite detentions, torture, and the like. We should be reminded that one of the grievances recited against George III in the Declaration of Independence is, “He has affected to render the Military independent of and superior to the Civil power.”111

V.

A critical underlying question here has to do with whether there is such a condition as “the unseemly.” Is this too “subjective” an appraisal to be taken seriously? Or is it somehow grounded in the very nature of human relations, however much it may depend on circumstances for its full recognition?

We return with these observations to a concern about a Sense of Proportion. This may be intimately related to that prudence upon which

109. Anastaplo, September Eleventh, supra note 2, at 175.
110. See infra Part 16.
111. THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776).
sound statesmanship depends, something else insisted on in the Declaration of Independence. Are not even the chronically imprudent among us likely to respect prudence when they see it "in action," especially if it is properly explained after the consequences of imprudence become apparent?

The lack of evident prudence on the part of the powerful can be distressing, and even threatening. It is such a lack that has promoted considerable distrust of the United States abroad, especially as our Iraqi policy has been exposed as remarkably ill conceived and self-defeating. It bears repeating that what may generally be thought about the United States may well affect whether we get the kind of cooperation by others that may be useful, if not even essential, for sustained effectiveness in what we call the "War on Terror."

VI.

Such aberrations as our much-publicized reliance on Guantánamo, torture, and the category of "enemy combatant" do make us suspect worldwide, especially among peoples that are accustomed to a genuine respect for the usages of international law. Whatever may be done in the short term "to get our way," the underlying issues will not be simply forgotten. Reminders can include the questionable (and disruptive) measures others themselves resort to hereafter, citing our ill-conceived practices as precedents.

Reminders can include as well the invocation of long-respected standards as efforts are made, for decades to come, to assess what the United States has been doing in what it considers self-defense. We can be reminded of this by the periodic reexamination, in this country, of the governmental proceedings that led, in June 1953, to the determined execution of a couple who had been condemned as Soviet "atomic spies." A recent reminder of this appalling conduct by our government, in marked contrast to what was happening in peacetime to convicted spies elsewhere in the Western World, was the effort made in January 2008 to secure the release of the grand jury records associated with the indictments in United States v. Rosenberg112 more than a half-century ago.

The disregard of a Sense of Proportion in the Rosenberg proceedings may be seen as well in the thirty-year sentence meted out to an alleged

112. United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952).
co-conspirator of the Rosenbergs, someone who was not charged as an "atomic spy." I have, in my Reflections on Freedom of Speech and the First Amendment, included an appendix in which there are examined troubling irregularities which included subjecting this rather mild-mannered convicted Soviet spy to the rigors of Alcatraz.113 This sort of measure anticipated what has been callously done with Guantánamo in recent years.

VII.

We saw, in how the Rosenberg Case was handled, what the dreadful effects of an undue fearfulness can be—and this could be recognized at the time even by those of us who never regarded the Rosenbergs as obviously innocent. We can see, in how this and other Cold War excesses have been reassessed decades later, how our current excesses in the "War on Terror" will in turn have to be examined some day. Of special interest should be the diagnosis of the disruptive effects of the Iraqi Intervention on the prosecution of the much more legitimate NATO effort in Afghanistan.

Particularly troubling, once the immediate passions of our "War on Terror" have subsided, will be the recognition of the deaths to which we have contributed in Iraq during the past decade. These numbers are tens, perhaps hundreds, of times greater than the casualties callously inflicted upon the United States by the September Eleventh criminals. And yet, it has already come to be generally believed, the Iraqi regime had nothing directly to do with what happened to the Twin Towers in New York City in 2001.

Also troubling, perhaps even more so, could be the recognition of the element of chance in how it was determined that Iraq should be dealt with decisively when it was. Adding to our eventual dismay could be the recognition that the principal beneficiary of our Iraqi Intervention has been the current Iranian regime, perhaps at the expense of the restive people of that oppressed country. Particularly distressing, that is, should be the recognition, again and again, that we simply did not know what we were doing when we invaded Iraq in 2003.

113. ANASTAPLO, REFLECTIONS, supra note 55, app. M.
It can be sobering to recognize as well how much does depend, in any country, on the leaders of the moment. The "agendas" of such leaders can be difficult both to anticipate and to correct. This makes even more critical the availability among us of a robust freedom of speech if we are to examine properly what is being done in our name by those temporarily in authority.

Then, of course, there is the problem of what we should be saying, during the generation ahead, about and to those with devastating suicidal inclinations. I notice in passing that the mounting recourse to suicide bombings in Afghanistan has evidently been influenced by highly publicized events in Iraq. How should the suicidally minded, wherever they are, be spoken to and about?

It may be useful here to be able to speak knowledgeably about the texts and doctrines that such deadly people regard as authoritative. Islam did not produce, centuries ago, a noteworthy civilization without having had access to serious thought of a high order. That thought has to be grasped by those among us who need to appeal to the best to which Muslims may still have access.114

What, then, do the suicidally minded and their families need to be reminded of? What have they forgotten—and why? And how is the good, to which they do somehow aspire, to be understood?

Of course, some (perhaps many, if not even almost all) of the suicidally minded may come to be beyond being reasoned with. But what about the leaders of the campaigns in which such people are callously used? Cannot they be properly challenged (drawing on the best in Islam) to justify their deliberate use of shameful suicide bombings in houses of worship, at funerals, and in pet markets?

Effective challenges here depend, at least in part, upon the obvious probity of those presuming to invoke enduring standards grounded in nature as well as in the sacred texts and the sounder practices of Islam. The probity of challengers is apt to be undermined, however, if they cannot display themselves as routinely living up to the high standards

114. See George Anastaplo, But Not Philosophy: Seven Introductions to Non-Western Thought 175 (2002) [hereinafter Anastaplo, But Not Philosophy].
that they themselves profess and invoke. Certainly, we should be concerned lest we provoke fair-minded people elsewhere to suspect that the terror we sometimes unleash (using the most powerful military forces in the history of the world) may be far worse than the terror to which we ourselves have at times been unjustly subjected—to suspect, that is, what John Van Doren (a New Yorker) has suggested in his post-September Eleventh poem, *Afghanistan*:

Technology and vengeful troops,
Neither limited by laws.
The terrorist miscalculated—
He didn’t know what terror was.\(^{115}\)

12. **ON PROPER RESPONSES TO OMINOUS CHALLENGES**\(^{116}\)

Spring 2008

How matters stand now with our “War on Terror” is suggested by three articles in the *New York Times* of Wednesday, March 12, 2008, (the seventieth anniversary of the Nazi takeover of Austria) from each of which I reproduce here the opening passage. First, there is the article *Top Commander in Mideast Retires After Rankling Bosses*:

WASHINGTON—Adm. William J. Fallon, the commander of American forces in the Middle East whose outspoken public statements on Iran and other issues had seemed to put him at odds with the Bush administration, is retiring early, the Pentagon announced Tuesday.

Admiral Fallon had rankled senior officials of the Bush administration in recent months with comments that emphasized diplomacy over conflict in dealing with Iran, that endorsed further troop withdrawals from Iraq beyond those already under way and that suggested the United States had taken its eye off the military mission in Afghanistan.

A senior administration official said that, taken together, the comments “left the perception he had a different foreign policy

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\(^{115}\) John Van Doren, Afghanistan (unpublished poem) (on file with author).

\(^{116}\) Remarks prepared for G.A.’s Jurisprudence Seminar, Loyola University School of Law.
Then there is the article *Citing Faith, Bush Defends War Actions*:

NASHVILLE—President Bush delivered a rousing defense of the wars in Iraq and Afghanistan on Tuesday, mixing faith and foreign policy as he told a group of Christian broadcasters that his policies in the region were predicated on the beliefs that freedom was a God-given right and "every human being bears the image of our maker."

In a 42-minute speech to the National Religious Broadcasters convention, Mr. Bush called upon European allies to step up their efforts in Afghanistan, and conceded that recent security gains in Iraq "are tenuous, they're reversible, and they're fragile." Still, he insisted that his troop buildup there was succeeding.

"The decision to remove Saddam Hussein was the right decision early in my presidency," Mr. Bush said, to a standing ovation.118

Finally, there is the article *Effort to Prohibit Waterboarding Fails in House*:

WASHINGTON . . . —The House on Tuesday failed to overturn President Bush's veto of legislation that would have prohibited the Central Intelligence Agency from using waterboarding, which simulates drowning, on terrorism suspects.

The measure would have limited the agency to 19 techniques approved in the Army field manual on interrogation. The Army rules ban the use of waterboarding.

. . . .

The House roll call was 225 to 188, or 51 votes short of the two-thirds majority required to override a veto.119

Lest it be suspected that I myself always favor “non-violent” responses to threats and dangers, I offer here the Letter to the Editor I sent (on February 19, 2008) to several newspapers. This letter was prompted by the Valentine’s Day massacre by a gunman on a university campus in DeKalb, Illinois:

The fiendish attack last week on a hall full of Northern Illinois University students by a heavily armed madman provoked typical responses by potential victims: by and large, people dove for cover or ran for exits. It is obviously difficult, when assaulted thus, to resist the natural impulse to flee or to hide, even if one may become thereby an easier target. It would usually be healthier, spiritually as well as physically, if potential victims in such dreadful circumstances had been taught (well before such a crisis) to rush the gunman, shouting vigorously and throwing things at him (backpacks, books, bottles, chairs, clothing, laptops, lunchboxes—whatever is at hand). Putting out the lights might also help. (Arming other students on a campus would probably be, to say the least, counterproductive—and not only because it can “send the wrong message.”) It would probably help, in any event, if a would-be gunman (no matter how demented) should be helped to recognize (as he makes his plans) that his hoped-for victims can no longer be counted on to remain simply targets, but might even take him alive. He yearns for, and indeed depends upon, much more uncontested control of the situation than he should be permitted by properly prepared fellow students to count on.120

Thus, the spiritual as well as the physical consequences of how we respond to ominous challenges should be properly assessed. This, I am afraid, was not adequately done by our government when it insisted upon undertaking (despite the well-documented warnings of many experts) “democratization” of the long-tormented “country” of Iraq. European (if not even “world”) opinion about American foreign policy these days is suggested by the opening paragraph of a recent editorial (“Today’s task is to mend broken Iraq: Despite US triumphalism there are no good options left”) in the Financial Times (of London), March 20, 2008:

120. Letter to the Editor from author (Feb. 19, 2008) (on file with author).
Five years after it was invaded, Iraq has been broken as a country. Already traumnatised by tyranny and war, it has now been torn asunder by an occupation that was certain to ignite violent insurgency, and by a savage sectarian struggle for supremacy. Triumphantist claims by President George W. Bush that the year-long US troops “surge” has turned Iraq around merely add another sorry chapter to this saga of serial delusion and epic bungling.¹²¹

13. LABOR DAY, 2008: WHAT BELONGS TO WHOM?¹²²

September 1, 2008

I.

Economic, especially financial, concerns have been critical nationwide during the months leading up to this Labor Day. Such concerns, as they bear on the working class of the country, are associated with interests that contributed to the establishment of this holiday by Congress in 1894.

But it is not only “labor” that is caught up by these concerns today, with the country’s banks, and those dependent on them, very much in the news. In fact, it is anticipated that the economy may be a major concern, if not the dominant concern, during the concluding months of the current Presidential contest.

II.

A related concern these days, partly economic in character, is with respect to the hurricane battering our Gulf Coast (even as we can easily gather here this afternoon). The national interest in Hurricane Gustav is stimulated, in large part, because of what Katrina did to New Orleans three years ago this week.

The magnitude of our country is such, however, that we here would not have, but for news reports, any immediate awareness of what is happening a thousand miles south of us on the Gulf Coast at this very

moment. If that storm affects us directly, it is perhaps by way of the quite pleasant weather we are enjoying these days.

III.

This hurricane will pass, and the reconstruction of towns and lives will commence with little immediate effect on most of us. But concerns about a Recession will remain, dramatized by disturbing news about mortgages and fuel costs.

What is odd, if not even unnatural, about all this is that domestic economic concerns, including debates about who should be taxed for what, dominate political discourse this season. It is odd, that is, that we hear much less (than we did, say, a year ago) about the “wars” we are engaged in.

There continue, of course, the conflicts in Afghanistan (now in its seventh year) and in Iraq (now in its fifth year). There is also the “War on Terror” which, we are warned, may continue for decades. And, it can be suspected, our current economic troubles may have been brought on, at least in part, by how our current “wars” have been financed.

IV.

It has been noticed that there has been no substantial official call for sacrifice on the part of the country as a whole. It has also been noticed that those making the greatest sacrifices have been military volunteers and their families, not the general public.

Would it be different, it can be wondered, if our military had been drawn, as during our Vietnam days, from the country as a whole? How, that is, may a people be helped to recognize what is truly their own?

It may be noticed, of course, that there is less daily interest among us in “the war” especially because everyday life seems to be calmer in Iraq than it was eighteen months ago. But, on the other hand, the “situation” of the NATO alliance sometimes seems to be steadily deteriorating in Afghanistan, the “country” from which (it is generally believed) the September Eleventh attacks were launched.

V.

At times, it can seem that even such a monstrous challenge as Gustav may be welcomed as a diversion. But our diversions are usually much
more benign, such as our “personal” identification with a variety of “home” sports teams, teams that have often been purchased, at least in part, only for the current season.

Then there are the diversions offered by our entertainment industries. Consider, for example, how mystery stories of all kinds (including even crossword puzzles) can engage us, perhaps providing for us a safe substitute for the grander mysteries that truly challenge us, whether or not we dare face up to them.

There are also the diversions offered by narcotics. Some of those narcotics offer such great rewards to their providers that thousands are killed annually among economically depressed peoples in battles for control of supplies for affluent customers, many in this country. Those customers remain generally oblivious of the misery that they routinely finance. The globalization that is made so much of, connecting peoples all over the world, can also have the curious effect of allowing us to insulate ourselves to an unprecedented degree, permitting us to care only for those with whom we immediately choose to identify and associate.

VI.

After all, it should be noticed, even the much reviled September Eleventh attacks did not really “hit” most of us. Accidents, both natural and man-made, can have like effects statistically—and we readily accommodate ourselves to them when we do happen to learn about them.

It can be wondered, indeed, how much any people can reasonably be expected to care for. Thus, it can be wondered, why does the Chinese government insist upon retaining millions of quite restive minorities when they would still have (without them) more than a billion (sometimes desperate) people to care for?

VII.

We ourselves, it is said, will have in this country almost a half-billion people by mid-century (just half a lifetime away). And ours is, of course, already a very big country.

When we notice what we care about and what we do not (perhaps cannot) routinely care about (such as those who daily risk their lives for “us” halfway around the world), we can be reminded of how big our Country really is. Again and again one is obliged to wonder what is truly one’s own. What is worth laboring for, even sacrificing for? In short,
what institutions and practices promote (especially in the modern world) a proper (and hence a spiritually satisfying) sense of belonging?

14. OBLITERATION BOMBING AND THE RULES OF WAR

September 2, 2008

I.

The Lord Bishop of Chichester rose in the British House of Lords on February 9, 1944 in order to ask His Majesty’s Government, whether without detriment to the public interest, they can make a statement as to their policy regarding the bombing of towns in enemy countries, with special reference to the effect of such bombing on civilians as well as objects of non-military and non-industrial significance in the area attacked . . .

Replies to the bishop and others of like mind were made on this occasion and, even more, a week later. The later discussion, of February 16, 1944, was under the heading, “Preservation of Historical and Art Treasures.”

These February 1944 debates were less than four months before the massive D-day invasion at Normandy (on June 6, 1944). By that time, the first half of 1944, the Allied air forces were dominating the skies over Germany and Occupied Europe. By that time, also, the German army had suffered serious reverses on its Russian front.

The Allied air forces were able, pretty much at will, to conduct massive “area bombing” of German targets, including the larger cities of the country. This came to be known as “obliteration bombing.” By this time, also, the massive firebombing of Japanese cities was underway.

II.

It was generally understood, among the peoples in the Allied

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125. Id. at 813.
countries, that "they had started it." That is, the Germans and the Japanese could be widely looked to as having begun, during the preceding decade, ruthless attacks upon helpless targets in Europe and Asia. Indeed, the Japanese were said to celebrate, year-round, the monthly anniversary of their surprise attacks on Pearl Harbor and other targets (American and British) in the Pacific.

Thus, it could be readily believed among the peoples of the Allied nations, in contemplating what the enemy was being routinely subjected to, that they "had started it." The grievances of enemies had long been lost sight of, such as the First World War blockade which had attempted to starve the Germans into submission. The Japanese, too, could resent well before the war what they regarded as highly questionable American and British policies believed by them to be grounded in longstanding racial prejudices.

The worst atrocities of the war were not yet generally known, certainly not in the hideous detail that came to be exposed when the Nazi death camps were fully exposed. But enough had long been known about Japanese and German practices as conquerors and rulers to warrant their condemnation as "barbarians." Such assessments drew upon centuries, if not even millennia, of generally accepted norms among the civilized nations of the world.

III.

There does not seem to have been, by 1944, any serious public concern expressed either in Japan or in Germany about how the power of those two countries had been exercised, especially as conquerors. This is not to suggest that there were no citizens in those countries deeply troubled by what had been done "on their behalf." But the most articulate German critics of the Nazis were obviously abroad, waiting for an opportunity to return to their country in order to begin to redeem it by drawing upon "the better angels" of its nature.

Criticisms of governmental policies, grounded in what would today be called humanitarian concerns, were heard during the War in Great Britain (and, perhaps to a lesser extent, in the United States). This was aside from the overall criticism of military policies implicit in conscientious objection to military conscription, a position that was somewhat deferred to in Great Britain and the United States throughout

126. See infra Appendix.
the Second World War. The safest way for British and American critics to proceed was to invoke the laws of war (and related treaties and conventions) rather than "merely" moral principles.

The rules of war were most conspicuously relied upon, at least in the European theatre, in the treatment of prisoners of war. Both sides—the Allies and the Axis—seem to have conducted themselves fairly well here, most of the time, drawing in part upon the sense of honor traditionally developed among military officers. No doubt, concerns about retaliation helped captors behave themselves with respect to their military prisoners.

IV.

The status of civilian populations, too, is governed by the laws of war. But here evasions are more likely, especially when one seems to have markedly superior power. This may even be seen today in how the somewhat privileged status of "prisoners of war" can be avoided by labeling some of those held as "unlawful enemy combatants" and the like.

The willingness of Allied air crews to carry out the orders given them; in effect, to destroy German and Japanese cities can be recalled in my own experience as an Air Corps navigator at that time. That is, I do not recall any indecision, among air crew members I encountered, of any reluctance to do what was evidently being done in 1944–1945 to the enemy. Those men among us who were conscientiously opposed to such service could have fairly easily gotten themselves disqualified as air crew members sometime in the course of their training.

It was generally believed among the air crew personnel I encountered that they were likely to survive if taken prisoner. That is, the laws of war were considered quite reliable here, provided that one survived (after bailing out over hostile territory) the angry treatment of the civilians one first encountered. Thus, the civilians protected by the laws of war might not themselves be mindful of such rules upon at last apprehending someone who had tormented them from on high, especially if such civilians had been taught that the massive enemy bombing to which they had been subjected was clearly unjustified.

V.

It is instructive to notice where some of the most telling British
criticism of obliteration bombing came from. The British clergy was perhaps more outspoken in this respect than their American counterparts. The Bishop of Chichester could anticipate vigorous opposition, but also respect (and he might even have his sentiments published in a letter to the Times).

Of course, members of the United States Senate have always been more vulnerable politically than members of the House of Lords. But even British students of politics sometimes do not seem to recognize how valuable a largely hereditary House of Lords can be in democratic times. It certainly used to be true that challenges to the orthodoxies of the day were more likely to be heard there than in the House of Commons.

The Bishop of Chichester recalled what had already been done by Allied bombers to Berlin and Hamburg. And he dreaded that that might be done, as well, to smaller cities, which he named, beginning with Dresden. The following year Dresden itself was virtually leveled, with tens of thousands killed, an action that has come to be regretted as an atrocity by even some of the most enthusiastic proponents of large-scale aerial bombardment.

VI.

It is disputed to this day whether systematic obliteration bombing significantly advances the military campaign of a country. Earlier bombing of this character, on a smaller scale than that eventually inflicted on Germany, was endured by British cities. The British even spoke of it as having strengthened their own resolve to fight.

But, it should be repeated, the devastation in Britain (in 1939–1940) was never on the scale of what happened in Germany (in 1944–1945). I myself could see, in German cities at the end of the war, what had been done by Allied bombardments. I can recall standing in parts of Berlin and not being able to see anything standing anywhere around me, except perhaps a chimney here and there.

Questions have even been raised as to whether it was the atomic bombing of Hiroshima and Nagasaki that prompted the Japanese surrender a few days thereafter. However that may have been, it is obvious that the prospect of such devastation can induce political and military leaders to proceed with extraordinary caution wherever nuclear weapons might be encountered. It does seem to be believed today that countries with deliverable nuclear weapons should be treated with considerable respect, as may be seen in how gingerly the United States
and the Soviet Union proceeded during the Cuban Missile Crisis in 1962.

VII.

Was it partly a matter of chance when nuclear weapons were first developed and where? Or did such a development depend, at that stage, upon the relative freedom available for human beings (and hence scientists, among others) in the United States and Great Britain? The obvious superiority in human measures among the Western Allies may have inspired a deeper and more reliable loyalty in thoughtful, decent men than the Nazis could inspire and maintain.

That is, the efforts of men such as the Bishop of Chichester, however misguided they seemed to those more respectful of authority, may have contributed to the productive loyalty of intelligent patriots. Citizen morale can be maintained, and even strengthened, when it is apparent that authority is being safely questioned. This is especially so when those in authority are seen to answer with plausible arguments, not simply with force.

Even those who consider themselves both entitled and obliged to wage “total war” can be assured when they encounter thoughtful opposition. They can see, in such circumstances, that they have been privileged to consider arguments that oblige them to examine thoroughly their position. That is, the totality they can then deal with includes facing up to what can be said against what they consider themselves obliged and able to do.

VIII.

Among the things said against the obliteration-bombing policies of the Western Allies in 1944–1945 were statements that had been made by Winston Churchill and others upon being subjected to the German air raids of 1939–1940. Those raids were recognized and condemned by the laws of war. And yet, when the balance of power had shifted decisively to favor the Allies, Prime Minister Churchill and others could exult upon finding themselves able to do far more damage to German cities by aerial bombardment than had once been done to British cities.

The early British protests against what the Germans were doing did draw upon a centuries-long development of the laws of war. We can see here how the Anglo-American common law also developed, guided and refined at times by statutes. We can see this development even better
when we examine the "military necessity" invoked by those who have attempted to justify recourse to obliteration bombing.

At the foundations of any development such as that of the common law is reliance upon the guidance provided by nature. This kind of reliance may be seen in the invocation, in the Declaration of Independence, of "the Laws of Nature and of Nature's God."127 It was in this context that there could be recognized an obligation to show "a decent respect to the opinions of mankind."128

IX.

It remains to be seen which "opinions of mankind" prove to be authoritative with respect to how war should be conducted in the twenty-first century. Among the influences to be assessed is the Nuremberg Trial of 1945–1946. The standards invoked there were loftier than those that the Allies sitting in judgment had themselves always been capable of living up to during the Second World War.

This assessment is obvious enough when the conduct of the Soviets is considered. Thus, their 1940 murder of more than twenty thousand Polish officers in the Katyn Forest stands out as particularly revealing. Both the Nazis and the Stalinists accused the enemy of this atrocity, thereby conceding (at least in public) that such actions are criminal and otherwise indefensible.

But it can be wondered whether the Western Allies, especially with their pulverizing bombardments of an ever-more-helpless Germany, always lived up to the standards drawn upon and reaffirmed during the Nuremberg Trial. Those were standards invoked by patriots such as the Bishop of Chichester. Such invocations, sanctioned by the law of the land, testified to the enduring strength of that spirit upon which Anglo-American constitutionalism depends.

127. The Declaration of Independence para. 1 (U.S. 1776).
128. Id.
15. THE "WAR POWER" AND THE CONSTITUTION

September 8, 2008

I.

It can be salutary to suggest that the natural state of the human race, at least according to the Constitution of 1787, seems to be *peace*. It is peace which is most productive of useful goods and services—and of life itself. War should be only one way to protect that good life which a well-ordered peace can provide and maintain.

The branch of the General Government most obviously concerned with activities of war is the Executive, or so it can seem to us. The President is identified in Section 2 of Article II of the Constitution as "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." But his activity here is, at least in principle, subordinated to the will of the Congress which both declares (and undeclares?) wars and supplies the armed forces available for the President to command.

It does not seem to be contemplated by the Constitution that the judges provided for in Article III should have much, if anything, to do with the immediate conduct (as distinguished from the aftermath) of war. The subordination of the laws in time of war is recognized in an old adage, *Inter arma silent leges*. Habeas corpus itself, perhaps the most dramatic testimony to the rule of law among the English-speaking peoples, may be suspended "when in Cases of Rebellion or Invasion the public Safety may require it."

II.

Much of the Constitution is prosaic in its language. The everyday workings of a system of governance are provided for in unexciting detail. We have here (after the high-minded Preamble runs its short course) little of the elevated rhetoric found in the Declaration of Independence.

Of course, the Declaration itself looks to a system of governance

131. *Id.* art. I, § 9, cl. 2.
which is to be once again available to the People of the Country when
tyrannical rule over them is successfully thrown off. That system will
not be primarily concerned with the struggle confronting the people
seeking relief from “foreign” mismanagement of their affairs. Once the
British yoke is thrown off, the People will concern themselves with the
need both to make and to keep their lives productive.

Thus, the Declaration concludes with the anticipation of what a
proper independence can provide once they are “Absolved from all
Allegiance to the British Crown.” The United States would then “have
full Power to levy War, conclude Peace, contract Alliances, establish
Commerce, and to do all other Acts and Things which Independent
States may of right do.” It is understandable, considering the
immediate challenge then faced by this People, that the levying of war
should come first in this inventory of future “Powers” found in the
closing lines of the Declaration of Independence.

III.

Once Independence was secured, the People of the United States
could settle down to its career as a proper country. The Preamble to the
Constitution of 1787 does provide a transition from the soaring language
of the Declaration of Independence. Much more methodical language
dominates thereafter the body of the Constitution.

The first third of that instrument is remarkably workmanlike in tone.
The selection and operations of the Congress are spelled out in
determined detail. There is little in the language used that is
memorable for the typical reader.

Perhaps the most impressive feature of the provisions thus set forth
in the Constitution is what is taken for granted about the routine
competence of the People thus provided for. It seems to be assumed that
people, all over the newly established Union, would be able to do what is
needed to provide for the selection of a Congress. And it is also assumed
that such a Congress, once assembled, will know what to do.

132. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).
133. Id.
134. See U.S. CONST. pmbl.
135. Id. art. I.
Then there are spelled out, in Section 8 of Article I of the Constitution, many of the powers of Congress. Many—perhaps most, if not all—of such powers are those which any proper government of a people should have. The first half of Section 8 is primarily devoted to domestic (or civilian) concerns.

Thereafter, provision is made for foreign relations and the military. The "common Defence" had been recognized early in Section 8, but this was in the course of anticipating how the monies collected by the Government might be used. "Commerce with foreign Nations" was also provided for early in Section 8, but that was regarded as part of the general commerce power.

The international relations of the country—whether commercial, diplomatic, or military—need not be considered essential. That is, even if the United States should somehow find itself completely isolated from the rest of the world, it would still want to provide for most of the ends enumerated in the Preamble ("to form a more perfect Union, establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty"). The only military-like force it would then have to be concerned about is not for "the common defence" but rather for whatever may be needed to protect citizens from the unruly among themselves.

Following upon the extensive catalogue of Congressional powers in Section 8 of Article I is the list of restraints upon governmental power. These provisions, in Section 9 of this Legislative Article, seem to be designed primarily to restrain the Congress established and empowered in the opening eight sections of the Constitution. This is, in effect, a bill of rights, except for the first clause in Section 9 which protects (until 1808) the "rights" of those who want to import slaves.

At the outset of the more respectable guarantees enumerated

136. Id. art. I, § 8.
137. Id. art. I, § 8, cls. 1–9.
138. Id. art. I, § 8, cls. 10–16.
139. Id. art. I, § 8, cl. 1.
140. Id. art. I, § 8, cl. 3.
141. Id. pmbl.
142. Id. art. I, § 9, cl. 1.
 thereafter is the provision with respect to the writ of habeas corpus, of which it is said that it “shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” The ultimate supremacy of Congress in the constitutional system is suggested by the placement of this guaranty in the Legislative Article, not in the Executive Article. Thus, it seems to be assumed, the most serious issues as to how the country is to be maintained, and in what condition, are ultimately to be decided by the Congress, not by the President.

Much more could be provided as a Bill of Rights—and this was done in the first ten amendments to the Constitution, amendments ratified in 1791. But those rights, it had been many times insisted upon during the 1787–1788 Ratification Campaign, belonged to the People of the country, whether or not they were explicitly provided for in the Constitution. Thus, the Ninth Amendment (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”) recognizes that there are rights that do not ultimately depend on their being enumerated in the Constitution.

VI.

We can be reminded, by Section 10 of Article I, of what State governments should be primarily about, at least in their more mundane operations. The States of this Union are to be discouraged from having foreign policies of their own and engaging in wars. Also, these States are prohibited from various activities which see one State in the Union imposing upon other States (by, for example, “lay[ing] any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it’s inspection Laws”).

Particularly instructive may be the restraints upon the States that are imposed as well upon the General Government. Thus, the States are prohibited from passing any “Bill of Attainder or ex post facto Law” or granting any “Title of Nobility.” These restrictions seem to be critical to the “Republican Form of Government” guaranty provided to the States

143. Id. art. I, § 9, cl. 2.
144. Id. amend. IX.
145. See id. art. I, § 10.
146. Id. art. I, § 10, cl. 3.
147. Id. art. I, § 10, cl. 2.
148. Id. art. I, § 9, cls. 3, 8.
in Article IV of the Constitution. 149

The concluding provision in Section 10 of Article I recognizes, in effect, the compelling desire that human beings usually do have to preserve themselves. It is there recognized that States, on their own, may indeed "engage in War, [when] actually invaded, or in such imminent Danger as will not admit of delay."150 But it seems to be generally understood that it is left to the General Government (and especially to Congress) to determine when and how the country should engage in wars.

VII.

We have noticed that it is recognized in the Constitution that the President is to be considered the "Commander in Chief of the Army and Navy."151 It is recognized, that is, that military activity should be subject to the immediate control of a designated leader. Even so, this military leader is explicitly controlled in various ways.

The declaration of war, we have noticed, is left to the Congress to make. Does not this mean, in effect, that the foreign policy of the country should be supervised by the Congress? This is evident as well in the authority of Congress to provide for the armed forces of the country.

The concluding words of Article II, the Executive Article, remind citizens of where the ultimate authority lies (within the General Government). It is provided there: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."152 It is evident throughout the Constitution, of course, that the People of the Country have the final authoritative "say" in these matters, whatever various officers of government may chance to believe or do from time to time.

VIII.

Article III, the Judicial Article, is by far the shortest of the three articles providing for the branches of the General Government. This

149. Id. art. IV, § 4.
150. Id. art. I, § 10, cl. 3.
151. Id. art. II, § 2, cl. 2.
152. Id. art. II, § 4.
brevity suggests that the British version of this branch substantially served as the model for the judicial system of the United States. Recollections of the British experience evidently influenced the warning with which Article III ends, the definition of *treason*, attempting to head off thereby the abuses to which some notorious English judges had been prone.153

The States, which had been restrained in Section 10 of Article I, are returned to in Article IV. They are obliged to conduct themselves, in various ways, as members of the Union respectful of the concerns and activities of other States and of the General Government.154 The limitations upon the States' war-making powers, seen in Section 10 of Article I, are compensated for, so to speak, by the assurance given to the States that the United States "shall protect each of them against Invasion; and on Application of the [State] Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."155

We notice here (as Article IV draws to its close) the priority assumed, in the States, for the legislature over the executive. This suggests one feature of the "Republican Form of Government" guaranteed there for every State.156 This can be considered, in effect, an assurance comparable to the treason concern evident at the end of the Judicial Article.

IX.

The importance of the States in this constitutional system is recognized in the provision made (in Article V) for amendments of the Constitution.157 The power of the States here is extensive, thereby permitting the States of the Union (including however many States are created pursuant to the Constitution) to provide for drastic changes in the Constitution. Even so, a critical protection for the States may be seen in the recognition that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."158

Article VI begins with the insistence: "All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall

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153. *Id.* art. III, § 3.
154. *Id.* art. IV.
155. *Id.* art. IV, § 4.
156. *Id*.
157. *Id.* art. V.
158. *Id.*
be as valid against the United States under this Constitution, as under the [Articles of] Confederation." 159 This recognizes that the United States should be regarded as having existed prior to the development, ratification, and implementation of the Constitution of 1787. This is reflected as well in the dating given for this Constitution, which is said to have been "DONE . . . [on] the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth." 160

Also having existed prior to the implementation of the Constitution of 1787 were various rights of the People, such as those found in the Constitution (as in Article I, Section 9) and in the first ten amendments to the Constitution (which do include, in the Ninth Amendment, the recognition of rights not listed anywhere in the Constitution). 161 Among the elements of the preexisting sense of the rights of the People is the understanding that the national war power is significantly limited, something evident from the implications of the Second and Third Amendments (with respect to the "right of the people to keep and bear Arms" 162 and with respect to the quartering of soldiers in houses 163). The Ninth Amendment, we have noticed, reinforces the insistence that critical rights belong to the People of the United States, whether or not made explicit in any constitutional document, an insistence that can illuminate what should be understood to be "a Republican Form of Government," a form of government which can include the recognition that the Legislature should be able to override any veto by the Executive (even with respect to issues of war and peace).

159. Id. art. VI, cl. 1.
160. Id. art. VII.
161. Id. amend. I-X.
162. Id. amend. II.
163. Id. amend. III.
16. ON FACING UP TO TORTURE

September 2008

Darius Rejali's eight-hundred-plus-page book, *Torture and Democracy*, offers a comprehensive guide to the nature and history of torture. It is evident from this remarkable account that torture is far less effective in achieving its stated purposes but far more widespread, vicious, and corrupting than it is usually regarded. This dismal review of the uses and abuses of torture, ancient and modern, Western and Eastern, should suffice as an encyclopedic account of the subject for the next half-century.

It can be sobering to be reminded, here and elsewhere, of the respectable people who have allowed themselves to serve as apologists for the measures resorted to by even the more civilized regimes during the past century. On the other hand, it should be heartening to observe that ordinary people are still reluctant to celebrate professional torturers as family members or as intimate friends.

We are reminded by this author that an awareness of the troubling dubiousness of any systematic resort to torture is reflected in the growing efforts routinely made these days to employ only those forms of torture that leave no marks on the body of the victim—and hence no evidence if torturers should be held to account. Thus we learn, “The Chicago police were the first to discover that some telephone books were heavy enough to ‘stun a man without leaving a mark.’”

Critics of the routine resort to torture have been challenged, in our time, by the “ticking time bomb” scenario. Surely, it is argued by would-be realists, torture may be properly relied on (indeed, it should be relied on) if it is learned that one's prisoner knows where there is hidden an infernal device that is set to inflict, quite soon, considerable devastation on a multitude of innocent victims. Professor Rejali ably challenges the presuppositions of this kind of justification for the use of torture, insisting both that it is quite rare (if not even virtually impossible) to have such a “situation” and that torture is hardly likely to

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165. DARIUS REJALI, TORTURE AND DEMOCRACY (2007).
166. *Id.* at 273 (quoting NAT'L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, No. 11, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 126 (1931)).
167. *Id.* at 534–35 (internal quotation marks omitted).
“work” even then, especially if the prisoner expects all along to be himself a victim of the catastrophe that is believed to have been set in motion.\textsuperscript{168} In any event, it might be added by the prudent observer, the truly rare challenge of this kind may have to be dealt with by desperate measures that are hardly likely to provide relevant precedents or reliable guidance elsewhere.

Debates will continue as to how effective torture indeed is in a variety of circumstances, aside from its use, in effect, as a form of punishment or as a deterrent against hostile deeds. Informed students of this subject often insist that anyone subjected to intense torture routinely says the sorts of things that it is believed by him that his torturers want to hear, without any regard for the truth of what he provides. Certainly, it is hardly likely that tortured prisoners will feel they have any moral obligation to be truthful in such circumstances.

Whatever the controversy about the “effectiveness” of torture, there should be no serious doubt about its adverse effects on the character and opinions of those unfortunate enough to resort to torture. Simply speaking, torturers and their masters are highly likely to be corrupted by such participation and perhaps even more both by what they “have” to do to conceal their dark deeds and by what they “have” to say when publicly challenged.

The opening account of torture in the massive Rejali compendium recalls the notorious 1991 Rodney King episode in Los Angeles, an episode that should remind us of how ruthless, and mindless, torturers can be:

On March 3, 1991, police pulled over Rodney King and two other passengers in Los Angeles. Most Americans saw how that incident ended. [Los Angeles Police Department] officers beat King senseless with metal batons. Many will remember that police fractured King’s face and legs. How many remember the number of times police fired electric stun weapons at King [who is believed to have been under the influence of phencyclidine (or PCP)] during the incident? How many can say how much shock passed through his body as he lay on the ground? [Some say that King had been driving at 100 miles per hour when stopped and that the PCP made him extraordinarily difficult to control.]

From the start, the King incident was about the sudden

\textsuperscript{168.} \textit{Id.} at 474.
remarkable visibility of police violence captured, by happenstance, on amateur video. As [an investigatory commission] stated, “Whether there even would have been a Los Angeles Police Department investigation without the video is doubtful . . . .”

Even a careful viewer of the amateur video would not see the police using electroshock. [A police sergeant] tased Rodney King thrice . . . . To *tase* means to use a Tommy A. Swift Electric Rifle (T.A.S.E.R). Tasers fire two darts trailed by long wires. Once the darts catch onto the clothing or body, the operator depresses a button, releasing electric charge from the batteries along the wires to the target. [The police sergeant’s] Taser model possessed two dart cartridges. [He] lodged the first pair of darts on King’s back and the second on his upper chest. Each discharge delivered short pulses of 50,000 volts, eight to fifteen pulses per second.

The pain was not trivial. [One] officer said King was “writhing.” [Another officer] stated that King “was shouting incoherently from the pain of the taser.” Even [the police sergeant], who was nine feet away, declared, “He’s groaning like a wounded animal, and I can see the vibrations on him.” . . . [He then] depressed the button a third time, draining whatever charge was left in the batteries. . . . [But] the third tase didn’t subdue King, and the beating continued.169

Can such police conduct (if not rare) be long concealed from the community at large? Are not such men likely to come from, and routinely return to, decent neighborhoods and conventional home life?

The routine callousness that decent communities can foster and somehow accept (if not even acclaim and hence be demeaned by) is reflected in such routines as the casual acceptance among us of the considerable hunting (by twelve million hunters in this country) that is *not* done for the sake either of food or of protection, but rather done primarily as a “sport.” This may even be seen in the hunting “vacations,” sometimes halfway across the continent, that influential Americans are known to take. Professor Rejali himself recalls that “[t]he summer before [he] began writing this book, [he] spent time with a

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169. *Id.* at 1–2 (footnotes omitted).
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This hunter had "offered [him] a remarkable lesson in modern memory," for he "did not know any [torture] technique[s] . . . described in this book," but knew rather only the accounts that "came from travel books of the Far East."171 We can get a sense even here of how torture can come to be accepted if a community's sensitivity is blunted. Thus, there seems no awareness, in the Rejali reference to his Alaskan companion, of the callousness of that routine hunting which permits, indeed even seems to glorify, the systematic pursuit of harmless wildlife that can be casually subjected to terrifying (torture-like) assaults. Such violent men and their decent associates apparently do not suspect anything questionable in what they are doing, however sympathetic they may properly be when a human being is reduced to "groaning like a wounded animal."172 (It can again be recalled as well by me, in turn, that I, an Army Air Corps flying officer during the Second World War, did not hear any serious concern expressed among us about the fierce obliteration bombardments of German and Japanese cities by us to the very end of the war, the steady demolition of the by-then-helpless cities of peoples who had themselves been obviously responsible for awful atrocities that did seem then to "invite" unprecedented retribution.) Thus, it should be apparent (at least upon reflection) that the passions and the callousness exhibited by agents of systematic violence come in a variety of forms among respectable men who can be dreadfully misled by what they become accustomed to.

Nor should there be any debate about the effects that public exposures of recourse to torture are likely to have on the reputation everywhere of any country deliberately employing torture, especially when it can begin to appear like a form of human sacrifice. This can be particularly harmful when, as now, an effective "antiterrorism" campaign on our behalf seems to depend on the goodwill and the cooperation of peoples around the world. In various ways, therefore, torture can be, as it is said, "counterproductive."

The ugliness of torture is likely to be readily apparent to decent people when they see others use it. The systematic resort to torture during the European witch-hunting campaigns of the fifteenth and sixteenth centuries can be usefully noticed here, campaigns that are said

170. Id. at 537.
171. Id.
172. Id. at 2 (quoting STACEY C. KOON WITH ROBERT DEITZ, PRESUMED GUILTY (1992)).
to have led to the execution of tens of thousands (mostly women). The authorities of those days, ecclesiastical as well as secular, made arguments in favor of their extreme measures which sound embarrassingly similar to what their counterparts today are sometimes moved to rely upon (even in so orderly a regime as the United States).

Particularly instructive for us can be the trial in Rouen, in 1431, of Jeanne d’Arc. At one point in the process, the clergy who were trying her threatened to have her tortured in order to force answers from her, even displaying to her in court the instruments of torture. They did not proceed to torture her, however, when she announced that she would, if tortured, tell them whatever they wanted to hear—but that she would thereafter disavow whatever was elicited in this manner.

Something of the consequences of such compulsion could be seen soon thereafter when the sentence was about to be pronounced, a sentence that would have led to her immediate execution by burning at the stake. Jeanne, in order to head off this sentence, disavowed what she long had been saying about divine revelations. When she was back in the relative safety of her cell, she returned to her forbidden way of talking (about angelic visitations and the like). She explained that she had recently said what she did by way of seeming recantation because of her “fear of the fire.” Should not the use of power in this way, against a helpless prisoner, routinely appear as obviously reprehensible to detached observers? So fearful were Jeanne’s judges of the “ticking time bomb” she represented that they could not recognize what their routine disparagement of her revelations did to the reliance they themselves had long placed upon revelations reported by other humble people a millennium and a half before. However that may be, Jeanne was promptly burned to death once she repudiated her desperate recantation of a few days before, having somehow conquered her understandable “fear of the fire.”

Had Jeanne’s authorities (who included the prestigious University of Paris consultants who were relied upon) truly seen what they were doing (and doing to someone of such an obviously exemplary character that she would eventually be canonized), they surely would not have acted as they did. Nor, it can be hoped, would any decent people, if they could truly see what was going on, ever permit any substantial reliance upon torture on their behalf. One can even be heartened, I have indicated, by the measures routinely taken among us to conceal the torture we do happen to rely on (sometimes by secretly “outsourcing” it). One can also
be heartened that we still do have a regime that permits someone such as Darius Rejali to do the research and thereafter publish his distressing encyclopedic account of torture in the modern world, torture resorted to even in genuine democracies.

17. QUESTIONS LEFT BY MORTON SOBELL'S ANSWERS

September 22, 2008

We should be challenged by the recent confession of Morton Sobell at age ninety-one. He now admits, for the first time publicly, to espionage by Julius Rosenberg and himself on behalf of the Soviet Union during the Second World War.

I was among that troubled minority in this country who believed in the 1950s that the executions of Julius and Ethel Rosenberg for espionage were inexcusably ferocious and that the thirty-year sentence for Morton Sobell was obviously excessive (which was made even worse by his being confined in Alcatraz Prison for more than five years). Virtually none of the people I personally knew to be appalled by those sentences, including several of my law school professors, were ever prepared to insist that these three decidedly left-wing Americans had never been guilty of any espionage on behalf of the Soviet Union.

I had breakfast at our home in Chicago with Mr. Sobell in 1987 after having introduced myself to him at a lecture appearance he had made on the University of Chicago campus. He remembered that I had, a quarter-century before, worked on a brief prepared by one of his lawyers, Stephen Love, a prominent Roman Catholic attorney in Chicago. (Mr. Love had asked me in 1954 to help him try to get Mr. Sobell out of Alcatraz, where he, as a well-behaved prisoner, clearly did not belong.) This 1987 encounter with Morton Sobell was the only time I ever met any of the principals (on either side) in that notorious case.

My 1987 published assessment of Mr. Sobell, after our one visit together, has been reprinted most recently in my 2007 University Press of Kentucky book, Reflections on Freedom of Speech and the First Amendment (which includes my 1954 Alcatraz-related memorandum for

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174. Sam Roberts, 57 Years Later, Figure in Rosenberg Case Says He Spied for Soviets, N.Y. TIMES, Sept. 12, 2008, at A1; Morton Sobell, Letter to the Editor, N.Y. TIMES, Sept. 19, 2008, at A18.
I wrote, in 1987:

“It is remarkable how ‘American’ and good-natured this convicted Soviet spy is. One would expect someone who has protested his innocence for three decades to be embittered, if he was innocent, or to be devious, if guilty, neither of which does he appear to be.

I found Mr. Sobell to be a decent man, however ingenuous he can be when he deals with political things. In fact, I suspect it was his ingenuousness that got him mixed up in the early 1940s with people who [became] so vulnerable to charges of subversion, if not also of espionage.”

I also observed, in my 1987 assessment:

“Whatever Mr. Sobell had been guilty of, it had clearly been done for ‘ideological’ reasons. Certainly, [I said in 1987,] he is appalled by what is happening in contemporary espionage, as we learn from periodic exposures [in the 1980s] of Americans who are willing (even eager) to betray their country merely for money, with no pretense of any cause being served by them.

The willingness of Americans to spy for money reflects, for Mr. Sobell as for me, a general corruption.”

Mr. Sobell’s September 2008 public admissions that both Julius Rosenberg and he had engaged in espionage for the Soviet Union are likely to remove any doubt that some may have had as to his and Julius Rosenberg’s guilt (whatever questions there may still be left thereby both about any atomic espionage here and about Ethel Rosenberg’s guilt beyond any awareness she is likely to have had of her husband’s illegal activities).

But should the Sobell public confession, without any other evidence from him, be regarded as conclusively settling all questions with respect to that half-century-old controversy? I do not mean to suggest that Mr. Sobell should not be believed at this time. But I do wonder how much

175. ANASTAPLO, REFLECTIONS, supra note 55, app. M.
176. Id. at 253–54 (quoting ANASTAPLO, ON TRIAL, supra note 35, at 415–16).
177. Id. at 254 (quoting ANASTAPLO, ON TRIAL, supra note 35, at 415).
observers, especially those who had never believed him (or the Rosenbergs), can accept at face value the recent statements by a very old man implicating Julius Rosenberg and himself, but only in nonatomic espionage on behalf (it is insisted) of a wartime ally. (I notice, in passing, the recent publication of a book about “the British Spy Ring in Wartime Washington.”178) If observers do accept as fully truthful what Mr. Sobell chooses to report now, what does that suggest either about how much he really knew about the espionage conducted by his good friends (the Rosenbergs) or about the appropriateness of the two electrocutions at Sing Sing Prison in 1953?

It can be further wondered, following upon the recent Sobell admissions, whether the fate of Ethel Rosenberg was improperly used not only by ruthless officials but also by her curiously thoughtless codefendants who could have tried to say and do much more than they evidently did in public to separate her from whatever they themselves might have done. The conduct of the principals on both sides of that 1950–1953 contest can appear even more shocking when it is remembered that it was always apparent that two quite young children would be left as orphans if the Rosenbergs were both executed. Also, it can be wondered, were not Mr. Sobell and any advisors he may have confided in sadly naïve and hence irresponsible (if not even callous) in allowing the conscientious Rosenberg children (one of whom I met during a Chicago broadcast in 1975) to insist for decades thereafter upon the complete innocence of their parents?

Critical to assessing both how threats to our safety today are routinely assessed and how responses to such threats are fashioned is a sense of proportion (that is, traditional prudence). Is it not obvious that an old-fashioned sense of proportion is indeed something very much needed as troubled Americans search once again, as they did during the darkest days of the Cold War, for an elusive “security”?

18. SEPTEMBER ELEVENTH, SEVEN YEARS LATER: BACK TO BASICS? 179

September 29, 2008

I.

There are, as we review the seventh September Eleventh year, some useful lessons suggested for law students. Efforts must repeatedly be made, especially during a protracted controversy, to recognize what might be said for “the other side.” Efforts must also be made in our everyday activities to recognize that the promotion of law-abidingness does not depend only on the use of sanctions. Indeed, an informed awareness of Right and Wrong may often be more important than the everyday operations of the Law with its sanctions. If an undue emphasis is placed by “realists” on sanctions, it can suggest to many that one may do (and may even be entitled to do?) whatever one can “get away with.”

This Seventh Year of the “War on Terror” has been distinguished by “the Surge” in Iraq, the recourse there to significantly enhanced military efforts, mostly by the United States with the help of the Iraqi forces it has developed. This “Surge” is credited with reducing the sectarian violence which had seemed to bring Iraq to the brink of civil war. This effort has been somewhat like that massive use of an occupying force unsuccessfully advocated by some military experts before the launching of the Iraqi Intervention in 2003. Thus, there has been this past year in Iraq a somewhat new beginning.

II.

What happens next in Iraq now that it seems to be stabilized? Has “the Surge” changed anything fundamental? These are questions that have come to the fore, especially as it is recognized that other demands upon the American military (especially in Afghanistan) make it likely that the personnel allocated for the Iraqi theatre will soon have to be markedly reduced.

Can the Iraqis take charge once the United States withdraws most of its military personnel, however much support will continue to be

provided by our planes and missiles? A tendency toward fragmentation, with the Kurds in the lead, continues to challenge that “country.” The Kurds themselves are apt to recall that they had been mistaken to rely upon critical assurances given them by the United States during the Gulf War. The Kurds themselves are apt to recall that they had been mistaken to rely upon critical assurances given them by the United States during the Gulf War. They will want to consolidate the substantial autonomy they now seem to have, however much this threatens and hence displeases the Turks and the Iranians, peoples that have restless Kurdish minorities of their own.

A sobering aspect of the Iranian “situation”—an aspect we can be reminded of upon recalling that several million Iraqis have fled their “country” as refugees—was the ferocity displayed during the sectarian strife that “the Surge” has suppressed, at least for the time being. One can be reminded of the Greeks during their civil war in the late 1940s. The outsider suspects that the passions exhibited in recent years go back (in Iraq, as in Greece and, say, Northern Ireland) for generations, if not even for centuries, however much the Saddam Hussein regime exploited such passions and perhaps made them even worse.

The Greek passions continued to be felt for decades, contributing to the ill-conceived Colonels’ coup of 1967–1974. Those passions now seem to have been moderated somewhat by the demands made upon contemporary Greeks by their productive membership in the European Union. It remains to be seen whether anything comparable is available to calm down the more volatile “countries” in the Middle East.

III.

However “the Surge” and its long-term consequences in Iraq are assessed, the 2003 Iraqi Intervention does seem to be regarded by more and more Americans as having been dubious. This is aside from negative assessments (because of obviously inadequate responses to such challenges as Katrina) of the competence in this country of those leading the Intervention.

These negative assessments can be sharpened whenever it is recalled that Osama bin Laden remains at large—and when it is also recalled that he and his associates were evidently based in Afghanistan, not in Iraq.

Critics of the Iraqi Intervention can be further disturbed upon being told, again and again, that the standing of the United States worldwide has been adversely affected by where and how the “War on Terror” has

180. See Anastaplo, September Eleventh, supra note 2, at 318–19.
been conducted by the United States. Repeated reliance by American authorities on the torture of prisoners (however labeled and wherever "outsourced") has not helped the standing of the United States among peoples who consider themselves civilized.

The sensibleness of American policies can be further questioned when it is complained that Iraq, which had never seemed to be a significant source of the terrorists launched against the West, has been turned (since 2003) into a "breeding ground" for terrorists.

IV.

It does seem to be generally expected that the primary antiterrorist efforts by the United States will now have to be returned to Afghanistan. The most mischief minded among the Iraqis, knowing this, have evidently been waiting for opportunities to settle old scores among themselves (equipped, in part, with weapons recently acquired from the United States) and to establish themselves securely, perhaps even in alliance with Saddam Hussein's (and the United States') old enemy, Iran.

NATO is still somewhat involved in Afghanistan. But it remains to be seen whether any NATO countries, besides the United States, can be induced to stay there for many more years. Indeed, it may come to be wondered, as the frustrating experiences there of England and Russia across centuries are recalled, whether any outsiders can reasonably hope to do much to bring Afghanistan into the modern world.

It may even come to be wondered as well whether the campaign against the Osama bin Laden gang should continue to be regarded as a "war" rather than as a "police action." After "criminals" have been identified and severely punished, should the "police" be expected to stay in "the neighborhood" to reform it?

Something may even be said as well for allowing Osama bin Laden and his lieutenants to observe (from this side of the grave) the debacle they are responsible for, a debacle which cannot for long appeal either to the good sense or to the moral sensibilities of decent communities worldwide, and perhaps especially to those sensible Muslim communities in whose name they presumed to act as they did in September 2001.

V.

It can also be wondered whether the American public has somehow
begun to sense that "war on terror" is dubious nomenclature. By and large, our people don’t really feel that their country is engaged in any war. It has been odd, for instance, that the public is told that two “wars” are being fought by the country (in Afghanistan and Iraq), yet no serious attempt has been made (for years now) to get the public to pay for them.

Instead, public attention is directed these days to another threat to national well-being, that of a massive financial “melt down.” The public at large is being “conscripted” to meet this challenge to the tune of at least seven hundred billion dollars.

Thus, a front-page article in the New York Times of September 20, 2008, bears the phrase “Washington [that is, Washington, D.C.] Takes on the Feel of Wartime.” Now, we seem to sense, things are getting serious. The public can be asked to run risks, to sacrifice, and to remain steady in response to this challenge.

All this has ratified the public sense that the President, Vice President, and Secretary of Defense who originally insisted on the Iraqi Intervention no longer matter. It has also been evident, in the public resistance to the Administration’s initial proposed financial “bailout” bill, that there is considerable public skepticism about anything that looks like the kind of emergency mind-set that led to the dubious Iraqi Intervention of 2003.

VI.

The lessons of the Iraqi Intervention remain mixed. It now seems that Saddam Hussein, in a rather weakened condition after the 1990–1991 Gulf War, may have pretended to have much more dangerous weaponry than he had—in order to intimidate neighbors (as well as Iraqi dissidents) who might otherwise threaten his ever-more-vulnerable regime.

One unintended lesson of our Iraqi Intervention may have been that an unpopular regime (a “rogue nation”) “needs” nuclear weaponry to discourage meddling by powerful global sheriffs. This seems to be suggested by the care with which the United States has dealt with the North Korean tyrants, who are said to have a few nuclear bombs. Iran, it also seems, has taken this lesson to heart.

Thus the continued existence of nuclear weapons should remind us

all that war can be horribly devastating. But also devastating, although often less dramatically so, can be “ordinary” warfare. One danger we face in overreacting to Iranian defensiveness is to undermine the substantial goodwill among the Iranian people toward the American regime, no matter what rulers in both countries are moved to threaten from time to time. That goodwill can be seriously compromised by air raids against Iranian nuclear facilities either by the United States or by an understandably apprehensive Israel (who would be widely regarded as “licensed” by the United States thus to attack Iran).

VII.

It remains to be seen what the next Congress, which is likely to be even more Democratic than it is now, will do with the “War on Terror.” Much is to be said for our “declaring victory” in both Afghanistan and Iraq—and coming home, whatever armed “observers” are left behind to monitor and otherwise guide developments.

In normal times, it would be expected that the Democratic Party would secure the Presidency as well. But I have believed all year that it is not likely that the American electorate will prefer someone named Obama to someone named McCain. (Much the same could be said when someone named Dukakis got the Democratic Party nomination in 1988.) It remains to be seen, however, what our current massive financial “melt-down” does to this assessment.

Whoever does become President of the United States in January 2009 will eventually have to give up on our Iraqi Intervention. If the departure from Iraq comes to be regarded as unfortunate, it would probably be better for this country if a Republican, rather than a Democratic, Administration is blamed for “losing Iraq.” It may not matter much then (for a decade or so) that the more thoughtful observers among us might know that Iraq was never really ours either to “have” or to “lose.”
19. WAR & PEACE AND SOCRATIC CONSTITUTIONALISM\textsuperscript{182}

October 11, 2008

I.

We are told in Plato's Republic that there was held, one long night in Piraeus, a "constitutional convention" presided over by Socrates, an Athenian. Most of the participants were also Athenians. But the hosts, the wealthy Metic (Cephalus) and his sons (especially Polemarchus), were what we would call "resident aliens."

Piraeus, the principal port of Athens, was open to the world, a place where commerce reigned and where innovations were more likely than in the old city of Athens. Cephalus himself, now a very old man, is said by scholars to have been a manufacturer of implements of war. His primary interest now, however, is not in the things of this world, but rather in preparing for his death and whatever follows.

This nocturnal "constitutional convention" is in marked contrast to what is depicted by Plato in his Laws.\textsuperscript{183} In that dialogue three old men (including "the Athenian Stranger," who seems Socratic), walking to a destination in Crete, work out a system of government in broad daylight for a city to be developed soon. In both dialogues, all of the participants seem to be aware of the systems of government then prevailing in places such as Athens, Sparta, Egypt, and Persia, just as the participants at Philadelphia in 1787 were aware of the systems of government both in their contemporary world and in ancient Europe.

II.

The point of departure for the hours-long conversation in Cephalus' house is an inquiry into both the meaning and the realization of justice. A full realization depends, it seems, on the development of a community ruled and hence shaped by philosophers. It is evident that other communities (not shaped by philosophers) cannot be expected to do more than conduct themselves sensibly intermittently.

And so, war and self-defense have to be prepared for by the well-
ordered community, just as the decent families we are familiar with have to anticipate the ambitions, foolishness, and passions of their neighbors. Even in the best community, therefore, soldiers have to be trained from their youth. That this is a way of life that the most thoughtful do not yearn for is evident from the career of the historic Socrates, who served valiantly as a soldier, but only when called upon (conscripted so to speak?) by Athens.

It can be wondered, of course, whether there lurk, even within the best-constituted community, divisive passions that are no more than papered over by the Socratic argument, passions that contribute to that unraveling of even the best regime conjured up by Socrates. Such passions are reflected in the accounts that poets have given of the ways of gods who can be, at least at times, all too human. The limitations of the warlike (human as well as divine) are suggested by the Socratic insistence that the gods should not be said to make war among themselves.¹⁸⁴

III.

A competition among communities, with respect to how divinities are honored, had been among the attractions that had brought Socrates and Glaucon down to Piraeus that day. Such competition is peaceful enough on this occasion, which permits Socrates to recognize a contribution made to the festival by outsiders. But the “fact” or possibility of war is nevertheless evident from the outset of the dialogue.

That is, a mock battle is “fought” (or at least threatened) as Polemarchus (“leader in war”) proposes to force Socrates and Glaucon (with the aid of his party, which includes at least one slave) to accept the insistent hospitality of the Cephalus household. The problem of maintaining any superior regime is suggested by the willingness of Socrates’ companion (the gifted Glaucon) to collaborate with “the enemy.” That is, the prospect of a party appeals to this young man, however much he had been so drawn to Socrates that he had accompanied him on the long walk down to the Piraeus earlier that day, a leisurely walk (I recall from my experience) that can take between two and three hours.

Polemarchus lives up to his war-oriented name when he suggests,
early in the inquiry thereafter promoted by Socrates, that justice is to help friends and injure enemies. Another guest at the party, the lion-like Thrasymachus, is even more “realistic” by insisting that justice is whatever the stronger considers to be in his interest. Socrates then has to bring his argument to an apparent close (in Book I of the Republic) by demonstrating that Thrasymachus is not as strong as he (a sophist) advertises himself to be.

IV.

Thrasymachus, as a stranger in this greater Athens community, may have been somewhat inhibited in his challenge of conventions. Glaucon (a brother of Plato), whose Athenian pedigree is of the top rank, can dare be bolder. He suggests what people are really like—and what they yearn for—by introducing into this conversation that proverbial “ring of Gyges” which can make its wearer invisible and hence seemingly all-powerful.

Thus, Glaucon suggests for the sake of argument (no matter what he may personally believe) the power and immunity provided by access to invisibility (or supreme caniness?) that would make others apprehensive. In such circumstances, Glaucon wonders, would it not become evident that communities have to reckon with the tendency of most people to take whatever they can get away with? In short, it is, by nature, a Hobbesian world in which there can be expected to be a war of all against all as each tends to look out primarily for himself (with “himself” including, perhaps, his own flesh and blood).

An awareness of human passions keeps Socrates from dismissing Glaucon’s “scenario” as simply irrelevant. The “problem of war” (either war between communities or war within a community) seems to be recognized in the Platonic dialogues. Thus, a standard index of those dialogues in print, as of the Republic itself, is likely to have five times as many entries under “war” as under “peace.”

V.

Much is made in the Republic of the kind of exemplary rule that only philosophers can reliably provide. Philosophers are celebrated, of

185. Id. bk. I, 332 a–334 e.
186. Id. bk. I, 336 b–354 c.
course, for their perceptive pursuit of truth. Among the truths suggested by Socrates on this memorable occasion is that the most effective shaping and maintenance of a well-constituted city depend on the deliberate promulgation of what we know as "noble lies."

The two stories offered here by Socrates are intended to recognize both affinities and differences within a citizen body. Are such stories needed to assure people that the borders their community may have are natural, making all residents there somehow naturally akin (having been born out of this earth), even as it has to be recognized that there are critical differences among them in their composition (with varying amounts in their souls of gold, silver, iron, and bronze)? The underlying problem here is suggested by the difficulties encountered everywhere in drawing generally acceptable borders between communities.

"Throughout history," an author in Foreign Affairs has suggested, "nations have been born in blood and frequently in sin," which is why (it is further suggested) "they tend to lie about their pasts."

Is not the past that the Athenians tended to celebrate—that they, unlike almost all the other Greek communities of their day, were born out of their soil, Attica—implicitly questioned by Socrates' evident identification of such a story as a fabrication (however salutary its promulgation may be in some circumstances)? Such an inclination—to insist upon one's own as natural—may be implicit in the identification of one's community as a nation—that is, as somehow born.

VI.

The insistence by a community upon itself as natural, or as one, is carried further in this all-male constitutional convention. Men and women are, Socrates argues, to be regarded as equal. Thus, women are even to be integrated into the military enterprise of the best-constituted community.

Do not the difficulties that we are aware of today among us, when attempts are made to integrate women into fighting forces, reflect critical natural differences between men and women? Complicating their relations, especially when the intimacy of old-fashioned combat conditions are prepared for, is what my Texan mother-in-law felt obliged to caution her children (a half-century ago) about the consequences of

“deadly propinquity” for the genders. Critical physical (if not temperamental) differences between male and female (of the human species) are testified to in the rosters of the record holders in various athletic activities on display in a university field house, rosters that have to be separated by gender if any women are thus to be routinely recognized.

The typical physical inferiority of women in some respects is recognized in this Socratic fantasy. Even so, men and women can be treated here more as similar than is usually done. Presumably there would still be among them critical differences as to what is in their souls (gold, silver, etc.) that should be recognized and provided for.

VII.

Is there a tendency, then, for Socrates to play down natural differences in his effort to blend the community together to an unprecedented degree? Of course, the gold/silver/iron differences and the male/female differences have to be recognized by him. But a radical amalgamation, for the sake of an unprecedented civic unity, is anticipated by him when philosophers rule.

However much is made of equality between the genders, is it not revealing that Socrates talks of a community of wives and children, not a community of husbands and children? That is, is there not to be overcome a deep, perhaps even a natural, reluctance of a sensitive man (needing assurances about his offspring) to share his woman with other men (something also critical for an enduring intimacy that some women never really appreciate)? And is not the typical family more of a natural unit than the typical political amalgamation?

This is reflected in what happens in the community projected by Socrates, where (somehow or other) mothers recognize and promote their children, thus setting up interests in tension with those of the community at large. Chance revelations may disclose biological affinities that can prove socially disruptive, especially when quite distinctive physical attributes are all too evident. But then, it should also be remembered, the constitutional convention so productive on this occasion in Piraeus seems to have been made possible by the chance encounter of Socrates and Glaucon with Polemarchus (who happened to be accompanied by Glaucon’s brother, Adeimantus).
It may be true, as Aristotle suggests in his Politics, that the political order develops naturally from the family, from the combination of families. But for many, if not for most people, family ties can appear much stronger than civic ties. This is recognized, and deferred to, in various legal provisions we are familiar with, such as the considerable limitations placed upon requiring anyone to testify against one's spouse.

The cohesiveness of the political order is threatened not only by intense family ties, but also by the activities of foreign powers. Efforts may have to be made to anticipate hostile interventions from abroad. Among these efforts may have to be such a territorial enlargement of the political community that it becomes difficult, if not impossible, even for philosophers to know it and hence to continue to govern it effectively.

Then there are the potentially corrupting effects of the brutal things that may "have" to be prepared for (if not even done) in war, especially when confronting a powerful enemy that seems to be unprincipled. We can be reminded here of the tendency of the authors of "utopian" proposals to locate their communities in isolated places. We can also be reminded here of the benefits derived by Britain and the United States (in the course of developing remarkable institutions) by the relative isolation permitted in one case by the English Channel and in the other case by the Atlantic Ocean.

We have noticed that Socrates had to have recourse in his projections of the development and maintenance of the best political community upon two "noble lies." Are not these stories supplemented by the extended "Myth of Er" with which Socrates closes out the constitutional convention in Piraeus? This story, which can be regarded as a dramatic reinforcement of the arguments that had been made that evening, seems as well to suggest problems with what had been developed on this occasion.

For one thing, Homer, who had (along with other poets) been deprecated by Socrates when the new system of education was promulgated, is now drawn on for the Myth, especially as the account

culminates in the life chosen “next time around” by the Homeric Odysseus. The life the Socratic Odysseus chooses, drawing on his experience as both a war hero and an assertive political leader, is that of a private man, even preparing himself perhaps for the determinedly private life of a Socrates. This Odysseus certainly does not seem to be interested in military exploits, and perhaps not even in establishing and maintaining an eminently just community.

We are left to wonder, that is, about how seriously the Socrates of the Republic intends his projected constitution to be taken, however instructive it no doubt is with respect to enduring questions about justice and philosophy. Still another story comes to mind here, the account of the Cave poetically conjured up by the ostensibly anti-poet Socrates in Book VII of the Republic. Are there not features of the arrangements evident in that dismal Cave which can remind us of the exemplary community ordained by Socrates on this glorious occasion, reminding us as well thereby of the perhaps inevitable limitations of any political order?

20. ON THE PROJECTION OF FORCE TO THE OTHER SIDE OF THE WORLD

October 19, 2008

I.

Thucydides’ Peloponnesian War has suspended over it an ominous prophecy. It came in the form of the warning by Pericles to the Athenians, at the outset of this three-decades-long struggle, that they should do no more than fight a defensive war. Any desire to expand their empire should be suppressed by the Athenians until after the then-current challenge could be dealt with.

Pericles himself can be remembered as a leading architect of the Athenian Empire challenged by an apprehensive Sparta and her allies during the Peloponnesian War. Thus, a recently published reference book begins an entry about him in this fashion:

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189. THE REPUBLIC OF PLATO, supra note 184, bk. VII.
Pericles... (c.495–429 B.C.) Athenian general and statesman largely responsible for the full development of Athenian democracy and the Athenian empire. He was elected to power sometime after 461, and he quickly helped adopt essential democratic reforms. He asserted Athenian control over the [Delian League] and used the league’s treasury to rebuild the Acropolis, [that had been] sacked by the Persians [in 480].

Pericles also prepared for war, this time with Sparta rather than with Persia, as may be seen in how his entry continues:

Pericles had the Long Walls from Athens to the port at Piraeus strengthened for protection, and when the [Peloponnesian War] broke out in 431, Attica’s population was brought inside the walls. When plague broke out, killing one-fourth of the population, Pericles was deposed and fined. Though reelected, he too died of the plague. His funeral [speech] (c.430) remains one of the greatest defenses of democracy, and his era is remembered as the Golden Age of Athens.

One problem with the Periclean warning was that it came from an Athenian who was in effect counseling the more ambitious among his younger fellow citizens not to emulate him. That is, they should not try to win the kind of glory that he had secured for himself. Would such glory be even greater if one could dare to accomplish what a great man had cautioned against?

II.

Sicily, with its several Greek cities, was on “the other side of the world.” The stories about both its wealth and its troubles tempted enterprising Athenians. It may even have seemed to adventurous Athenians that Sicily was so far away, and so much a mystery, that it should not be regarded as covered by Pericles’ warning.

Indeed, Thucydides, as he begins his account of the Sicilian stage of the war, emphasizes how ignorant Athenians were about Sicily. The reference book already drawn on in these remarks describes Sicily, the

191. WEBSTER’S NEW EXPLORER DESK ENCYCLOPEDIA 932 (2003).
192. Id.
largest island in the Mediterranean Sea, in this fashion:

It has been a crossroads of history. The Greeks colonized it in the 8th–6th centuries B.C., and in the 3rd century B.C. it became the first Roman province. It came under Byzantine rule in the 6th century A.D., and in 965 fell to Arab conquest from North Africa. It was taken in 1060 by the Normans. . . . In 1861 it was incorporated into the kingdom of Italy.  

The differentness of Sicily, and hence the problems encountered by an ambitious Athens, can even be noticed in the twentieth-century Giuseppe di Lampedusa novel The Leopard, which regards this island as not truly part of the united Italy celebrated by the political descendants of Cavour and Garibaldi.  

The entry on Syracuse in the reference book already drawn on can remind us of how critical that city has been in the history of Sicily:

Seaport city . . ., East coast of Sicily, Italy. Founded in 734 B.C. by Greeks from Corinth, it was seized by Hippocrates of Gela in 485 B.C. and ruled by tyrants until about 465 B.C. In 413 B.C., during the Peloponnesian War, it defeated an Athenian invasion force. Under Dionysius I the Elder 405–367 B.C., it became the most powerful of the Greek cities, fighting three wars against rival Carthage. It fell to Rome in 211 B.C.  

The Syracusan connection with Corinth, an ally of Sparta during the Peloponnesian War, may have dramatized for some the challenge of Sicily. It became, in a sense, the Troy to the West.  

III.  

There must have been, among the Achaeans mobilized for the Trojan War centuries earlier, serious reservations about that projected enterprise. Thus, there is the tradition of Odysseus having (unsuccessfully) feigned madness in order not to have to go to Troy. He

193. Id. at 1109.  
195. WEBSTER'S NEW EXPLORER DESK ENCYCLOPEDIA, supra note 191, at 1181.
anticipated in his reluctance the misgivings with respect to Sicily centuries later of the sober Athenian general, Nicias.

A critical suspension of hostilities between Athens and Sparta was known as the Peace of Nicias. It is described thus in The Oxford Classical Dictionary ("Peloponnesian War"), which draws, as all scholars have to in these matters, primarily on Thucydides:

[Almost midway in the Peloponnesian War, 431–404 B.C.,] peace was . . . made between Sparta and Athens, practically on the basis of the status quo ante bellum. This . . . was in effect a victory for Athens, the more so because her enemies were divided, Corinth and Boetoia refusing to sign the peace; the united forces of the rest of Greece had been unable seriously to weaken the Athenian Empire.  

This state of affairs could even have been seen as a vindication of Periclean restraint.

The Oxford Classical Dictionary account indicates, however, that the Athenians could not leave well-enough alone. There was, it is indicated, something all too familiar in what happened next in Athens:

But again the ambition of a politician wrecked the peace . . . . Alcibiades intrigued against Sparta in the Peloponnese, and a coalition was formed against her—Argos, Elis, Mantinea, and Athens; but Athens sent half-hearted help. Sparta recovered herself at Mantinea (418). Athens suddenly attacked and destroyed the unoffending Melos (416), because it was an island not subject to her.  

Indeed, it can be argued, the notorious Melian Dialogue, displaying the arrogance of a powerful Athens, anticipated the misconceived debates among the Athenians that led to the ill-fated Sicilian expedition.

IV.

It can be wondered why Nicias, in his determined opposition to the

197. Id.
Sicilian expedition, was not more effective than he was. Indeed, he himself may even have made matters worse by insisting that many more forces would have to be committed to the enterprise than had been originally contemplated. This insistence only had the effect that an even greater force was indeed sent to Sicily, thereby making the eventual crushing defeat even more costly.

Critical to the Athenian decision to go to Sicily was the insistence by Alcibiades (whose guardian had been Pericles). It was an insistence that exploited deep yearnings of the Athenians. Alcibiades seems to have had in mind a program that would have had Athenians conquering Carthage after Sicily, and then Italy.

Thus, the Athenians might have done what the Romans eventually did, who acquired (in the following century) Sicily as their first province. Instead, there was for the Athenians one disaster after another, summed up in this way by the *Oxford Classical Dictionary* in its “Peloponnesian War” entry:

[Athens] then launched the grandiose expedition to Sicily (415–413), championed by Alcibiades and opposed by Nicias. The finest force that ever left Greek shores went to Sicily; but Alcibiades was soon recalled to answer charges to which his lawless private life had exposed him, and he promptly went over to the enemy; and the irresolute Nicias allowed initial successes to be turned into defeat. Large reinforcements under Demosthenes were sent; but finally the whole force was utterly destroyed (Oct[ober] 413). 198

Thus, the Athenians compounded their folly by putting Nicias in supreme (and, at times, virtually sole) command of an expedition that he personally did not have the heart for.

V.

The “lawless private life” of Alcibiades was believed by his enemies to have included the drunken mutilation of statuary Hermae throughout Athens. His willingness (if not even eagerness) to be regarded as determinedly irreverent is to be contrasted with, say, the determination of Abraham Lincoln (in July 1846) not to be labeled an “infidel” (or, as a

198. *Id.*
scoffer at religion). The question of what Alcibiades had really done one fateful night in Athens may have been addressed decades later by Plato’s *Symposium.*

Nicias, on the other hand, had been so intimidated by a lunar eclipse in Sicily that he did not go ahead immediately with an evacuation plan that would have saved the massive Athenian expeditionary force. Thus, it can be said, Alcibiades was not pious enough for the good of Athens, while Nicias was far too pious. Neither, it can be suspected, really knew what he was doing, nor did most of those allied with them.

The lure of Sicily would be seen among the most thoughtful as well. Consider, for example, Plato’s ill-fated efforts there years later, as may be seen in his *Seventh Letter.* The more one sees of such foreign adventures, the more sensible Socrates seems to have been in his reluctance to travel.

VI.

It can be instructive to wonder what might have happened if Athens had, after military success in Sicily, done what Rome did more than a century later in laying the foundations for a “world” empire. This would have followed, it can be conjectured, if the enterprising Alcibiades had been allowed to dominate the Sicilian campaign and thereafter forays to Carthage and to Southern Italy. What, it can especially be wondered, would a Roman-like ascendancy have done to Athenian (and hence Greek) philosophical thought?

It can be suspected that that thought would have become more Ciceronian than Socratic. Did the post-Peloponnesian War Socratics, especially Plato and Aristotle, need a subdued Athens in which to develop the substantially apolitical tradition that we have inherited? The Roman philosophical tradition, on the other hand, seems both more politically active (in some practitioners) and more Stoic (in others).

A critical difference between Socrates and Cicero is that the latter was much more interested in immediate political success. He was, in effect, a philosophical descendant of Gorgias, a sophist who is shown by Plato to have been respected by Socrates. What Socrates would not have respected, however, was Cicero’s unbecoming fearfulness when faced by

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the immediate prospect of death, a fearfulness that may be somehow linked to the kind of ambition exhibited throughout his career by Cicero.

VII.

It can be further wondered what Thucydides himself saw as the risks posed to the integrity of Athens by war and, especially, by success in war. The Melian episode, immediately preceding the presumptuous Sicilian adventure, suggests the moral deterioration begun among the Athenians. The chance influence on Nicias of a lunar eclipse may even be considered providential for the fate of philosophy in the West.

The Platonic assessment of these developments may begin to be gathered from an article, *Plato, Thucydides, and the Education of Alcibiades*, by a scholar at the International Peace Research Institute in Oslo, Norway. The abstract for this 2006 article says:

The problem of the relationship between warmaking and the health of the city constitutes an important part of the Platonic corpus. In the Platonic dialogue *Alcibiades I*, considered in antiquity one of Plato’s most important works, Socrates leads Alcibiades to agree that there ought to be a close link between justice and decisions about war. In light of this, Alcibiades’ actual advice to the city regarding the Peace of Nicias, as portrayed by Thucydides in *History of the Peloponnesian War*, is put in stark relief within the dialogue. Plato’s dialogue about Alcibiades can thus be seen as offering an alternative and morally critical account of how Alcibiades could have used his talents and rhetorical skills in addressing the city on the issue of war. More broadly, it reminds us of the difference between true statesmanship focused on the common good, and political or military rule engaged in for personal benefit or ambition.

Did the reputation of the *Alcibiades I* in antiquity reflect an awareness that there may be found in that dialogue a critical assessment of both the grandeur and the risks of Athenian intellectual capacities and political ambitions?

202. Id. (emphasis omitted).
The Norwegian scholar’s article just abstracted includes these observations about “Alcibiades and the Peace of Nicias”:

The choice of theme and wording in the Alcibiades dialogue—the question of what Alcibiades should know when he first addresses the city, and the suggestion that he must master questions of war and peace—is striking in light of book 5 of Thucydides’ History of the Peloponnesian War. Therein, the (relatively) young Alcibiades appears for the first time as an advisor to the city on the theme of whom one should wage war against, whom one should make peace with, and the manner of doing so. The parallel can be considered more than coincidental, Alcibiades appearing in Thucydides’ narrative much as he does in Plato’s dialogue: as self-assured and ambitious, eager not to be passed over, and seemingly more concerned with his own standing than with the actual challenges of the city. In the case of the narrative in Thucydides, the concrete challenge is the wisdom of the peace treaty with Sparta, the so-called Peace of Nicias. Alcibiades cannot stand the fact that the peace has been negotiated without involving him, an excellent and still quite young man whose family has tended to important Spartan affairs in Athens for years.

We, in turn, can be reminded here that Pericles was part of Alcibiades’ family heritage, the very man who had warned against extending the war (a warning equivalent to the caution, during our 1990 Gulf War, against “going all the way to Baghdad”?). The fundamental disposition, if not even limitations, of Pericles himself may have been revealed in his determination to deliver a now-celebrated funeral speech without mentioning death (except for an “unfelt death”), something in marked contrast with the “funeral speeches” delivered in Plato’s Apology and Plato’s Phaedo (as well as by Abraham Lincoln at Gettysburg).

203. Id. at 297 (footnote omitted).
204. PLATO, Apology, in 3 THE WORKS OF PLATO, supra note 183, at 89.
205. PLATO, Phaedo, in 3 THE WORKS OF PLATO, supra note 183, at 159.
206. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), in WHITE, supra note 85, app. 9, at 390.
The debacle in Sicily for Athens was unprecedented. But the resiliency of the city is indicated by the fact that her great war with Sparta and her allies could continue for another decade. It was fighting in which the always self-promoting Alcibiades could still play a part, sometimes on behalf of Athens.

Sicily seems to have been, however, a critical turning point in the war. The survival of the Athenian Empire would have depended on proper negotiations with Sparta, but for these Nicias (who had died in Sicily) would have been needed. Instead, there was the installation by the Spartans of the Thirty Tyrants in Athens, who were eventually overthrown by democratic forces that were deluded into regarding Socrates as somehow responsible for the subversion of the Athenian democracy.

It does not seem to be noticed how dangerous for the integrity of the Sparta of old its overwhelming success in the Peloponnesian War was. Brasidas may have been the only one of its leaders who could be infected with “Athenianism” (that is, cosmopolitanism) without losing his bearings as a Spartan. Should a Spartan “Pericles”—unlike what Alcibiades did while allied with the Spartans—have reminded his city how much it depended for its integrity upon isolationism, spiritual and “philosophical” as well as physical?

IX.

Athens, on the other hand, *had* been empowered by her great successes against Persia, first at Marathon and then at Salamis. Thus, the legacy of the achievements of her Acropolis remains remarkable to this day. Nothing comparable to those monuments may be found among the meagre ruins of Sparta, in marked contrast to the magnificent Byzantine things still to be seen (in *that* part of Greece) in nearby Mystra.

The medieval Byzantine accomplishments may be seen as influenced, in part, by the spectacular promulgation of Hellenism by Alexander the Great. And Alexander, in turn, may be seen as influenced by the kind of youthful ambition displayed by Alcibiades. Both of these gifted men exhibited a partial, but still perhaps significant, allegiance to philosophers—to Socrates, in one case, and to Aristotle, in the other.

Alexander, too, ventured to the other side of the world, but in a different direction from Alcibiades. He is said to have lamented that he
would have no Homer to record his deeds. Had Alexander been more thoughtful he might have settled for a Thucydides, something he might have indeed eventually gotten in Plutarch, an author who could write in this fashion about the Sicilian ambitions of Alcibiades (thereby anticipating various points made in these remarks):

The Athenians, even in the lifetime of Pericles, had already cast a longing eye upon Sicily; but did not attempt any thing till after his death. Then, under pretence of aiding their confederates, they sent [succours] upon all occasions to those who were oppressed by the Syracusans, preparing the way for sending over a greater force. But Alcibiades was the person who inflamed this desire of theirs to the height, and prevailed with them no longer to proceed secretly, and by little and little, in their design, but to sail out with a great fleet, and undertake at once to make themselves masters of the island. He possessed the people with great hopes, and he himself entertained yet greater; and the conquest of Sicily, which was the utmost bound of their ambition, was but the mere outset of his expectation. Nicias endeavored to divert the people from the expedition, by representing to them that the taking of Syracuse would be a work of great difficulty; but Alcibiades dreamed of nothing less than the conquest of Carthage and Libya, and by the accession of these conceiving himself at once made master of Italy and of Peloponnesus, seemed to look upon Sicily as little more than a magazine for the war. The young men [in Athens] were soon elevated with these hopes. . . . Socrates the philosopher and Meton the astrologer are said, however, never to have hoped for any good to the commonwealth from this war . . . .

21. SEDITION IN WARTIME: THERSITES AND THE TROJAN WAR

October 27, 2008

I.

Homer's accounts of the Trojan War and its immediate aftermath are said to have been vital to centuries of education for the Greeks. That fateful military expedition, much celebrated among the Greeks, was severely criticized by the Persians. Indeed, the Persians may even have sought, in a way, to avenge the Trojans by invading Greece.

East-West relations, reported by Herodotus, are introduced by him with an account of how the Persians understood the development of the animosity between the Greeks and the barbarians (that is, the non-Greeks), a centuries-long animosity which is said to have begun in this fashion:

The chroniclers among the Persians say that it was the Phoenicians who were the cause of the falling-out [between the Greeks and the barbarians]; for they came from [the Indian Ocean] to our sea [the Mediterranean], and, having settled in the country in which they now live, they at once set about long voyages; and carrying Egyptian and Assyrian freights, they put into other lands, and among them Argos. At this time Argos excelled all others of what is now called Hellas. To Argos, then, came the Phoenicians, and there they put their cargo on display. On the fifth or sixth day after their arrival, when almost all their goods had been sold off, there came down to the sea, with many other women, the king's daughter; her name—it is the same in both the Greek and Persian accounts—was Io, and she was the daughter of Inachus. The women all stood by the stern of the ship and were buying from among the wares whatever they had most set their hearts on; as they did so, the Phoenicians let out a great shout and made for them. The most of the women, they say, escaped, but Io and some others were carried off. The Phoenicians loaded them into their ships and sailed away to

Egypt. \(^{209}\)

Herodotus continues this account:

That is how, the Persians say, Io came to Egypt (though that is not how the Greeks tell it), and that was the beginning of the wrongdoing. After that, say the Persians, certain Greeks, whose name they cannot declare, put into Tyre in Phoenician country and carried off the king’s daughter, Europa. These must have been Cretans. So far, say the Persians, it was tit for tat, but after that the Greeks were guilty of the second piece of injustice; for they [under the leadership of Jason] sailed with a long ship to Aea in Colchis and the river Phasis, and from there, when they had done the business on which they came, they carried off the king’s daughter, Medea. The king of the Colchians sent a herald to Greece to ask for satisfaction for the carrying-off of his daughter and to demand her return. But the Greeks answered (this is still the Persian story) that the Persians, on their side, had not given satisfaction for the carrying-off of Argive Io, and so they themselves would give none to the Colchians.

It was in the next generation after this, as the story goes, that [Paris], the son of Priam, having heard of these deeds, wanted for himself, too, a wife from Greece by rape and robbery; for he was certain that he would not have to give satisfaction for it, inasmuch as the Greeks had not. So he carried off Helen. The Greeks first resolved to demand her back, as well as satisfaction for her carrying-off. But when they did so, the Persians brought against them the rape of Medea, saying that the Greeks had given no satisfaction for that nor had surrendered her when asked. Did they now want satisfaction from others? \(^{210}\)

The stage was then set, in the Persian account, for the great Trojan War.

“Up to this point,” it is argued, “it was only rape on both sides, one from the other; but from here on, say the Persians, the Greeks were greatly to blame.” \(^{211}\) Herodotus continues:

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210. Id. at 33–34 (footnotes omitted).
211. Id. at 34.
For the Greeks, say [the Persians], invaded Asia before ever the Persians invaded Europe: “It is the work of unjust men, we think, to carry off women at all; but once they have been carried off, to take seriously the avenging of them is the part of fools, as it is the part of sensible men to pay no heed to the matter: clearly, the women would not have been carried off had they no mind to be.” The Persians say that they, for their part, made no account of the women carried off from Asia but that the Greeks, because of a Lacedaemonian woman, gathered a great army, came straight to Asia, and destroyed the power of Priam, and from that time forth the Persians regarded the Greek people as their foes. For the Persians claim, as their own, Asia and all the barbarian people who live in it, but Europe and the Greek people they regard as entirely separate.  

Thus, Herodotus reports, “That is how the Persians say it happened, and it is in the capture of Troy that they discover the beginning of their [own] enmity toward the Greeks.”

II.

Homer’s *Iliad* concerns itself primarily with only one complicated episode late in the ten-year siege of Troy. We are shown the deadly consequences of a division between Agamemnon, the leader of the Greek expeditionary force, and Achilles, the most formidable Greek warrior. That division, too, turned around the issue of the possession of a woman.

Agamemnon had had to give up the female captive he had been awarded when it was learned, from Calchas (a seer), that his retention of that woman (the daughter of a priest of Apollo) was the cause of a plague in the Greek army. The seer had ventured to make this dangerous disclosure only after Achilles guaranteed to protect him from any reprisal for revealing what he knew. Agamemnon, in retaliation, used his authority to take from Achilles the woman he had been given.

The mortified Achilles is tempted to strike down at once the offending Agamemnon, but settles for withdrawing his forces (and

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212. *Id.* (footnote omitted).
213. *Id.* at 35.
214. *See The Iliad of Homer* (Richmond Lattimore trans., The Univ. of Chi. Press 1951).
especially himself) from the siege of Troy. Much of the *Iliad* recounts the fierce fighting that takes place once the Trojans are no longer restrained by the presence of Achilles. The story concludes with the reestablishment of Greek superiority when Achilles is moved to return to action, a development (which includes the killing of the Trojan champion, Hector) that prepares the way for the eventual subjugation of Troy.

III.

Agamemnon, once Achilles withdraws from the campaign, had been "inspired" to test his army by suggesting that they give up the siege of Troy. The general frustration was evident in the eagerness with which the various contingents, both leaders and men, responded. The entire campaign against Troy seemed on the verge of collapse.

Only the vigorous intervention of Odysseus saved the day. He cajoled the various leaders in a way appropriate to their station. The common soldiers, on the other hand, he subdued with harsh words and blows.

Particularly vigorous was Odysseus’ treatment of Thersites, a chronic complainer among the troops. The chastisement of this physically unattractive soldier could be enjoyed by the onlookers. This was the kind of response that Thersites did seem to be accustomed to.

IV.

The Thersites episode had been introduced in this way by Homer after Odysseus had saved the campaign from Agamemnon's ill-conceived test:

> Now the rest [of the army] had sat down, and were orderly in their places, but one man, Thersites of the endless speech, still scolded, who knew within his head many words, but disorderly; vain, and without decency, to quarrel with the princes with any word he thought might be amusing to the [Greeks].

He is then described: "This was the ugliest man who came beneath [Troy]. He was bandy-legged and went lame [on] one foot, with

shoulders stooped and drawn together over his chest, and above this his skull went up to a point with the wool grown sparsely upon it.\textsuperscript{216}

And he has a "record": "Beyond all others [Achilles] hated him, and Odysseus. These two he was forever abusing . . . . The [Greeks] were furiously angry with him, their minds resentful."\textsuperscript{217}

"[B]ut now at brilliant Agamemnon he clashed the shrill noise of his abuse."\textsuperscript{218} Thus, Thersites scolded the supreme commander:

"Son of Atreus [that is, Agamemnon], what thing further do you want, or find fault with now? Your shelters are filled with bronze, there are plenty of the choicest women for . . . your shelter, whom we [Greeks] give to you first of all whenever we capture some stronghold. Or is it still more gold you will be wanting, that some son of the Trojans, breakers of horses, brings as ransom [for someone] . . . that I, or some other [Greek], capture and bring in? Is it some young woman to lie with in love and keep her all to yourself apart from the others? It is not right for you, their leader, to lead in sorrow the [Greeks]."\textsuperscript{219}

Thereafter, Thersites ventures to incite his fellow soldiers to give up the campaign against Troy:

"My good fools, poor abuses, you women, not men, of [Greece], let us go back home in our ships, and leave this man [Agamemnon] here by himself in Troy to mull his prizes of honour that he may find out whether or not we others are helping him. And now he has dishonoured [Achilles], a man much better than he is. He has taken his prize by force [from Achilles] and keeps her. But there is no gall in [Achilles'] heart, and he is forgiving. Otherwise, son of Atreus [that is, Agamemnon], this were your last outrage[!]"\textsuperscript{220}

The authoritative response to Thersites came at once not from Agamemnon but from Odysseus:

\textsuperscript{216} Id. bk. II, ll. 216–19.
\textsuperscript{217} Id. bk. II, ll. 220–23.
\textsuperscript{218} Id. bk. II, ll. 221–22.
\textsuperscript{219} Id. bk. II, ll. 225–34.
\textsuperscript{220} Id. bk. II, ll. 235–42.
"Fluent orator though you be, Thersites, your words are ill-considered. Stop, nor stand up alone against princes. Out of all those who came beneath [Troy] with [Agamemnon] I assert there is no worse man than you are. Therefore you shall not lift up your mouth to argue with princes, cast reproaches into their teeth, nor sustain the homegoing. We do not even know clearly how these things will be accomplished, whether we sons of the [Greeks] shall win home well or badly; yet you sit here throwing abuse at Agamemnon . . . . You argue nothing but scandal. And this also will I tell you, and it will be a thing accomplished. If once more I find you playing the fool, as you are now, . . . [I will] take you and strip away your personal clothing, your mantle and your tunic that cover over your nakedness, and send you thus bare and howling back to the fast ships, whipping you out of the assembly place with the strokes of indignity."

Therefore, it is reported by Homer:

So [Odysseus] spoke and dashed the sceptre against [Thersites'] back and shoulders, and [Thersites] doubled over, and a round tear dropped from him, and a bloody welt stood up between his shoulders under the golden sceptre's stroke, and he sat down again, frightened, in pain, and looking helplessly about, wiped off the tear-drops.  

The reactions of onlookers can remind us of how seemingly presumptuous critics of a regime can be left to fend for themselves:

Sorry though the men were they laughed over [Thersites] happily, and thus they would speak to each other, each looking at the man next him:

"Come now: Odysseus has done excellent things by thousands, bringing forward good counsels and ordering armed encounters; but now this is far the best thing he ever has accomplished among the [Greeks], to keep this thrower of words, this braggart [that is, Thersites] out of assembly. Never again will [Thersites'] proud heart stir him up, to wrangle with

221. Id. bk. II, ll. 246–64.
222. Id. bk. II, ll. 263–69.
the princes in words of revilement."\(^{223}\)

V.

And yet, is not Thersites' criticism of the Greek leadership in this campaign somewhat justified? It is a leadership that will see even the wily Odysseus return home without any of the men in the twelve ships he had led to Troy. It is also a leadership that will see the victorious Agamemnon return home blissfully unaware of the deadly reception that his long-angry wife had prepared for him.

Indeed, did not Homer himself indicate more than once that Agamemnon's leadership was deeply flawed? Consider, for example the opening lines of the *Iliad*:

Sing, goddess, the anger of Peleus' son [Achilles] and its devastation, which put pains thousandfold upon the [Greeks], hurled in their multitudes to the house of Hades strong souls of heroes, but gave their bodies to be the delicate feasting of dogs, of all birds, and the will of Zeus was accomplished since that time when first there stood in division of conflict [Agamemnon] the lord of men and brilliant [Achilles].\(^{224}\)

This is not to suggest, however, that Achilles had been simply right, for he did so conduct himself that many of his fellow Greeks died, including finally his dearest comrade, Patroclus.

Criticisms of leadership could be heard also among the Trojans and their allies, especially when it is wondered whether Helen is really worth the immense sacrifices required to keep her. And Glaucos, the leader of the Lykian allies of the Trojans, can berate Hector (the leading defender of Troy) in terms that sound like both Achilles' and Thersites' berating of Agamemnon:

[Hector], splendid to look at, you come far short in your fighting. That fame of yours, high as it is, belongs to a runner. Take thought now how to hold fast your town, your citadel by yourself, with those your people who were born in [Troy]; since no Lykian will go forth now to fight with the [Greeks] for the

\(^{223}\) *Id.* bk. II, ll. 270–77.  
\(^{224}\) *Id.* bk. I, ll. 1–7.
sake of your city, since after all we got no gratitude for our everlasting hard struggle against your enemies.\textsuperscript{225}

We can be reminded by the criticisms of the war aims of the Greeks and the Trojans alike of that supreme folly of recent centuries that we know as the First World War.

VI.

Why did not anyone defend Thersites? Had he lost “credibility” because he criticized everyone? A tradition (but not Homer) even has him killed eventually by Achilles.

Certainly, Thersites’ judgment was flawed if he meant what he said (to Agamemnon) about Achilles being “forgiving” despite his deep grievances. So deep were those grievances that Achilles had already set in motion, through his divine mother, actions that would destroy many of his fellow Greeks. That is, not even Thersites could anticipate how self-centered (and hence deeply irresponsible) various of the Greek leaders were.

Thersites’ peculiar vulnerability, because of his verbal recklessness, seemed in part due also to his physical unattractiveness, an unattractiveness shared with the divine Hephaestus who can be understood, in his fashioning of the scenes on the shield of Achilles, to question the human resort to war (which can be worsened by the participation therein of divinities such as Ares and Pallas Athena).\textsuperscript{226} Also, class differences may have contributed to how others thought of Thersites. Indeed, he may be the only character of any prominence in the \textit{Iliad} without a patronymic assigned to him.

VII.

We can be reminded by all this of the risks run by critics of any military campaign. It can be a matter of chance, in such encounters, who is lined up on what side. Special protection may be needed for critics of a war.

This was evident in Book I of the \textit{Iliad} where a seer did not dare expose Agamemnon’s culpability until Achilles had promised to defend

\textsuperscript{225} \textit{Id.} bk. XVII, ll. 142–48.
\textsuperscript{226} \textit{See id.} bk. XVIII.
him. Thersites had no such champion. And so he could be reduced to tears upon being beaten for his presumptuousness.

Eventually, of course, many of his Greek comrades would weep because of policies that had not been properly assessed. The same was true among the Trojans and their allies. And, it might even be suspected, the immortal gods who seemed to enjoy this grand spectacle did not understand the folly exhibited both by the mortals caught in the battles and by the gods and goddesses lined up in support of the contending armies.

VIII.

The folly of the decade-long campaign against Troy is apt to be suggested by those who wonder (as Herodotus’ Persians evidently did) whether any woman was worth such sacrifice. This kind of criticism was heard later from Euripides, who (Thersites-like?) enjoyed exploiting in one of his tragedies the variant tradition that Helen had never gone to Troy. Rather, she had spent that fateful decade living chastely in Egypt.

The Athenians, centuries after Homer, had their own grand expedition—not to the East, where Troy had been, but to Sicily. This expedition, in the course of the Peloponnesian War, had been advocated by Alcibiades (a kind of Achilles?). It had been counseled against in effect by Pericles (a kind of Odysseus?) two decades earlier.

The Sicilian campaign was, Plutarch tells us, counseled against by Socrates. But Socrates, because of his earlier associations with young men such as Alcibiades, became vulnerable during the debacle in Athens following upon the Sicilian disaster. Plato has provided us instructive accounts of the difficulties Socrates could face when he tried to suggest to his fellow Athenians what truly mattered in the careers of cities, and in the lives of human beings and citizens.

IX.

Plato is known for having had the Socrates of the Republic argue for the banishment of poets from a properly governed city. He warns, for example, that poets can subvert the courage of citizens, partly by making death seem so ominous. And he further suggests that poets can subvert the goodness of the gods by depicting them as prisoners of passions.

Even so, Plato (in the closing pages of the Republic) can be “poetic” in describing the lives chosen by souls about to be reincarnated on Earth,
a description provided by Er which concludes with an inventory of eight such souls that are named:

[Er] said that this was a sight surely worth seeing: how each of the several souls chose a life. For it was pitiable, laughable, and wonderful to see. For the most part the choice was made according to the habituation of their former life. He said he saw a soul that once belonged to [1] Orpheus choosing a life of a swan, out of hatred for womankind; due to his death at their hands, he wasn’t willing to be born, generated in a woman. He saw [2] Thamyras’ soul choosing the life of a nightingale. And he also saw a swan changing to the choice of a human life; other musical animals did the same thing. The soul that got the twentieth lot chose the life of a lion; it was the soul of [3] Ajax, son of Telamon, who shunned becoming a human being, remembering the judgment of the arms [of Achilles]. And after him was the soul of [4] Agamemnon; it too hated humankind as a result of its suffering and therefore changed to the life of an eagle. [5] Atalanta’s soul had drawn one of the middle lots; she saw the great honors of an athletic man and couldn’t pass them by but took them. After this soul he saw that of [6] Epeius, son of Panopeus, going into the nature of an artisan woman. And far out among the last he saw the soul of the buffoon [7] Thersites, clothing itself as an ape. And by chance [8] Odysseus’ soul had drawn the last lot of all and went to choose; from memory of its former labors it had recovered from love of honor; it went around for a long time looking for the life of a private man who minds his own business; and with effort it found one lying somewhere, neglected by the others. It said when it saw this life that it would have done the same even if it had drawn the first lot, and was delighted to choose it.227

Four of the eight named souls may be found in Homer, with the campaign at Troy in effect thereby called into question, if not altogether repudiated. The last soul named, Odysseus, deliberately turns away from the political/military career he had had (the last time through), choosing in effect a private life that resembles the career of Socrates.

Linked here by Socrates to Odysseus, as is done by Homer in Book

II of the *Iliad*, is "the buffoon Thersites," who can be repudiated, in effect, by being relegated to reincarnation as an ape. But is not the Trojan campaign itself repudiated by what is said here about the "lessons" learned by Ajax, Agamemnon, and Odysseus (with Homer's Achilles himself calling it into question in Book III of the *Republic*)? And might not all this suggest, in turn, that the seditious (yet Hephaestus-like) Thersites (who, like Socrates, is far from handsome), for all his innate buffoonery, somehow assessed the Trojan campaign better than his celebrated superiors had been able to do while still alive, something that the reincarnated (now more philosophical) Odysseus should recognize?

22. THE RULE OF LAW: A PROPER DEDICATION

November 6, 2008

I.

This is my first visit to Alexandria since the death three years ago of Camille F. Gravel, Jr. (1915–2005), whom I had met in this city two decades ago and whose legal and political career I have followed, partly with the help of his relatives.

I believe it appropriate to dedicate the lecture that follows these opening remarks ("Who Were the Greeks—and Why Do They Matter?") to his memory—particularly appropriate just now, considering the historic successes this very week of an African-American candidate for the presidency of the United States. After all, Mr. Gravel, an astute lawyer and a prudent counselor of those in politics, had been a leader, a sometimes lonely leader, in the Civil Rights movement here in Louisiana a half-century ago. It can help us begin to understand such a man, dedicated to the rule of law, if we recall how highly another Southern lawyer, also dedicated to a civilized freedom, Henry Clay, could be regarded by Abraham Lincoln.

II.

There are, of course, inevitable limits to any system of law, any

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228. Remarks prepared for a meeting at Louisiana State University, Alexandria, Louisiana, November 6, 2008.
system dominated (as it has to be) by rules. Among such rules are those by which lawyers are guided and governed.

I was reminded of this particular set of rules a few days ago when I observed (at the Loyola University of Chicago School of Law) a panel discussion of recent developments in Cook County, Illinois. Two troubled lawyers described the dilemma they had faced, as public defenders, when a client of theirs, who was serving a life sentence for a 1982 murder, admitted to them in 1982 that he had also murdered another man, for which crime an innocent man was eventually to receive a life sentence.

These lawyers believed they could not say anything publicly about all this, lest their client (already in prison) be indicted once again, perhaps with a view to securing his immediate execution. They did manage to get from this client his consent to reveal the truth about the murder after he (their client) died, which he did in November 2007 (while still in prison). It was only then that this story became public, leading to the release from prison a few months later of the innocent “lifer.”

By the time their client died, an innocent man had spent twenty-six years in prison as a convicted murderer. As such he had been spared a death sentence only because two jurors had held out. (I have with me, for your examination, a copy of the cryptic one-sentence affidavit (only recently made public) that these two lawyers signed on March 17, 1982, recording that they knew “through privileged sources” that an innocent man had been convicted of murder, an affidavit (appended to these remarks) they released only after their guilty client had died in prison.)

III.

The two lawyers described, during the panel discussion that I observed, their torment for decades, knowing what they did—and knowing also that their client would not risk releasing them to tell the truth while he lived.

The relevant rules for lawyers in such circumstances differ somewhat from State to State. Thus, a lawyer may be permitted, if not even obliged, to reveal information that would save an innocent man from execution. Many of the rules prescribed for lawyers are regarded as essential if clients are to trust their lawyers, something that is useful, if not even necessary, for an adequate defense—and hence for “the System” to work. Such trust is encouraged by the assurance of
confidentiality that a lawyer gives to his often-wary client.

I could not help but wonder, as I listened to these lawyerly confessions of anguished helplessness, what someone such as Mr. Gravel might have done in circumstances such as those I have just described. His character was such that he could be said to be the friend of every Roman Catholic priest in Louisiana. And it is said of his ability as a criminal defense lawyer that he “had such a statewide status that when anyone hired him, people knew the defendant was in real trouble.” So I do wonder what Mr. Gravel would have done—perhaps even did—when faced by the kind of problems I have been touching on. What, in short, had he learned about the limitations of any system of rules—and about how those in authority or with influence might be approached and dealt with in extraordinary circumstances?

IV.

Limits can be noticed even in our highly prized system of the rule of law. Should not the rule of law itself be subordinated, usually discreetly, to an even higher calling? Should not we be able to do right in critical instances, no matter what the rules may have to say?

Consider, for example, what Senator William H. Seward said (in breaking in 1850 with that great champion of the Constitution, Daniel Webster): “[T]here is a higher law than the Constitution, ... the common heritage of mankind.” Some (such as Abraham Lincoln) could be troubled by this challenging sentiment, or at least by its timing. But is not some higher standard routinely relied on in the development, adoption, and amendment of constitutions?

We can be reminded by all this that, according to the greatest thinkers of antiquity, a regime grounded in the determined rule of law is, however commendable, second best. Superior to even such a regime is one that depends on the rule of the supremely wise and hence the truly virtuous.

V.

As I listened to this panel on the ways of lawyers (which panel included the innocent man, now out of prison, who is trying to recover a life), I wondered whether there was not something dreadfully wrong in

229. 1 FREDERIC BANCROFT, THE LIFE OF WILLIAM H. SEWARD 247 (1900).
any system when decent men know critical truths that they cannot use—and all this to the severe detriment of an innocent man who is obliged to spend a quarter-century in prison.

That man, by the way, reports himself most distressed upon being released from prison by the considerable deterioration he now observes in how children are permitted to talk to and about their parents.

All this does not deny that our rule of law, insisted on by a disciplined bar and reinforced by a healthy freedom of speech for the community at large, is markedly superior to what is found in many places worldwide. Even so, I venture to insist on this occasion, there can develop circumstances which no general rule can properly govern.

In short, the truly good human being has to be intelligent, informed, moral, and flexible, restrained all the while by an awareness of the limitations of many others, those others who cannot reasonably be expected to do more than follow well-established rules.

VI.

It would be irresponsible to offer these observations without emphasizing, once again, that the rule of law is almost always far better than anarchy or tyranny.

But the rule of law can be reinforced, not least among the thoughtful, when it is recognized that the spirit of the rule of law should instill in us an overriding respect for that which is sought for by such rule. This means that the informed champion of the rule of law knows how to deal humanely and effectively with challenges that call for temporarily setting aside such rule.

Is a political/social system moderated by the rule of law more likely, at least in the modern world, to be one in which truly thoughtful citizens might be developed, those who grasp what is superior even to that very rule of law which helped shape them?

VII.

I also venture to suggest, as I bring this Dedication to a close, that someone such as Camille Gravel would have thought of something both decent and effective to do if confronted with the lawyer’s confidentiality dilemma that I have touched upon here.

Perhaps, it can be salutary to believe, he would have thought of someone to talk to with a view to having the right thing done without
jeopardizing a generally useful system of rules. After all, he was able to remain an eminently successful lawyer with a Statewide (indeed, a national) reputation even as he challenged the unfortunate opinions about race relations by which many of his fellow Louisianans (obviously decent human beings) chanced to have been imprisoned. In this he was a truly free and obviously helpful citizen worthy of sustained admiration.

ADDENDUM

The notarized affidavit of March 17, 1982, referred to (on stationery of the Office of Public Defender, Cook County, Illinois), signed by two lawyers, reads:

I have obtained information through privileged sources that a man named Alton Logan (re. RD D-001952 M/B/28, 22 Aug. 53, IR# 282373) who was charged with the fatal shooting of Lloyd Wickliffe at on or about 11 Jan. 82 is in fact not responsible for that shooting that in fact another person was responsible.

23. WAR & PEACE IN THE BIBLE

November 13, 2008

I.

"May you live in interesting times" is said to be an ancient Chinese curse. Such are the times when there are repeated wars and other upheavals to challenge a people. Times of peace do tend to be uneventful and hence of little interests to chroniclers and their audiences. These distinctions are reflected in the index to a typical encyclopedia of Biblical materials. The war-related items are apt to have at least three times as many entries as the peace-related items. And it is not unusual to have the heroes of war celebrated more than the heroes (including the architects) of peace.

Is war likely to be made more of if the emphasis is on life here? Heaven, on the other hand, tends to be regarded as unchanging in its

pervasive, enduring peacefulness. Thus, Dante's *Inferno*, with its portrayals of vigorous measurers employed against the unredeemed sinful enemies of the Lord, is usually far more interesting to readers of *The Divine Comedy* than is Dante's *Paradiso*.

II.

Consider the three great figures of the Hebrew Bible (once Adam and Eve got things going), an account which is people centered in this world. These three are Abraham, Moses, and David, all of whom die “in their beds,” so to speak. They conduct important wars or military-style campaigns, the most critical perhaps being the Exodus from Egypt to a new homeland.

These three men are somewhat like the heroes among the ancient Greeks, a people who developed completely independently, it seems, of the Israelites. David first came to general view, we are told, in his celebrated duel with Goliath. David can still be thought of in modern Israel as *the* model for political leadership, even as Christians can still celebrate Jesus as “son of David.”

An anticipation of the strife perhaps inevitable in the worldly existence of human beings is the first action recorded outside the Garden of Eden, once Cain and Abel are born, the action which has Cain killing his brother. Eventually, it is prophesied, the Messiah (who is regarded as of the line of David) will usher in for the Israelites a golden age on earth. In this way, Peace can be held up as ultimately preferable to War, perhaps even as the most defensible objective of the wars that human beings resort to.

III.

Then there are the three great figures of the Greek Bible (that is, the New Testament), leaving aside whatever may be indicated about the Trinity. These are Jesus, Peter, and Paul, all of whom died violent deaths (that is by execution). Of Jesus himself, the Prince of Peace, it can nevertheless be said (as in a poem by George Herbert (1633)): “He our foes in pieces brake . . .”

The primary orientation of Jesus as spiritual leader is toward the life

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to come. Accommodations are counseled by him, however, to the everyday regimes of this world. Wars among those regimes seem to be taken for granted by him.

Whatever the primary earthly orientation of "the son of David," Paul looks beyond the Israelites (or Jews) to the world at large. He can concern himself, in ways that even the earthly Jesus seldom did, with the souls of Gentiles, especially Greeks and Romans. The causes and prospects of war are much reduced if people should indeed accept Paul's celebrated negation of long-held differences between men and women, between Jews and Gentiles.

IV.

Christianity does tend to discourage the social and political differences that contribute to war. But it does not seem to be expected by Christians that wars will cease on earth, short of Jesus' Second Coming. Rather, that grand pacifying condition will itself be anticipated by the great Battle of Armageddon.232

It is at Armageddon, we are told, that "the kings of the earth under demonic leadership will wage war on the forces of God at the end of history."233 This is somewhat "Israelite" in spirit, not in the spirit of the forgiveness orientation of the New Testament. It is understandable, therefore, that Isaac Newton, in his remarkable study of Biblical prophecies, should have brought together the Hebrew book of Daniel and the Greek book of Revelation.

The need for an Armageddon seems to suggest that the impulse to war is deeply rooted in the human soul. It is not expected, that is, that millennia of soul-stirring preaching and charitable works will lead to universal disarmament. Indeed, it may lead instead to that remarkable growth in populations which makes wars ever greater, and even worldwide in scope.

V.

Divine intervention is said to be needed to address that worldwide anarchy decisively confronted at Armageddon. In this grand struggle the Prince of Peace seems to be transformed into the Master Warrior. It can

233. WEBSTER'S NEW EXPLORER DESK ENCYCLOPEDIA, supra note 191, at 67.
be wondered how the piety of Believers contributes to this dramatic encounter.

Should this encounter, with its resulting universal pacification, be understood to have been somehow anticipated by the initial creation of the world that we know? Should that creation itself be regarded as an even greater pacification? It was then, perhaps, that (a pre-existing?) chaos was tamed and disciplined.

Does, however, a tendency toward chaos remain inherent in all nonheavenly things? Is this somehow related to the energy that is available in the things of the world? That is, may there not be even something reassuring in the capacity that human beings have for war as well as for sin?

VI.

The campaign by Paul to take Jesus’ message to the Gentiles repudiated, if only implicitly, any reliance upon one’s inherited community for the best of life. This is reflected in how it is determined who is a Jew—and who is a Christian. The Christian need not be, in principle, a member of any earthly community—and certainly not as a matter of birth.

It is in the world decisively influenced by Christianity that the now-familiar notions of individualism and privacy become decisive. The direction of one’s actions thereafter could be influenced more than in the ancient world by that which we know as conscience. What one is, or what one should do, can come to be regarded (if not even cherished) as an ultimately personal matter.

One form this development can take with which we are familiar is the invocation of conscientious objection to military service. Such invocation is not usually required by traditional Christian doctrines, at least in modern times, but it can be nurtured by elements in the Christian approach to personal salvation. The somewhat perverse form of this is the insistence by Thomas Hobbes that one is naturally entitled (in the final analysis) to look out completely for oneself, no matter what duties the State may attempt to impose.

VII.

It can be wondered whether the Bible looks to the same ends as those prescribed by nature. Neither the Hebrew Bible nor most of the Greek
Bible has any explicit recognition of the *natural* in human affairs. The Christianity promoted by the Greek Bible even came to speak (unlike Judaism) of the *fallen nature* of human beings.

The term, *nature*, is used in the book of *Acts* and in the Epistles, primarily in writings attributed to Paul. But an implicit reliance on *nature* can be seen to result from the very language in which the New Testament chanced to be written, no matter what the language was that Jesus and his immediate followers had happened to use in the Holy Land. And with that language seem to have come presuppositions about the very ordering of things, inanimate as well as animate, that were quite different from the emphatically community-minded Hebrew language of what we know as the Old Testament.

Consider, for example, what happens to “God” in the celebrated phrase of the Declaration of Independence: “the Laws of Nature and of Nature’s God.” The God shaped (if not even governed) by Nature is quite different from that God in the Hebrew Bible who can identify himself as “I am who I am” (or, better still perhaps, “I will be who I will be”). How relations among human beings should be understood may depend on what one regards as the promptings of nature with respect both to their appetites and to their potentialities.

VIII.

Of particular interest to us here is whether war is indeed natural for human beings. Certainly, there is among us an intense yearning for self-preservation, which war can both serve and threaten. And we do seem to be taught by the Hebrew Bible that the preservation of one’s people is useful, if not essential, for one’s enduring personal safety.

Christianity, on the other hand, is often regarded as counseling against any overpowering concern for one’s life here. But there can be found among Christians even more massive organization of war-making efforts than was ever seen among the Israelites. The recourse to the seemingly endless Crusades of the twelfth and thirteenth centuries, as well as to the devastating Thirty Years’ War of the seventeenth century (and the incredibly foolish Thirty Years War of the twentieth century)—

234. For the Pauline Epistles, see Romans; 1 Corinthians; 2 Corinthians; Galatians; Ephesians; Philippians; Colossians; 1 Thessalonians; 2 Thessalonians; 1 Timothy; 2 Timothy; Titus; Philemon.
all this reminds us of the tremendous war making that Christians are capable of.

How the Bible, or at least the militant religiosity attributable by some to the Bible, can contribute to the glories of war may be seen, among us, in The Battle Hymn of the Republic (1862). A more cautious reliance on Biblical authority for one's war-making may be seen in Abraham Lincoln's Second Inaugural Address (1865), which includes these observations:

Neither party expected for the war the magnitude or the duration which it has already attained. Neither anticipated that the cause [slavery] of the conflict [the Civil War] might cease with or even before the conflict itself should cease. Each looked for an easier triumph, and a result less fundamental and astounding. Both read the same Bible and pray to the same God, and each invokes His aid against the other. It may seem strange that any men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces, but let us judge not, that we be not judged. The prayers of both could not be answered. That of neither has been answered fully.

Then the President said:

The Almighty has His own purposes. "Woe unto the world because of offenses; for it must needs be that offenses come, but woe to that man by whom the offense cometh." . . . Fondly do we hope, fervently do we pray, that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said, "the judgments of the Lord are true and righteous altogether."

238. Lincoln, supra note 15, at 143.
239. Id.
IX.

It can be wondered how Lincoln would have interpreted, from the perspective of the Bible, that “mighty scourge of war” known as the Holocaust of the twentieth century. That did seem to be the dreadful culmination of at least a millennium of intermittent wars on the Jews by Christians. Lincoln would have remembered, of course, the many campaigns of exterminating wars recorded in the Bible, including even some ordered by the Lord.

Would Lincoln also have sought to discern the salutary long-term purposes of the Almighty somehow served by such a catastrophe? Where, for instance, does the recent reemergence of the State of Israel fit into such divine calculations? And what should the Holocaust catastrophe (as well as such developments as the routine obliteration bombing of cities during the Second World War) oblige Christians and Jews alike to think of Biblical teachings about war and peace?

The moral standards that most westerners bring to the judgment of contemporary catastrophes do seem to depend, in large part, on the Bible, not least upon the Ten Commandments. We have seen that the Lincoln who had reminded his audience that “the judgments of the Lord are true and righteous altogether,” had just (in his Second Inaugural Address) wondered how “any men should dare to ask a just God’s assistance in wringing their bread from the sweat of other men’s faces.” This suggests that there is available in Biblical texts guidance that may be used to reinforce the moral standards that thoughtful human beings may naturally come to recognize, and not only with respect to questions about war and peace.

24. FEARFULNESS AND THE SEARCH FOR AN ELUSIVE “SECURITY”

November 24, 2008

I.

Thomas Hobbes described, four centuries ago, that yearning for self-preservation, which can so grip a people that it becomes paramount

240. See infra Appendix.
241. Lincoln, supra note 15, at 143.
among them. Thus, he could speak in his *Leviathan* of that to which the concern for one’s self contributes, that “general inclination of all mankind, a perpetual and restless desire of power after power, that ceaseth only in death.”243 We are familiar with the yearning for self-preservation, on a social level, in the form of the determination to maintain *security* at almost any cost.

How far the drive for security can go is suggested by the notice now applied to mailboxes in this country. This has long been evident on the streets of Chicago, but it may be seen as well in towns—as in, say, Lafayette, Louisiana. The July 2007 notice, routinely applied to mailboxes by the United States Postal Service and headed “Attention: 13-Ounce Rule,”244 reads:

> Stamped Mail Over 13 Ounces Prohibited. Due to heightened security, all mail that bears postage stamps and weighs more than 13 ounces must be taken *by the customer* to a retail service counter at a Post Office. Failure to do so will result in the return of your mailpiece.

The most pervasive, and expensive, domestic form of the determination to be “secure” may be seen in what happens daily to passengers at our commercial airports. Then there are the routine exhortations on the public address systems of our trains and buses, culminating in the plea, “If you see something, say something.” The truly disturbing “something,” about which little is said, is that we should allow ourselves to be handled thus, which testifies to the influence upon us of that “Terror” so aptly described by Edmund Burke more than two centuries ago:

> No passion so effectually robs the mind of all its powers of acting and reasoning as *fear*. For fear being an apprehension of pain or death, it operates in a manner that resembles actual pain. Whatever therefore is terrible, with regard to sight, is sublime too, whether this cause of terror be endued with greatness of dimensions or not; for it is impossible to look on anything as

243. THOMAS HOBBES, LEVIATHAN 58 (Edwin Curley ed., Hackett Publ’g Co. 1994).
trifling, or contemptible, that may be dangerous. There are many animals, who though far from being large, are yet capable of raising ideas of the sublime, because they are considered as objects of terror. As serpents and poisonous animals of almost all kinds. And to things of great dimensions, if we annex an adventitious idea of terror, they become without comparison greater. A level plain of a vast extent on land, is certainly no mean idea; the prospect of such a plain may be as extensive as a prospect of the ocean: but can it ever fill the mind with anything so great as the ocean itself? This is owing to several causes; but it is owing to none more than this, that the ocean is an object of no small terror. Indeed, terror is in all cases whatsoever, either more openly or latently, the ruling principle of the sublime.

II.

Distinctive to Lafayette, Louisiana, are not the mailboxes I have already referred to but rather a monument in the center of the city to the September Eleventh attacks. It incorporates girders from the World Trade Center in New York and scarred slabs of concrete from the Pentagon in Washington. There may be seen here a determined patriotism on display.

Lafayette is the capital of “the Cajun country” of southern Louisiana. The September Eleventh monument has, on one side, the inscription, quoting President George W. Bush: “Terrorist attacks can shake the foundations of our biggest buildings, but they cannot touch the foundation of America.” On the other side there may be seen, in the French of the region, this inscription:

Le 11 septembre 2001,
des attaques terroristes ont tué plus de 3,000 Américains
et ont menacé la force de notre pays.
Pendant l’automne de 2001,
on a extrait ces solives du


It can be wondered whether anything as dramatic as this monument may be seen, anywhere in Lafayette, recalling the victims of recent hurricanes that have devastated Louisiana during the past decade. Somewhat comparable, as testimonials to the risks of “the human condition,” however, are the churches of the city. Is there not something of religious awe in the response, nationwide, to the September Eleventh assaults?

III.

It can also be wondered, of course, what the proper response is to such assaults. Salutary instruction in these matters has been provided by a vigorous Texas conservative, Don Erler, in his column in the *Fort Worth Star-Telegram* of July 24, 2007. This column is aptly titled, 'War’ Isn’t the Best Word for This Struggle.247

Mr. Erler sums up thus his argument in this column: “Being safe from terrorism depends less on military action than on sound police work and an effective system of international law.”248 His column begins thus:

Should [this struggle] be properly considered a war or a police action?

According to wire reports during the past several days, a

247. Don Erler, ‘War’ Isn’t the Best Word for This Struggle, *Fort Worth Star-Telegram*, July 24, 2007, at 13B.
248. *Id.*
"Jordanian doctor has been charged in connection with last month’s foiled car bomb plots in London and Glasgow, Scotland, police said." And Italian police “said they have broken up an al Qaeda cell that had set up a terrorist training camp in a mosque in the central city of Perugia.”

These arrests and others in various countries—including many in the U.S.—involved careful police work, some surely aided by “inside information” from those trusted by would-be terrorists. None involved military force.249

Mr. Erler then continues with his assessment of our September Eleventh responses, an assessment which he recognizes would not be endorsed by “[m]any—probably most—conservatives”:

When President Bush was first informed of the attack on Sept. 11, 2001, he declared, “This is war!”

But was it? Certainly it was a vicious attack by crazed fanatics, but it was not a war in any historically recognized sense.

Military force, of course, will be necessary in some aspects of the fight against terrorists. But that force must always be weighed against its likely consequences, including the crucial effect on sensitive information provided by sensible Muslims (who resent the actions of their most deluded co-believers) and by other civilized governments.

If certain actions tend to make us appear anti-Islamic or turn us into an international pariah, military force can reduce our security rather than enhance it.250

It does help to be clear about the terminology a government uses. Should, for example, the June 1950 response to the North Korean invasion of South Korea have been recognized as a war, not (as was done) as a police action? Does precision in language tend to encourage a salutary restraint in how force is used, something that might have made the fateful Chinese intervention in late 1950 less likely?

249. ld.
250. ld.
IV.

We are talking about, at most, a few thousand men and women willing and able to be enlisted worldwide in serious campaigns of terror against the United States. They must, in order to be at all “successful,” remain hidden. And they must rely on quite limited resources.

The United States, on the other hand, is the most powerful military and economic power in the history of the earth. Thus, a collapse of the World Trade Center because, say, of engineering flaws would have been readily assimilated by us with few discernible long-term effects. One sensible response to what did happen was not the massive transportation-security program we have endured, but rather the securing of airliner cockpits from unauthorized in-flight intrusion.

It should be obvious that the “terrorists” of our day have to remain hidden, as they continue very much on the run. It should also be obvious that they are not likely to impress the generality of the human race as sensible. It should be obvious as well that any government, such as that of the Taliban in Afghanistan, which permits itself to be exploited by any “terrorist” organization, will be severely (perhaps even excessively) punished by foreign powers.

V.

The “war on terror” by which we are entangled is not only self-defeating, but also simply unbecoming. And, as such, it lowers our stature worldwide, thereby making us (in our moral isolation) ever more vulnerable. Even worse, it can cripple us in our efforts to understand ourselves and hence to conduct public affairs sensibly.

At the heart of the problem here (I have had to point out, again and again) is the remarkable lack of a Sense of Proportion. This means, among other things, that we simply cannot know ourselves. And (these cautions can continue) if we do not know ourselves, it can be difficult to assess others usefully.

Particularly troubling in these matters is the scarcity, if not even a complete absence, of such cautions from anyone in authority in this country. Do leaders elsewhere know better? And if so, what accounts for their superiority in this respect?
VI.

Such superiority should be troubling for us, reminding us as it can of the unseemliness of unwarranted fearfulness. Is an immature temperament revealed thereby? Or is ignorance at the heart of the problem here?

That there is a problem is suggested by the contempt with which an unduly fearful temperament can naturally be regarded. Such contempt can be reinforced whenever ugly measures are relied upon in search of security. Our experience with the worldwide response to “Guantánamo” should be instructive in the decades ahead.

Also instructive should be the considerable experience for centuries, if not even for millennia, of would-be conquerors of regions such as Afghanistan. Adventurers originating there can be punished and thus perhaps discouraged from foreign atrocities in the short term. But the prolongation of punitive expeditions within Afghanistan puts invaders at more and more risk without any comparable rise in sustained effectiveness.

VII.

If we could know ourselves better, we should be able to assess better the character and hence the doings of others. Thus, it is still not generally recognized, at least in this country, how much of a “fluke” the September Eleventh assaults were. The perpetrators depended, for their “success,” on various chance factors—or, at least, on their remarkable absence.

We can even be thankful that the “masterminds” behind those assaults might still be alive. This means that they have had to observe and reckon with the considerable damage they have done to whatever cause they intended to serve. They can even be exposed as ultimately thoughtless in the campaigns they have waged.

Some of them may enjoy contemplating the consternation they have aroused in so powerful a nation as the United States. But this would only reveal how shallow, as well as mean-spirited, they truly are. It should provide no genuine satisfaction to sensible people to bring out the worst and the unseemly in others.
VIII.

The best "revenge" by the victims of vicious attacks can be responses grounded in sensibleness. Sensibleness, since the September Eleventh assaults, includes a curb on fearfulness. It includes as well prudent redirection among us of the vast resources devoted to "homeland security."

There should be recognized in these, and like, matters the limits of human ingenuity. We may be confronting such limits in, say, our efforts to eliminate the threats of nuclear warfare. Steady efforts have been made, for decades, to reduce worldwide (and eventually abolish) the stockpiles of nuclear weapons.

But, we can be warned by informed students of these matters, the complete dismantling of such weapons may not be desirable. That is, we are told, unscrupulous states may be able to reacquire and use (one way or another) such weapons faster than unarmed decent states can develop countermeasures. Thus, it can be argued, it would be irresponsible for "the good guys" to be, or to seem to be, vulnerable, unable to retaliate immediately, and most decisively, against nuclear misconduct by villains.

IX.

An informed realism is called for in human affairs. This was evident during the great economic decline in 2008. Thus, a wealthy man lamented to me that he had lost seventy percent of his fortune.

"How much were you worth five years ago?" I ventured to ask him. "About what I am now," he responded. "And," he could then be asked, "did you not consider yourself in good shape then?"

This reminder was acknowledged by him to be encouraging. Apprehension about "terrorists" should remind all of us, in turn, of the far deadlier risks faced a quarter-century ago from nuclear war. They should remind us as well of the mortality, and the attendant apprehensiveness, naturally inherent in "the human condition," no matter what protective measures may be experimented with (from time to time) in thoughtless desperation.
A prayer implicit in celebrated lines by Robert Burns can remind us of our natural limitations:

O [wad] some Power the giftie gie us  
To see ourselves as others see us!  
It would from many a blunder free us,  
. . . .  
And ev’n devotion!\(^2\)

Thus, we should be grateful for anything, or anyone, that helps us to see ourselves. The more impassioned we are, the more difficult it may be to see anything well, let alone ourselves.

The silliness and self-destructiveness of others may be all too apparent. When we look at other times and places, it can be much easier to see the then-prevailing foolishness and unseemliness. Indeed, the motives and deeds of others may even seem simply incomprehensible.

Help may be needed to see ourselves, something evident, for example, in the way the prophet Nathan approached King David about Bathsheba. The Freedom of Speech recognized in the First Amendment is designed to provide such help. This kind of help is primarily intended to permit us to learn what we, as a community, should both be and do.

Consider the sedition prosecution and convictions reviewed by the United States Supreme Court in *Schenck v. United States* (1919).\(^3\) The core of the evidence in that case was the two-sided leaflet opposing military conscription. This circular had been issued, in the closing year of the Second World War, by a branch of the Socialist Party in

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The author of this leaflet was remarkably patriotic. Much more is made in it of the merits of American liberty than of capitalist misconduct. It is unusual to see so much made of the United States Constitution by systematic critics of the American economy. One can wonder what the United States Attorney in Philadelphia could have been thinking of when he sought this indictment.

One can also wonder how much such prosecutions of American Socialists contributed to the radicalization of the American Left during the subsequent decade. The influence of the Bolshevik Revolution in Russia, along with the Great Depression here, probably contributed even more to this development. However this may have been, there is something innocent, and hence refreshing, about the language paraded in the Schenck leaflet.

III.

Critics of American foreign policy during the closing years of the First World War could not see what became all too apparent during the decades that followed. We can easily see now the almost unbelievable folly of that war, including the evident determination of influential Americans (including the President) to become embroiled. The stirring announcement, “Lafayette, we are here,” may have been the last high note of that intervention.

One can wonder what the Marquis de Lafayette and his more thoughtful contemporaries (such as George Washington, Thomas Jefferson, and Gouverneur Morris) would have thought of the suicidal exploits of Western Civilization from 1914 on. Thus, it can be wondered whether anyone “in charge” truly knew what he was doing. It has long been evident that the horrendous damage inflicted by that war all over Europe has yet to be fully repaired.

The obscenity of that war and how it “had” to be fought for years at a time is evident to any visitor to the trench-warfare exhibit in the Imperial War Museum in London. The American people, it can be suspected, knew better than to allow themselves to join the madness that had gripped highly civilized European nations for three years. After all, the Schenck leaflet notices, the President was reelected in 1916, having been extolled as a leader who had “kept us out of war.”

254. See Anastaplo, Constitutionalist, supra note 21, at 296–300.
IV.

The most serious German misconduct alleged in the 1917 push for a declaration of war in Congress were actions that had been known by Americans before the 1916 election. Known even longer were the principles and standards invoked in opposition both to going to war and to employing the war measures relied on thereafter. The Schenck leaflet makes much of the Conscription Act resorted to by the administration.

The principles and standards invoked in the Schenck leaflet are drawn, for the most part, from the Constitution of the United States. Far less is made of Marxist or any other radical ideology. Particularly noteworthy is the insistence, in the leaflet, that Philadelphia should recall that it had been in their city that “the immortal Declaration of Independence” had been promulgated.

The leaflet is determinedly patriotic in its evocation of sacred political documents. The documents are understood to have been generated first by the Revolutionary War and thereafter by the Civil War, which indicates that the position taken in the leaflet was not pacifist at its foundations, however much may be made therein both of the evils of conscription and of the prerogatives of conscientious objectors. The passion evident in the leaflet is aroused by how the Great War is regarded:

To draw this country into the horrors of the present war in Europe, to force the youth of our land into the shambles and bloody trenches of war-crazy nations, would be a crime the magnitude of which defies description. . . .

Will you stand idly by and see the Moloch of Militarism reach forth across the sea and fasten its tentacles upon this continent? . . .

. . . .

Will you be led astray by a propaganda of jingoism masquerading under the guise of patriotism?

No specious or plausible pleas about a “war of democracy” can becloud the issue. Democracy cannot be shot into a nation. It must come spontaneously and purely from within.255

Particularly striking is the use made, on that side of the leaflet emphasized in the indictment, of the Ninth Amendment to the Constitution, which is quoted: ""The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."" Indeed, it can be suspected, more was made of that Amendment in this leaflet than has ever been made of it by the United States Supreme Court. That is, this has been a much-neglected constitutional provision, matched in its disregard only by the Republican Form of Government Guarantee in Article IV of the Constitution.

The Ninth Amendment is particularly significant as a reminder that the rights enumerated in the Constitution of 1787 and its subsequent Amendments exist independent of such constitutional recognition. These are rights that seem to be regarded as natural, at least for a republican regime. It seems to be taken for granted that there are other rights of the People to be identified and relied upon (and developed?) in other circumstances.

The instincts of whoever was responsible for the use of the Ninth Amendment in the Schenck leaflet may have been sounder, therefore, than the instincts of those responsible for the official condemnation recorded in the Schenck case. If there is a grounding in nature for vital rights of a people, this suggests that there are similarly grounded standards by which governments may be judged. It may even be wondered whether a "best possible regime" is implied by such rights and standards.

VI.

The foolishness of the Schenck prosecution was fancied up by the eloquent United States Supreme Court opinion of Justice Oliver Wendell Holmes ratifying that prosecution and its conviction. It was foolishness somehow appropriate for a period which had insisted upon the four-year folly of the First World War. The misguided passions of suppression continued to shape the opinions and policies of the "Red Scare" of the 1920s.

Such passions were resurrected during the Cold War following upon the Second World War. The risks posed by the Soviet Union, especially

256. Id. at 296 (quoting U.S. Const. amend. IX).
to Europe, were widely recognized. But the passions of the era made it difficult for Americans to recognize as well how weak (economically and socially) the Soviet Union was, something that should have been evident to Western visitors in the 1950s.

On the other hand, self-destructive passions had not crippled American public opinion during the Second World War (however dubious our Japanese Internment was). Much the same can be said about the condition of public opinion in this country today (however dubious the treatment of the Muslims among us can sometimes be). And however dubious Cold War passions all too often were, the public did come to be exposed routinely to dissenting opinions (especially during our Vietnamese Intervention) that made the “sedition” in the Schenck pamphlet seem trivial by comparison.

VII.

Chance factors no doubt influence how public passions can be developed and exploited in various circumstances. This may be seen in the Rosenberg Case of 1950–1953, which is described in this way by Webster’s New Explorer Desk Encyclopedia:

Rosenberg, Julius and Ethel orig[inally] Ethel Greenglass (1918–1953, 1915–1953) U.S. spies. Born in New York City, both joined the Communist Party. In 1940 Julius became an engineer with the U.S. Army Signal Corps. The two apparently gave military secrets to the Soviet military in a conspiracy with Ethel’s brother, Sgt. David Greenglass, a machinist on the atomic-bomb project at Los Alamos, and Harry Gold, a courier for the U.S. espionage ring. They were all arrested in mid-1950. Greenglass and Gold received prison terms, but the Rosenbergs were sentenced to death. Despite a worldwide campaign for mercy, they were executed in 1953, the only U.S. civilians ever executed for espionage.  

The espionage referred to here seems to have been during the Second World War and on behalf of a major wartime ally.

The Rosenbergs and their associates happened to be exposed at a time when Cold War passions were perhaps most intense, reinforced by

257. WEBSTER’S NEW EXPLORER DESK ENCYCLOPEDIA, supra note 191, at 1043.
the outbreak of the Korean War in June 1950. Had these people been exposed either five years earlier or five years later, it is hardly likely that death sentences could have been resorted to. Also, it seems, the United States may have then been the worst place in the world (except perhaps for the Soviet Union and China) in which one might chance to be suspected of espionage.

Consider, for example, what the encyclopedia I have drawn on reports about an even more serious Soviet spy:

Fuchs . . . , (Emil) Klaus (Julius) (1911–1988) German physicist and spy. He joined the German Communist Party in 1930 but fled the Nazis in 1933. He settled in Britain, earned a doctorate and worked on the [atomic bomb] in Britain and the U.S. In 1943 he began passing scientific secrets to the Soviet Union, which accelerated Soviet development of the bomb. His activities were detected in 1950 and he was imprisoned until 1959, when he moved to E. Germany, becoming deputy director of the Central Institute for Nuclear Research.258

The Rosenbergs, at about the same time that Klaus Fuchs was tried, were unlucky in the trial judge they drew, a jurist whose unfortunate passions were exposed in the remarks he made upon sentencing them to death. The role of chance in such matters is suggested also by the fact that this trial judge later earned a reputation as a quite good member of a United States Court of Appeals.

VIII.

It is, as has been indicated, difficult if not impossible for us today to imagine how the Schenck leaflet could ever have gotten anyone a prison term. But then, it may someday be difficult to imagine the length to which American authorities went in the name of Security after the September Eleventh atrocities. It will certainly be wondered, some day, why it was not evident that much (perhaps most) of the huge expenditures on domestic security could have been better spent (with a view to saving many more American lives) on other measures (such as highway safety and medical efforts).

Then, of course, there are the questions that should be raised about

258. Id. at 458.
military actions abroad. It was inevitable that “something would have to be done” in Afghanistan when it became apparent that the September Eleventh attacks had been somehow launched from there. Serious reservations have been expressed, however, about our Iraqi Intervention of 2003.

The Great Depression which began in the late 1920s may have discouraged further indulgence in the “Red Scare” of the preceding decade. Perhaps the 2008 worldwide financial “meltdown” may have a like effect with respect to the “War on Terror.” In such circumstances, the competence of those in authority tends to be subjected to searching examination.

IX.

When passions are aroused, especially in wartime, even the most talented can be recruited for dubious causes. This is evident in how Oliver Wendell Holmes was trapped by the Schenck case. He later moderated his stance in sedition cases (such as in Abrams v. United States (1919)). But the damage he did in Schenck (with his “clear and present danger” talk and his “falsely shouting fire in a theatre”) he could never repair.

Perhaps the most ominous experiment by Justice Holmes in these matters may be seen in the Opinion he wrote for the Court in Debs v. United States (1919). Eugene Debs, a recognized political leader with a substantial national following, was imprisoned for speeches that (it was opined) “had as their natural tendency and reasonably probable effect [the obstruction of] the recruiting service,” and that such obstruction was intended. Thereafter, this man was to conduct from prison the last of his five Presidential campaigns.

Should not Justice Holmes have recognized, by 1919, the monumental folly of the Great War? Should not he have recognized as well that the defendants whose convictions he so eloquently endorsed (not simply affirmed) had had something to say that the American people very much needed to hear? In short, was he not, in his eloquent disregard for a vital republicanism, the Mark Antony of our Supreme

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262. Id. at 216.
Court Justices?

26. LEO STRAUSS AND THE "NEO-CONS"263

July 29, 2009

I.

It can feel odd to see used, in fiction (such as the Jeff Dorchen play, **Strauss at Midnight**264), three men one has known (mostly at the University of Chicago)—Saul Bellow, Allan Bloom, and Leo Strauss. Such names are hardly likely to have been picked by the playwright out of a telephone directory. It must make some difference who these men were or what they are believed to have stood for.

I, for one, probably would not have seen this play but for these associations. That is, I do not see many plays, nor am I much of a television watcher. My inexperience here may be a serious limitation in me, especially for such an occasion as this.

Particularly compelling for me on this occasion was the Strauss name, especially since that name had become somewhat notorious because of supposed “Neo-Con” associations and dubious military adventures abroad, matters evidently alluded to in Internet and other accounts of this play. We have seen what political turmoil may do to the general understanding of thinkers and their ideas, and even more as life-and-death issues are dramatized when a nation goes to war, especially to a “war on terror.” Among the matters about which we can be instructed in these circumstances is what poetic license means and how it is to be assessed.

II.

Of the three men I am particularly interested in, the fairest game for a playwright was Saul Bellow. After all, he has had done to him in this


play what he did (across decades) to one intimate acquaintance after another, including the women he had been closest to. And yet he comes off best amongst these three men, perhaps partly because one gifted artist could appreciate another.

The Bellow use of his personal experience was dramatized for me, one day, as I sat at my study window (facing a Hyde Park street where Mr. Bellow had spent time). I was sorry I could not hear the accounts given with his gestures, as he pointed out to his then-most-recently-acquired wife this and that house, all of which (I was sure) had been mined for various of his stories. It was such mining that could be seen in the Ravelstein novel which has been generally recognized to have been inspired by the Bellow–Bloom friendship.265

I myself have expressed in print serious reservations about what was done to Allan Bloom in Ravelstein, as in the following observations:

One can see magnified in Ravelstein almost a glorification of personal gratification. The philosophical (especially that taught by Plato and Aristotle) is virtually transformed into the self-indulgent, even as an attempt is made to moderate this by an almost instinctive deference to Judaism.

One can see in the Bellow “novel” (which is interesting in much of what it purports to disclose about Allan Bloom) that obsession with death which influences much of contemporary “fiction.” One can also see thoughtless self-indulgence and a self-centered individualism carried to extremes.

Monumental personal gratification is presented as essential to the Allan Bloom character in Ravelstein, with very little reliable indication of what made our old schoolmate truly attractive. Certainly, no one grounded in the thought of Socrates, Plato, and Aristotle (as Leo Strauss’s students were encouraged to be grounded) could make as much of mortality as is done in this Bellow novel. How much mortality dominates this story may be seen in what is depicted not only of its hero’s dying and death but also of its narrator’s own [then-recent] near-death experience.

Much is made in the “novel” of art and self-expression, with a peculiar emphasis upon dress and food. This means that Allan Bloom’s genuine talents and worthwhile thoughts (which were

shaped by Leo Strauss’s influence and work) are lost sight of. Indeed, there may perhaps be seen, in the closing decades of Allan Bloom’s life, a contest for the soul of this gifted man between Leo Strauss (as remembered) and Saul Bellow (as constantly present). 266

I should immediately add that quite competent political scientists have been much more favorably impressed than I have been by this Bellow “novel” (as may be seen, for example, in the 2003 volume of Perspectives on Political Science267). It might also be noted that Strauss at Midnight, which has Allan Bloom on Leo Strauss’s leash, suggests that Mr. Strauss had won the contest I have referred to.

III.

Of the three men caricatured in Strauss at Midnight, I “personally” knew best Allan Bloom. We had been graduate students together—and had taught together in the University of Chicago Great Books adult-education program. His admirable scholarship included his quite reliable translations of Plato’s Republic and Rousseau’s Emile.268

Then there came, in 1987, The Closing of the American Mind, which made him an international celebrity and thereby trapped him.269 This book, for which Saul Bellow provided a remarkably influential Foreword,270 is not very reliable in what it suggests about various authors of note and contemporary student movements (especially in response to American foreign policy). But however questionable Mr. Bloom’s dogmas may have been, he simply did not deserve what was done to him either by Saul Bellow or in our play (where he is degraded into an apish dog on the Strauss leash).

If I had not been asked by Mortimer Adler to review the Closing

268. THE REPUBLIC OF PLATO, supra note 184; JEAN-JACQUES ROUSSEAU, EMILE (1762), republished in 13 THE COLLECTED WRITINGS OF ROUSSEAU 155 (Christopher Kelly & Allan Bloom eds. & trans., 2010).
270. Saul Bellow, Foreword to BLOOM, supra note 269, at 11.
book (for The Great Ideas Today series), I probably would never have said much, if anything, about it in print. My review of the book led to my isolation from Allan Bloom and some of his champions, even though various of his associates indicated to me privately that they tended to agree with my assessment of Closing, but thought it imprudent to say publicly what I had said. Even so, I was, thereafter, in large part responsible both for initiating an instructive collection of reviews of the Closing book and for finding a publisher, reviews which are mostly favorable in their assessments of the book.

IV.

Leo Strauss poses the greatest challenge among the characters depicted in our play, which helps to explain why his depiction there is little more than an irresponsible caricature. That is, it is difficult to get him right without serious study, which the typical artist may not have either the opportunity or the training to engage in. It is not generally appreciated, for instance, how determined Mr. Strauss always was to be accurate and fair in depicting his opponents, even as he lamented the political degradations of the twentieth century and insisted upon seeking guidance for himself and his students in the greatest thinkers of antiquity.

Anyone who knew Leo Strauss, even superficially, would know that the character depicted in this play is not the man they remember. Thus, a St. John’s College scholar, Eva Brann, who was not drawn to Mr. Strauss intellectually, could observe, “He was absolutely the most exquisitely courteous man imaginable.” This scholar has also observed:

[O]ne point of difference [between Leo Strauss and Jacob Klein, an old friend of his], and maybe the most important, was that Mr. Strauss thought that political philosophy was fundamental. I think that [Mr. Klein] thought that ontology, or metaphysics, was fundamental, and that the revolution in science was more telling for modernity than the political revolution. (I never heard [Mr. Klein] express much interest in Machiavelli.)

273. Id. at 361–62.
The attempt to associate Leo Strauss with our “Neo-Con” adventurers of the past decade must seem foolish to anyone who really knew him, especially whenever attempts are made by the United States to democratize regimes all over the world. Mr. Strauss was too great an admirer of Winston Churchill to allow himself to endorse such an indulgence. Certainly, he was always quite grateful for what the United States had done in saving both Western Civilization and the Jewish people from some of the calamities that Nazism (as well as the Stalinists) seemed to be destined to bring about.

V.

These, then, are my capsule assessments of the uses made in our play of three men I knew. A much more interesting question for us than that of “accuracy in depiction” is how we should understand what artists may do with the historical figures they do make use of. This is a question that very much bears, for example, on how we understand what William Shakespeare does with the personages he takes from Homer, from Plutarch, and from English history.

That is, does what Shakespeare tries to “say” include what he expects his “reader” to know about the sources on which Shakespeare drew? Critical to understanding a serious thinker may include what he chooses to ignore, or even to alter, in the accounts he takes from his sources. Does not the most thoughtful artist want to be assessed in this way?

Take, for a recent example, a play about Thomas More, A Man for All Seasons. What did that playwright want the viewer to understand who knew of the dreadful severity that Thomas More himself, when in power, was capable of (if not even eager for) in dealing with the helpless heretics of his day? What a playwright is “really thinking of” may be more seriously contemplated when the observer takes into account what, in the historical record, “had” to be suppressed by that playwright and why.

VI.

In thinking about our play, I have dealt primarily with what has been done to and with three men I knew (in varying degrees). I have ignored

274. ROBERT BOLT, A MAN FOR ALL SEASONS (1960).
what is said in the play about life and death and especially, it seems, about the eternal dispositions of human souls. One is tempted to wonder how much is intended to be made of what remarkable predecessors, such as Moses Maimonides, Dante Alighieri, and John Bunyan, have suggested about these matters.

It is obvious that other, much more recent, artists are drawn on as well. Our playwright, it is also obvious, is quite skilled. One might be able, however, to assess his work if one knew, far better than I ever will, the dramas of immediate predecessors evidently drawn on (such as Neil Simon's *The Odd Couple*).

The continuing correspondences between the two (or more) worlds depicted in our play are a challenge for the viewer. This also seems to be so, from what I have seen of our play’s script, for any reader of the text. It is again and again obvious that the playwright seems to know much of what he is doing.

VII.

Among the things he knows he is doing is the language he is using. And it is in that uninhibited language that there emerged for me problems in addition to those related to my ignorance of theatrical sources and models. I must confess, that is, to an old-fashioned sensitivity about the determined unseemliness of so much of the language used in public by this play, language anticipated by the notice posted at the box office for this play: “This show is intended for mature audiences and contains offensive language, sexual content, and adult themes.”

I do not believe that it is simply my age that chances to “show” in my reaction to all this. I recall much the same reservations when I encountered the language of some of my associates in the Air Corps more than a half-century ago. I have, since childhood, always had the impression that such language reflects poverty (if not even a paralysis) in both thought and spirit, however inventive its uses may sometimes seem.

But even more troubling—even more significant—is the way an audience can lap up such tawdry talk, exposing itself thereby as anything but “mature” and “adult.” Such receptivity reflects, I am afraid, a degradation in public taste and sensitivity. Such a decline is evident also in the preference, even among sober constitutional law scholars, for the quite permissive “freedom of expression” term over the traditional, more

disciplined "freedom of speech" term.

VIII.

The most serious problems we are likely to encounter either as human beings or as citizens do require disciplined thinking. Sometimes, of course, we may seem to be the beneficiaries of truly inspired revelations. Still, even such revelations are likely to require, over the long run, sustained disciplined thinking in their interpretation and application.

Our artists can be critical here, at least in disciplining our sensibilities and suggesting answers to perennial problems. There are enduring questions with which we can use all the help available from artists and other thinkers. These include questions, of course, about how killing one another should be regarded and how life, death, and a possible afterlife might be dealt with in the healthiest way.

We might get from our playwrights help as well in the study of perhaps our greatest comic playwright, Aristophanes, someone else who could be both quite unseemly in his language and interested in life and death, in war and peace, and in a truly virtuous life. I notice, in passing, that Leo Strauss is rare among modern students of political philosophy in that he took Aristophanes as seriously as did, say, Plato. Indeed, there is even a tradition that there was found under the pillow on Plato’s deathbed a copy of Aristophanes.

IX.

Partly accounting for what has happened in our political discourse (including, it seems, in our theaters) is the dubious foreign policy we have been subjected to during the past decade. Particularly unnerving has been the rhetoric of the "War on Terror." Someone I know, upon being scheduled to meet the President at a White House reception this week, was asked by me to convey to this ex-fellow-Hyde Parker my best wishes along with the belief that “we have been in Afghanistan long enough,” a sentiment developed by me in a June 24, 2009, Letter to the Editor where I argued:

[It is disappointing that] the Administration has signaled that it intends for us to remain in Afghanistan militarily for the next decade or so. It should have been enough, seven years ago, to
punish dramatically (as we obviously did) both the alleged perpetrators and the enabling hosts of the September Eleventh atrocities, without presuming to attempt long-term political restructuring in a "country" such as Afghanistan. Quick, decisive punishment puts on notice everywhere both governments and gangs tempted to mount unjustified attacks on the United States.276

I have already suggested that Leo Strauss (who did vote for Adlai Stevenson before he voted for Barry Goldwater) could be quite sensible in assessing the circumstances of his adopted country. However concerned he could be about the Stalinist threat, he did put the Cold War in proper perspective when dealing personally with human beings he knew. Thus, in response to an adverse ruling by the United States Supreme Court in my Cold War-era Illinois bar admission case,277 he could say in a two-sentence letter to me of June 22, 1961: “This is only to pay you my respects for your brave and just action. If the American Bench and Bar have any sense of shame they must come on their knees and apologize to you.”278

One must try to put ideology aside in dealing with the human things one confronts. It helps, in attempting to do so, to be reliably aware of what has been said by the best thinkers to whom we do have access. Thus, Mr. Strauss did like to quote what a Dutch grandmother said to her grandson, “You will be surprised, my son, to learn with how little wisdom this world of ours is governed.”

27. WHAT THE UNITED STATES CAN LEARN FROM CHINA AND GREECE279

August 28, 2009

I.

My first exposure to the Chinese (aside from enjoying their restaurants in this country) was (shortly after the Second World War)
during an Air Corps mission flying out of Guam (where our air crew was temporarily stationed), searching for one of our planes that had gone down into the Pacific Ocean far to the west. Our flight (on which I was the navigator) was uneventful, except for a troubling hour when it appeared that our own plane (a B-29) was literally coming apart at high altitude, a prospect which led me to calculate our position for the radio operator to use. The area we were assigned to search did take us to the edge of Formosa, which was the name by which that beautiful island was then known to us.

An experience that evening at our air base on Okinawa, where we spent the night, proved enlightening for the twenty-year-old that I was. I could not help noticing one of the participants in a lively card game in our officers’ quarters, an exasperated officer who was the foulest-mouthed man I ever encountered during more than three years of military service. I was astonished to learn, upon inquiry, that this was an Air Corps chaplain, which proved a quite useful lesson for a youngster that things may not always be what they seem, even among those in apparent authority.

My first substantial exposure to the Chinese was a quarter-century ago during my study of the great Confucian texts in translation, texts which can sometimes seem to be still as fundamental to China as the Declaration of Independence is to the United States.  

A critical difference here is that this American founding document could invoke “the Laws of Nature and of Nature’s God.” Nature, as it came to be known first in the West, did not figure explicitly in the thought of Asians before they were systematically exposed to the influence of ancient Greek thought.

II.

Of course, the ability of a people to maintain a recognizable continuity on so large a scale for some three thousand years, as the Chinese have done, suggests (unless the Divine is posited as having been at work there, as it is said to have been with the Israelites) that the Chinese have long had a somewhat reliable sense of the workings of Nature. This can include the empowerment of an instinct for recognizing and developing “one’s own.” This may be seen most pervasively,

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280. See ANASTAPLO, BUT NOT PHILOSOPHY, supra note 114, at 99.
281. THE DECLARATION OF INDEPENDENCE para.1 (U.S. 1776).
perhaps, in the fundamental role instinctively assigned by the Chinese to the family in the truly civilized community (with the family name coming first, as among many Asians, in any personal identification).

In the United States, however, family ties can be far less intense, reflecting perhaps the fact that ours is still a highly mobile society, having been populated for the most part by millions who were willing, if not even eager, to abandon their ancestral homes thousands of miles away. Within a couple of generations after their settlement here, the language and customs (including eventually the religious sentiments) of their forebears tend to become far less important than they had been, if they are not even forgotten. Much in the social and economic circumstances of Americans encourages, if it does not require, even more mobility among those settled here, mixing up thereby peoples that can have only an ever dimmer awareness of what "the Old Country" meant.

Americans can be reminded by the Chinese of how deep, and obviously rich, family ties can be. We, on the other hand, must wonder what the long-term effects of the current one-child-per-family policy of the Chinese government will be if it can indeed be sustained. Is there about such a policy something as unnatural, at least in appearance (if not also in what it eventually means for the care of the aged), as that extraordinary mobility upon which the United States seems to depend?

III.

Americans can be reminded by contemporary China of what a "market economy" can be and may do. We see dramatized among the Chinese today both the encouragement of personal economic initiatives and the legitimation of an intense self-centeredness. But the Chinese do not seem to be as determinedly (or, at least, as obviously) suspicious of pervasive governmental regulation as many Americans tend to be—and in this, perhaps, the lingering influence of Confucian thought may be seen.

Even so, the Chinese can help us see how our European ancestors acted for three centuries in taking over much of North America. That is, the ethnic Chinese, too, steadily displaced "aboriginal" people all over Asia—and (it seems) continue to do so by mandating large-scale Han Chinese migration into their western territories. The Chinese, however, do not seem ever to have had (on a large scale) the system of chattel slavery once insisted on in one-third of the American States.

On the other hand, as I have indicated, Americans do not seem ever
to have had the toleration that the Chinese have long had for steady, heavy-handed governmental regulation. This has been exhibited even in the severe measures announced from time to time these days against foreign businessmen who are encouraged to operate in China. Such a recent repressive measure drew, in a *New York Times* editorial of July 18, 2009, the rebuke of "thuggish behavior." \(^{282}\)

IV.

The Chinese can be said to have learned from the Americans how a continent-wide regime should be preserved, no matter how it may have been acquired. The horrendous domestic casualties that someone such as Mao Zedong was willing to endure in order to consolidate his regime may seem, for some, to have had a respectable precedent in the steady casualties Abraham Lincoln was willing to endure during the American Civil War. In both cases, noble sentiments could be invoked as multitudes “had” to be sacrificed.

Much of what the Chinese government evidently still considers itself both obliged and entitled to do in order to preserve “the Nation” can seem questionable today, at least to outsiders. Americans are challenged thereby not only to reassess their own past but even more to see truly what they themselves are doing in the present. Thus it can be wondered by patriotic citizens among us what genuine national interest it was that justified the heavy damage inflicted by us since 2003 both on the people of Iraq and on the worldwide reputation of the United States as a humane regime.

But is not such a “national interest” even more suspect when it cannot be freely discussed by people at large? Should not the way that the Chinese government conducts itself at times remind us of how critical “freedom of speech . . . [and] of the press” \(^{283}\) may be for a modern empire, especially if both rulers and people are truly to understand and deal sensibly with whatever happens from time to time? Such troubling governmental conduct, when extended (for example) to the determined suppression in China (as was once attempted to be done in the United States with the Mormons) of the innocuous-seeming Falun Gong movement, can remind us as well that “the right of the people

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\(^{283}\) U.S. CONST. amend. I.
peaceably to assemble” also is both a fundamental right and an indispensable need for a truly self-governing people.

V.

China, in its controversial one-child-per-family policy, could be said to draw upon teachings that may be found even in venerable Western authors such as Plato and Aristotle, teachings that consider the community as prior in principle even to the family. Still, it is said that China will soon have to minister to one-fifth of the world’s population. What does such a size do to the possibility of self-knowing as a condition for self-governing, especially if genuine freedom of speech cannot be relied upon?

The United States, itself approaching now a population of a third of a billion people, has come a long way (both up and down?) from the three million that were proclaimed a sovereign body by the Declaration of Independence. It is not generally recognized, however, that the Constitution of 1787 tended to leave the selection of public servants to election or appointment by those most likely to be able to assess the candidates (an arrangement that I have called “coordinated electorates”). Thus, for example, eligible citizens at large did not vote (in the earliest years of the Republic) for the President of the United States but rather (at least ostensibly) for those fellow citizens among themselves involved in public life who could be expected (as Electors) to be better equipped than the general public to assess the presidential candidates of the day.

Here, too, Plato and Aristotle can be instructive, especially in their taking for granted the polis (the city, in its full extent) as the political habitat most suitable by nature for human beings. Thus, the Aristotle who argued that the mammoth metropolis of Babylon was not a polis also observed that putting a wall around all of the Peloponnesus (that part of southern Greece roughly equivalent in area to our state of New Jersey) would not make it a polis. Does not the gigantic modern state tend, even with the best of intentions, toward a repressive totalitarianism (and hence toward the inefficiency, if not sometimes also toward both the callousness and shameless deception on a large scale (and periodic eruptions of deep, mindless anger), associated with not truly knowing

284. Id.
285. ANASTAPLO, CONSTITUTIONALIST, supra note 21, at 615 n.35.
VI.

The dreadful alternative to totalitarianism in the modern superstate all too often seems to be anarchy. The technology that permits the control of ever larger human aggregations may also promote a virtually instantaneous awareness of what seems to be happening “everywhere.” But it can be wondered how reliable (and hence human) is either such control or such awareness.

Confucianism offered cautions to those inclined to take on more than they could either understand or control. The rival Taoism approach seemed to suggest that even Confucius was not cautious enough in assessing human prospects. Critical to all such assessments should be an awareness of what human mortality truly means.

Particularly to be guarded against among us in our modern superstates is ruthlessness. There is not only the sporadic ruthlessness that desperate mobs resort to when civil order breaks down, but also the sustained ruthlessness that apprehensive rulers may feel obliged to rely upon whenever the breakdown of civil order seems to be threatened. In neither case may the actors involved recognize how the objectives they have pursued (grounded in an ever-growing industrial productivity) have unleashed forces that are hard either to identify or to control.

VII.

Americans who study the remarkable Chinese experience may be fortunate, therefore, in what they can learn about themselves. Thus, it can be wondered (as one result of such study) whether modern China needs (as the United States may still need) both a “Canada” and a “Mexico.” Both of those countries here in North America have populations similar in critical respects to significant elements in the United States.

Canada has always reminded Americans of noble elements in their common heritage. This was seen most dramatically before the Civil War in the recognition that a fugitive slave became permanently free if he or she managed to cross over from the United States into Canada. Mexico assumes (with Puerto Rico and Cuba) ever-greater significance as the

286. See ANASTAPLO, CHRISTIAN HERITAGE, supra note 266, app. F, at 319.
proportion of people of Spanish-speaking origins in the United States grows.

It seems to be partly a matter of chance that Canada is as independent of the United States as it is and that Mexico is still as large as it is. There was, after all, a place left in the Articles of Confederation arrangement of the 1770s for an automatic acceptance of Canada in the newly independent American Union. Also, there was a place in Southern secessionists' plans of the 1860s for much of northern Mexico and all of Cuba, territories regarded by the secessionists as "naturally" suited for an extension of slavery.

VIII.

I may seem to be questioning here tendencies exhibited by Chinese governments in recent decades, particularly as they contemplate their relations with Taiwan and also with Tibet, and Xinjiang (and other territories in the West). But I can be seen to be questioning as well, if not even more, observations and judgments I myself made in my first book (some forty years ago). That is, I presumed to say there (in remarks which I did hint at, even then, as arguably "demented") the following:

Some Americans continue to be confronted with the modern version of the Thucydidean question, "Shall we go to Sicily?" Union with Canada sometimes seems inevitable, it can be argued, and after that, union with Mexico is likely. The Canadian union (for which there is already considerable support—especially among those Canadians who see their lives determined more and more by decisions in Washington in which they have no effective voice—and to which the farsighted French-Canadian isolated in an English Protestant setting should be receptive) should bring the United States and Great Britain (with perhaps France) even closer together and should help establish on even firmer ground among us the principle of the rule of law. This sixty-state culmination could . . . provide not only a firmer basis of some kind of union with Mexico—partly because of the incorporation in the United States of Roman Catholic Quebec—but also the time and resources needed to raise the Mexican economy to the level needed to sustain free institutions today. The North American republic would then have both the experience and the moral stature for the gradual
establishment both of closer ties with South America and of an Atlantic union. (Is not Cuba’s natural tie with the United States, even more so than Puerto Rico’s?) It is along such lines that the founder of a federated world republic may direct his efforts.²⁸⁷

The expedition against Sicily referred to at the outset of those 1971 remarks, we recall, contributed significantly to the undoing of Athens during the Peloponnesian War. In some ways, it can be suspected, Sicily was then with respect to the great Athenian empire somewhat like what Tibet, say, is now with respect to the great Chinese empire. Had Athens succeeded in Sicily, it might thereafter have been able to do in and for Europe what the Romans eventually did.

But it can again be wondered (especially from a Taoist perspective) whether such an Athenian ascendancy would have been at the cost of the intellectual tradition promulgated especially by Plato, Xenophon, and Aristotle. That great Socratically minded tradition developed and took permanent root in an Athens which could no longer (after its Sicilian debacle) expect to dominate the world politically. Surely, there are thoughtful Chinese observers today who wonder what is put at risk (especially in their precious heritage) if their country should indeed become as dominant, politically as well as economically, as some of her current leaders seem determined to make her.

IX.

Three rules of perhaps general applicability (anticipated by what has already been said on this occasion) should be taken to heart by any nation aspiring to become or to remain a “superpower” respected by decent human beings everywhere and for years to come, whether it be China, India, Indonesia, Japan, Pakistan, Russia, or the United States. The first of such rules would have it noticed what the impact of a nation’s criminal justice system “has” to be. Thus, Americans should find disturbing the grim report noticed in the New York Times of June 29, 2009 (however comforting it can be both that such an account, reminiscent of slavery, can be safely published by our press and that even grimmer reports (for example, about numerous executions) come out of other penal systems these days)—“The United States, which has

less than 5 percent of the world’s population, has almost one-quarter of its prisoners.”

The second of our modern rules testing for true greatness in a nation would have it noticed how freely its “press” can indeed routinely speak about how the life of the community is governed and developed. Such freedom assures people at large that they can safely have their say, that “a decent respect [is maintained] to the opinions of mankind.” But, perhaps even more critical here, the rulers of a very large country (however they may seem to be selected) are more likely (if their press is truly free) thereby to learn what is really happening nationwide, and to do so in time to take, and to explain properly, the measures needed to make the best of sometimes unavoidably disturbing circumstances.

The third (and perhaps the simplest) of our rules contributing to and testing for true and sustainable greatness (at least in our time) would have it noticed whether a country has to make far greater efforts in order to keep people out than it has to make in order to keep people in. The infamous Berlin Wall that the Soviet masters of Germany “had” to build (in 1961) testified, day in and day out thereafter, to the existence of a deeply repressive system that proved incapable of truly knowing and hence properly developing and maintaining itself. It testified, that is, to the limits of the determined (if not even suicidal) illusions by which both the rulers and the ruled of a supposed great power may be trapped.

EPILOGUE:

ON LEAVING WELL ENOUGH ALONE

I have drawn on Ancient Greece and the Ancient Greeks in an effort to examine what the United States can learn today from China. Those lessons have been reinforced by reminders of the earliest experiences of Americans in establishing their Republic.

The British learned from experiences with their American colonies how to deal more sensibly thereafter with other restless colonies, especially those with the same ethnicity and language, and hence with the same constitutional heritage and political expectations, as themselves. The British also did, with colonies of different races and languages, generally better than other colonial powers in the twentieth century.

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289. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).
The control given up by Great Britain in the twentieth century included that over Cyprus. The independence was proclaimed in 1960 of that island, a place with a majority of Greeks but with a significant minority of Turks. There has long been in Greece an element agitating for the Union of Cyprus with Greece. This prospect has always troubled Turkey, which is much nearer geographically to Cyprus than is Greece. The acceptable alternative for Turkey was an independent Cyprus, even if dominated by its Greek majority. Such rule would be secure, of course, only so long as the Turkish minority there was seen to be treated fairly.

In 1967, however, a cabal of ambitious Greek Army Colonels took over the government of Greece. But they proved so obviously incompetent that they became desperate for some success that might rehabilitate them in the public estimation—and this they believed a takeover of Cyprus would provide. Their move to do just that in 1974 justified, or at least permitted, the Turks immediately to take over part of the island for its Turkish minority. The issue of reunification of an independent Cyprus has agitated Greek politics ever since—and has poisoned relations between Turkey and Greece.

The Greek-American community in this country has long been vigorous in its insistence that Turkey should give up the part of Cyprus that it has controlled since 1974. It is not usually remembered in this country, however, that the most influential Greek-Americans forty years ago had been critical in insisting that the United States support the usurpation of the Colonels in Greece. So eager were these influential Greek-Americans for the enosis (the union) of Cyprus and Greece that they were willing to have the relatively free Greeks of Cyprus subjected to the rather repressive military dictatorship ruling Greece at that time.

In what ways, it can be wondered, are comfortable Chinese-Americans following, in their “reunification” demands, that program of successful Greek-Americans which has subjected all the Cypriots to decades of turmoil. That turmoil has continued to this day—that is, long after the regime of the Greek Colonels collapsed (as it did in 1974) when it became evident to everyone what a mess had been made even of their Cyprus gamble.

Sensible Greek military officers, not caught up in the Colonels’ usurpation, always recognized the strategic folly of any effort by Greece to take over Cyprus by force. It can be wondered whether there are, among sensible Chinese on the Mainland as well as abroad, observers
who are likewise dubious about the deprivation for the Chinese people as a whole that would result from a suppression of salutary examples in political/social openness provided by Chinese communities in places such as Hong Kong and Taiwan.

Indeed, the more astute Chinese leaders on the Mainland, and especially those imbued somewhat by the spirit of Confucianism, should welcome the opportunities for social and economic experiments provided elsewhere for people with a similar heritage and similar inclinations. Indeed, it could be argued—if there were not already in Asia somewhat independent regions populated by thriving Chinese—that it might be prudent to establish some. We can be reminded that Americans do learn how to conduct themselves by watching what Canadians, among others, experiment with.

The Greeks (both ancient and modern), I have suggested, learned that there is all too often something to be said for “leaving well enough alone,” even when “well enough” may be far from “the very best possible.” It is useful to be reminded in such circumstances of still another familiar saying among us, “If it ain’t broke, don’t fix it.”

28. SEPTEMBER ELEVENTH, EIGHT YEARS LATER: CHARACTER AND A PROPER RESPONSE TO CRIME

September 14, 2009

I.

An annual assessment of the “War on Terror” currently waged by the United States could elicit from me in September 2009 the following Letter to the Editor (drawing on my letter of June 24, 2009):

The eighth anniversary of the monstrous assaults of September Eleventh finds our military still engaged on two fronts. We have now been fighting in Afghanistan twice as long as we had to fight against the formidable Axis powers during the Second World War. And yet our newly elected National Administration signaled earlier this year that it intends for us to remain in Afghanistan militarily for the next decade or so. It

should have been enough to punish at once and dramatically (as we obviously did) both the alleged perpetrators and the enabling hosts of the September Eleventh atrocities, without presuming to attempt long-term political restructuring in a "country" such as Afghanistan. Quick, decisive, well-publicized punishment puts on notice everywhere both governments and gangs tempted to mount unjustified attacks on the United States.

The President was urged early in the current administration by some of his military advisors to consign even more troops to Afghanistan. At the same time it became evident that our NATO allies in Afghanistan were steadily reducing the forces they had once dedicated there to the defense of Western Civilization.

Comparisons with the time devoted by us to the Second World War may be useful for encouraging assessments of how the Afghan operation might be regarded. Should such operations be treated more as "police actions" than as "acts of war"? Of course, some may be tempted to suspect these operations, no matter what they are called, to be really an incipient colonialism.

No doubt, the efforts devoted by the United States to Afghanistan and the sacrifices required there are quite modest compared to those associated with the Second World War. A more relevant comparison, heard from time to time, is with that Soviet involvement in Afghanistan which is said to have contributed to the unraveling of the Marxist regime in Russia. But this, too, can be misleading, especially if it is recognized how precarious the Soviet economy (as well as its political system) had been well before the ill-fated Russian move into Afghanistan thirty years ago.

II.

A more instructive parallel for us may be "Vietnam." But there are some curious differences. Thus, the American casualties in Vietnam were far greater than all such casualties have been in New York City, Washington, Iraq, and Afghanistan combined.

Also curious are the differences in provocations which have stirred the United States to act from time to time. Certainly, no Vietnamese had attacked American interests in the Western Hemisphere in the 1960s. Somehow or other, Americans allowed themselves to inherit the French legacy in Indochina.