On Trial: Explorations

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Having thus briefly spoken of the Naturall Kingdome of God, and his Naturall Lawes, I will add onely to this Chapter a short declaration of his Naturall Punishments. There is no action of man in this life, that is not the beginning of so long a chayn of Consequences, as no humane Providence, is high enough, to give a man a prospect to the end. And in this Chayn, there are linked together both pleasing and unpleasing events; in such manner, as he that will do any thing for his pleasure, must engage himselfe to suffer all the pains annexed to it; and these pains, are the Naturall Punishments of those actions, which are the beginning of more Harme than Good. And hereby it comes to passe, that Intemperance, is naturally punished with Diseases; Rashnesse, with Mischances; Injustice, with the Violence of Enemies; Pride, with Ruine; Cowardise, with Oppression; Negligent government of Princes, with Rebellion; and Rebellion, with Slaughter. For seeing Punishments are consequent to the breach of Lawes; Naturall Punishments must be naturally consequent to the breach of the Lawes of Nature; and therfore follow them as their naturall, not arbitrary effects.

THOMAS HOBBES

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The editors have complied with many of the author's stylistic preferences in preparing this Article for publication.—Ed.

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### Introduction

The cases and controversies I happen to discuss here include some that I have dealt with elsewhere.

Students of law should recognize in this article various matters that are addressed in law school courses in law and literature, in jurisprudence (or philosophy of law), in criminal law, in evidence, in civil procedure, in constitutional law, and in legal history. Simplifications of the statements of the cases reviewed have been required for some of the audiences I have addressed. I draw upon nonlegal materials that were once much more familiar to legislators, judges, lawyers, and other students of law than they are now.

This collection brings together talks and essays prepared by me during a period of some seventeen years, the earliest going back to 1974. Each of the two dozen discussions collected here should be able to stand alone: I assume in most instances the general knowledge among us of the matter at hand. (The original independence
of each discussion accounts for some overlapping between parts of this article.) Extensive notes have been provided which reinforce the argument in each case and which relate the discussions to one another, especially as common principles and issues become apparent. Just as courtroom trials can often be seen as real-life dramas, so life itself can often be seen as a trial.3

Literary sources (going back to the Garden of Eden) as well as historical trials provide materials for these discussions of what justice and the rule of law mean. The reader is challenged to see what sense there is to the judgments I presume to make, judgments that again and again draw upon and refine principles and standards that invite thoughtful criticism. I judge in order that I may be in turn judged, hoping to learn thereby what more I need to know to understand better the matters I presume to discuss here. It should be evident that one should be helped in thinking about these matters by getting what guidance one can from the best thinking available in the greatest works of the mind offered us by our tradition.4

1. FROM ADAM AND EVE TO FAUSTUS

1-A. Adam, Eve, and the Serpent5

I.

The account in the opening chapters of Genesis, once generally known as the First Book of Moses, is dismissed by some today as “just a story.” Much that we may discover in that account may not have been noticed by its author: we know that artists often say more than they are consciously aware of.6 Even so, the author may have had a hold of something substantial, which accounts for the durability and appeal of Genesis to this day.

Included here in Genesis is the story of Adam and Eve in the Garden of Eden, of the trials they endure. Multiple trials can be discerned:

1) there is the trial of Adam and Eve, in the sense of their being tested;
2) there is the trial of Adam and Eve, in the sense of the experiment that they conducted;
3) there is the trial of Adam and Eve, in the sense of the experiment that God conducted, in His effort to give mankind an opportunity to develop or maintain perfection in the Garden;7
4) there is the trial of Adam and Eve, in the sense of God’s quasi-judicial examination of them, and to a far less extent of the serpent, after their transgressions;
5) and there is the trial of Adam and Eve, in the sense that
they were imposed upon, if not even used, by the serpent and perhaps even by God.

All these senses of trial may be seen in our discussion on this occasion of what happened in the Garden and how that bears on our notions of where man came from and of what he wants to go to or to return to.

Eden is depicted in the opening chapters of Genesis as a definite place on earth: for example, it is located in relation to certain rivers (Genesis 2:10-14). It seems, also, to have been definitely placed in time. The name Eden is used a half-dozen times in Genesis (2:8, 2:10, 2:15, 3:23, 3:24, 4:16); it is used seven more times in the Old Testament (thirteen times altogether). The later references to Eden are, for the most part, by way of comparison, not with a view to reconsidering the original story. It has been suggested that the word Eden itself means delight, which suggests that there can be a reliable correspondence between a thing, including a place, and its name.

It is from the word Garden, it seems, that we get our word Paradise (by way of the Persian language). Paradise is literally an enclosure or park. The Garden is considered by some as that paradise in which we, as mankind, have already been and to which we long to return in some form. This may be the orthodox Jewish view. The word paradise, in its Greek form, may be found at three places in the New Testament, as a perhaps new place for mankind to which one can hope to go. The most emphatic New Testament use may be what Jesus says to the penitent thief crucified with him, "Truly, I say to you, today you will be with me in Paradise."

II.

Differences between Jewish and Christian emphases with respect to these matters may be seen also in responses to such notions as "the Fall of Man" and "Original Sin." Jewish writers insist that these notions are foreign to them—that is, to the Old Testament. Thus, one commentator has argued,

Strange and somber doctrines have been built on this chapter of the Garden of Eden, such as the Christian doctrine of Original Sin (e.g., "In Adam's fall, we sinned all"—New England Primer. "The condition of man after the fall of Adam is such that he cannot turn and prepare himself by his own natural strength and good works to faith can calling upon God"—Art. X, Free Will, of the Thirty-nine Articles). This Christian dogma of Original Sin is throughout the Middle Ages accompanied by an unbelievable vilification of Woman, as the authoress of death and all our
earthly woe. Judaism rejects these doctrines. Man was mortal from the first, and death did not enter the world through the transgression of Eve. Stray Rabbinic utterances to the contrary are merely homiletic, and possess no binding authority in Judaism. There is no loss of the God-likeness of man, nor of man's ability to do right in the eyes of God; and no such loss has been transmitted to his latest descendants. Although a few of the Rabbis occasionally lament Eve's share in the poisoning of our human race by the Serpent, even they declare that the antidote to such poison has been found at Sinai; rightly holding that the Law of God is the bulwark against the devastations of animalism and godlessness. The Psalmists often speak of sin and guilt; but there is never a reference to this chapter or to what Christian Theology calls "The Fall." One searches in vain the Prayer Book, of even the Days of Penitence, for the slightest echo of the doctrine of the Fall of man. "My God, the soul which Thou hast given me is pure," is the Jew's daily morning prayer. "Even as the soul is pure when entering upon its earthly career, so can man return it pure to his Maker" (Midrash).13

This commentator observes elsewhere, "Only as long as Adam lived was the earth under a curse ..."14

The Christian approach to these matters, on the other hand, may be seen in such passages as the following from Cardinal Newman's *Apologia Pro Vita Sua*: The world and man's condition in it are such that "the human race [must be] implicated in some terrible original calamity."15

We can see here, therefore, two quite divergent responses to "the human condition." Does the response to which one inclines depend, in part, on what one sees, or has been taught to see, the world to be like? The response to which one inclines, influenced perhaps by one's natural temperament, may bear on whether one believes a special divine redeemer (other than God Himself) to be necessary for the salvation of mankind.

We will return to these general considerations after we review the story of what is reported to have happened in the Garden.

III.

Whatever the differences between Jews and Christians, they do seem to agree in principle with respect to the proper status of revelation as against reason. Thus, Rabbi Hamina ben Dosa is reported to have said, some two thousand years ago, "Whosoever fear of sin precedes his wisdom, his wisdom stands; and whosoever wisdom precedes his fear of sin, his wisdom stands not."16
One commentator has added the following observation upon this saying:

Different meanings are assigned to the precedence of the fear of sin to "wisdom." The saying is taken to denote either that a man's fear of sin should be instinctive, rather than a result of calculation; or that the fear of sin should be a motive urging him to the acquisition of knowledge as a safeguard against transgressions into which his ignorance might betray him. The former interpretation is to be preferred: a man should build upon the foundation of religious feeling, rather than of philosophy.\(^{17}\)

Emphasis is placed here not upon what one figures out about the good but rather upon obedience to the rules or law laid down through revelation. It is not one's judgment, or wisdom, that is ultimately decisive but rather one's submissiveness, or surrender, before the divine command.

Of course, it is predicted in Deuteronomy that nations which shall hear all the statutes laid down for the Jews will say, "Surely this great nation is a wise and understanding people."\(^{18}\) But the wisdom which the Torah represents is, for most observant Jews, rooted in, and primarily devoted to, subordination under the law, a law for which no reasons are given in most instances.\(^{19}\)

There may even be a danger in making much of the reasons for the rules, since (as we all know from experience) it is tempting to rationalize devoting ourselves to what we anticipate pleasure in doing: an excuse can almost always be found, if there is something we want "bad enough" to do. What man needs, then, is not permission to "figure out" ways to satisfy his desires, calling his calculations wisdom. Rather, what man needs is practice in doing what he is blessed enough to have had God tell him to do.

The tension between fear of sin, on the one hand, and wisdom, on the other, may be seen in one biblical commentator's observation:

The will of God, revealed in His Law, is the one eternal and un-failing guide as to what constitutes good and evil—and not man's instincts, or even his Reason, which in the hour of temptation often calls light darkness and darkness light.\(^{20}\)

A critical difference remains, then, between reason and revelation, however much each of them does make use of the other.\(^{21}\)

IV.

These general observations have prepared us for our examination of the story of what happened, once upon a time, in the Garden of Eden. I do not intend a systematic commentary upon the
story, but rather brief considerations of a series of points raised by that story.

i.

The temptation to rationalize one’s disobedience of the law applies to law made by men as well as to law handed down through revelation. When God’s law is involved, however, man is asked for unquestioning compliance. What unquestioning compliance means, in contradistinction to what happened in the Garden, may be seen once and for all in the story of Abraham and Isaac. Indeed, it can be said, only he could be the founder of a holy nation who would, like Abraham, exhibit so radical a faith in, and obedience to, God as to “make up” (so to speak) for what had happened in the Garden, where it had proved too much for man (in the midst of plenty) to comply with one seemingly modest prohibition.22 The Christian can see Abraham as an anticipation of Jesus in this respect.

Consider how the story of Abraham and Isaac can be commented on in our day:

The election of the holy nation begins with the election of Abraham. Noah was distinguished from his contemporaries by his righteousness; Abraham separates himself from his contemporaries and in particular from his country and kindred at God’s command—a command accompanied by God’s promise to make of him a great nation. The Bible does not say that this primary election of Abraham was preceded by the fact of Abraham’s righteousness. However this may be, Abraham shows his righteousness by obeying God’s command at once, by trusting in God’s promise whose fulfillment he could not possibly live to see, given the short lifespan of postdiluvian man: only after Abraham’s offspring would have become a great nation would the land of Canaan be given to them forever.

... The apparent contradiction between the command to sacrifice Isaac and the divine promise to the descendants of Isaac is disposed of by the consideration that nothing is too wondrous for the Lord. Abraham’s supreme trust in God, his simple, single-minded, childlike faith was rewarded although, or because, it presupposed his entire unconcern with any reward, for Abraham was willing to forgo, to destroy, to kill the only reward with which he was concerned: God prevented the sacrifice of Isaac. Abraham’s intended action needed a reward although he was not concerned with a reward because his intended action cannot be said to have been intrinsically rewarding. The preservation of
Isaac is as wondrous as his birth. These two wonders illustrate more clearly than anything else the origin of the holy nation. Did not God prevent the sacrifice of Isaac in as casual a way as he had first requested it, in so casual a way as perhaps to make one wonder whether all of this depended on Abraham’s peculiarly sensitive openness to God? Are we not to understand that this kind of devotion is in marked contrast to the conduct seen in the Garden?

ii.

We can understand Abraham’s obedience to have been with respect to that on which his survival depended: in a sense, he was being asked to sacrifice his life, at least as the father of a nation. In a sense, too, he was giving up the privilege of thinking for himself, of wondering whether an impossibility (or self-contradictory course of action) had been charted for him by the God who promised him a multitude of descendants through the very child he was asked to sacrifice. Should this remind us of the prohibition laid down for Adam and Eve in the Garden? Certainly, we can wonder why that prohibition took the form it did, with respect to acquiring knowledge of good and bad. We sense that this bears upon qualities which distinguish man from the other animals.

Perhaps, indeed, this is why the decisive command, which somehow accounts for man’s condition, should have been put in terms of the knowledge of good and bad. Tragedy reminds us that our very strength can sometimes lead to our downfall. This decisive command is directed to that which we treasure as making man deeply human.

Only three episodes in the Garden are recorded for us, once man is created. (We do not see man gardening, although we are told he is to do some.) The third, and final, episode consists, of course, of the eating of the forbidden fruit and the responses to that. But the first episode also bears on that which is distinctively human, for we see man naming the animals (2:20). It has been suggested by some readers that this naming is more or less arbitrary on Adam’s part, whereas the naming God had done earlier had not been arbitrary. Still, when Adam comes to give the woman a name, it is hardly arbitrary, for he calls her Eve, “because she was the mother of all living” (3:20). Besides, it seems, it is after the animals have been named that it becomes evident that the woman must be created as a helper for the man (this is the second Garden episode to which I have referred). The naming by Adam was a kind of searching—and no helper was found.
The naming episode suggests that man did know something before eating of the fateful tree. But to know some things is hardly the same as knowing good and bad, even though some commentators have suggested that “knowledge of good and bad” may also mean knowledge of all things, or omniscience. This may be going too far. Still, one does need to know some things, perhaps even something about the good, in order to be able to comply at all with the command that one not eat of the tree. At least, one needs to be able to grasp the good enough to want to obey; also, one needs enough knowledge to be able to distinguish among the trees.

Perhaps knowledge of good and bad is somehow different from being aware of the good (or of the right thing to do) as the result of God’s commands and provisions for one. Does to know good and bad mean, among other things, to know something about the tentative character of the good in some respects? Is it not to accept and do the good fully? The problem with any questioning is suggested by the fact that the first question asked in the Bible is put by the Serpent. (3:1) But is it possible to learn, or to learn fully, without questioning, without calling into question that which has been revealed and commanded even by God?

Besides, to know both good and bad may mean that one is to some extent tainted by the bad: is not one exposed to it and to some extent affected by it? Does knowledge imply a unity between the knower and the known? To know good and bad means, then, that the bad does exist, or comes to exist, for man, especially if knowing should be primary in one’s soul. Certainly, we have all had the experience of being to some extent shocked, if not even wounded (and permanently scarred), upon learning about the awful things that others have done. Such things then become thinkable for us: do not they somehow become a part of us? At the very least, it can be said, the prohibition in the Garden was designed to shield man from dangerous exposure to the bad until he was prepared to receive it properly.

iii.

I have implied that some kind of knowledge of good and bad would have had to come eventually if the first human being was to live a full life, just as it is essential for us, if we are to conduct ourselves properly, especially in our social capacity. Certainly, God as ruler must distinguish between the good and bad or, in the first instance, between the good and the not-good. The explicit prohibition by God to Adam with respect to the tree of the knowl-
edge of good and bad is followed immediately by God's making a
judgment as to what is good for man (that he not be alone) (2:18).30
But mere knowledge, or knowledge for its own sake, seems to be
suspect. Consider, also, the ambiguous status of the arts in Genesis
and elsewhere in the Bible.

Another way of putting all this is to say that Adam and Eve
were wrong in their timing: they should have been more con-
cerned first with the tree of life.31 Preparation for proper assimila-
tion of the knowledge of good and bad depends on training,
experience and maturation. We have all seen the bad effects of
premature exposure to learning. One is apt to be released from
unwelcome moral restraints before one comes to appreciate the
reasons for such restraints.32

We notice also that the serpent is the first interpreter of biblical
language. This, too, should warn us against what can happen
when unbridled cleverness is let loose upon the world. Moral at-
tainment, we have heard, follows upon discipline and testing.33
The truth, we have also heard, can be deadly.

In any event, to say, later in the Bible, that someone has no
knowledge of good or bad is to indicate that he is not of an age to
incur communal responsibility.34 This is not to suggest that once
one does come of age, whether in the Garden or in "real life," one's
problems are over. Commentators have suggested that more
prohibitions would have followed in the Garden, had Adam and
Eve successfully passed the first test imposed upon them.35

Even so, it can be said that the failure of Adam and Eve fore-
closed the possibility of an enduring good for mankind until after
the Flood. Thus, from the time of man's expulsion from the Gar-
den until after the Flood, the word good is not used in the Bible. It
had been used fourteen times (and one more time in the phrase,
"not good") during the first three chapters of Genesis. It is not
used again until Abraham appears on the scene.36

iv.

There have been differences of opinion for thousands of years
now as to whether man would have been immortal in the Garden
had he not eaten of the forbidden fruit. Maimonides, it seems, be-
lieved he would not have been immortal; others believe that the
man and the woman were intended to live in the Garden forever.37

Did death come into the world only after the disobedience in the
Garden? We are told that God made "coats of skins" with which
to clothe Adam and Eve after they had fallen (3:21). Had He had
to kill animals in order to get the skins? Or, at least, had some animals died, whose skins could be used? (Some commentators, in order to postpone death’s appearance, have suggested that the sloughed-off skins of serpents had been used, but that does not seem likely.) Why had not God used, if not the leaves of other trees, cotton or linen (that is, the products of vegetation) with which to make clothing? Would this have made too much of art?

What was the purpose of the tree of life? Had there even been an implied command to eat of all the trees of the Garden? Some so argue, that there is a mitzvah, or duty, to sustain oneself with what is permitted. Would one meal from the tree of life have sufficed for eternal life? That seems to be suggested by what God says in Genesis 3:22: “[A]nd now, lest he put forth his hand and take also of the tree of life, and eat, and live for ever . . . .” It is this concern by God that triggers the expulsion from the Garden, a garden already radically changed in character, it seems, by what man had done. At the very least, perhaps it can be said, to deprive man of the tree of life was to allow his innate mortality to assert itself.

A recent commentator on these matters has raised the question, “One may wonder why man, while he was still in the Garden of Eden, had not eaten of the tree of life of which he had not been forbidden to eat.” He goes on to suggest, “Perhaps he did not think of it because, lacking knowledge of good and evil, he did not fear to die and, besides, the divine prohibition drew his attention away from the tree of life to the tree of knowledge.” That is, he had not recognized, while in the Garden, that death is a clearly bad thing, something to be avoided. Is it?

Proper training for life would have prepared man for exposure to the bad. The tree of life and the tree of the knowledge of good and bad are brought together in this fashion by a recent commentator:

For almost all purposes the word of God as revealed to His prophets and especially to Moses became the source of knowledge of good and evil, the true tree of knowledge which is at the same time the tree of life.

It has been suggested, eternal life would be an intolerable burden for any one who has sinned.

v.

Man, we are reminded, “was denied knowledge of good and evil, i.e., the knowledge sufficient for guiding himself, his life. Though not being a child, he was to live in childlike simplicity and obedience to God.” Is only the innocent truly durable? Purity means
that a thing is unalloyed, that it is not a vulnerable composite. There is an inherent tendency of composites to disintegrate into their elements. Death, then, is linked to the change toward which all composites tend.45

Is there already a compromise with the most durable unity when the human being becomes male and female? God, as eternal, is one and unchanging. Man, like God, may have been originally a complete whole, containing both male and female, but he was unaware of that perfection.46 Is God (in whose image man is made) compromised also, if only by implication, in that both male and female are contained in Him? Is He somehow dual in nature?47 Or should we teach ourselves that God simply cannot be understood according to our rules and our “chemistry”? Is the impurity of mankind, reflected in its duality, evident in sexuality? It does seem appropriate that the first offense should have been sex-linked and that it should have at once led to a recognition by human beings of their nakedness. Had they been “naked” theretofore? We do not consider the animals to be naked.48

Sexuality does imply inadequacy, imperfection, a lack of a self-sufficient oneness. It reminds us of our vulnerability and mortality, and hence of the need for procreation.49 Does any questioning expose one’s ignorance and hence one’s vulnerability? Consider how Maimonides speaks of shamefulness when he responds to the query about whether Adam’s disobedience had been a good thing for mankind.50 Related to the significance of sexuality is the observation that Adam and Eve, once they are created, continue as if they had been generated in the ordinary way. They are like others after them, as if they, too, had had predecessors. We, like them, do not “know” our origins, except by hearsay?

vi.

God, of course, knows our origins. Is He responsible for all this? Is there reflected, in the provision in Genesis 1:28 (“God blessed them and said to them, be fruitful and multiply; fill the earth and master it; have dominion over the fish of the sea and the fowl of the sky and all the living things that creepeth on the earth.”)—is there here an anticipation of the fact that man would not be permanently confined to the Garden or, at least, that the Garden would, because of man’s conduct, change in character?

As for God’s responsibility, these things can be said: He did make the serpent (about whom, more later). Also, He gave to
Adam the woman who, in turn, gave Adam the forbidden fruit, something that Adam points out to God when he is judged (3:12). Indeed, the original prohibition with respect to the tree was immediately followed by God’s becoming concerned about a helper for Adam (2:17-18)—as if to help him deal with that tree! And, of course, God “caused to grow” the tree of the knowledge of good and bad (2:9).

Would the world have been incomplete without such a tree, without the occasion for sin in the world? We do know that there are in the world numerous occasions for sin. Thus, it has been suggested, “Perhaps creation as a whole cannot be ‘very good’ if it does not contain some evils.” Or, “[E]verything that God had created would not be very good if it did not include something congenitally bent on mischief.” Certainly, it can be said, the world would be incomplete if there were not in it beings capable of doing bad, and exposed to temptations to do bad, who nevertheless choose to do good.

Was the fall of Adam and Eve inevitable? The answer to this question depends, in part, on what one means by inevitable. If one says that God “had” to act as He did against man, is not one suggesting that God merely reflects the human condition and that He is limited in what He could have done? God’s command does look arbitrary to many readers, just as do various of the laws laid down later in the Torah. Is it a reflection of our ignorance, if not innate willfulness, that we should consider any of God’s prohibitions arbitrary? Have we not seen that there must be a reason why this particular fruit was forbidden? That is, the fruit was forbidden because it was wrong, at least at this stage of man’s development; it was not wrong merely because it happened to be forbidden.

We can hardly expect to understand fully the reasons for the various prohibitions that God lays down. Similarly, it is hard for us to understand why Moses’ sin (striking the stone and chastising the people?) should have been as severely punished as it was. Certainly, we should not have expected God to guard access to the tree of the knowledge of good and bad as He was later to guard access to the tree of life (3:4). To have done so would have denied man his humanity.

Is God implicitly rebuked in the Lord’s Prayer, which asks, among other things, that we not be led into temptation? Or is that request merely a concession to the limited view of man as to what is indeed responsible for what happens to him? Is this, moreover, primarily a Christian rather than Jewish view of things? Even so,
Maimonides does conclude his chapter on the significance of the disobedience of Adam (and whether that was a good thing for man)—he concludes this discussion with the observation, “Praise be to the Master of the *will* whose aims and wisdom cannot be apprehended!”

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vii.

God's motives are, it can be said, difficult, if not simply impossible, to fathom. But what about human motivation with respect to eating of the tree?

We must concern ourselves, in the first instance, with the motives of the woman. They seem to be summed up in the observation (3:6) that “the woman saw that the tree was good for food, and that it was pleasant to the eyes, and a tree to be desired to make one wise.” Only the third item, that it was “to be desired to make one wise,” is new here, since it had been said earlier (2:9), “And from the ground [in the Garden of Eden] the Lord God caused to grow every tree that was pleasing to the sight and good for food. . . .” The woman saw what was there with respect to the eyes and the appetite. As for her desire for wisdom: some see her to have been moved primarily by *pride*; others see her as having been moved primarily by *naivete*.

So much, then, for the woman's motivation. What about the man's? Is it not essentially the same as the woman's, with one significant addition, perhaps, the desire he might have had not to lose her? (This is suggested in Milton's *Paradise Lost.*) Does this desire conform to the divine plan? Of course, it could have been that he ate the fruit, not knowing where it came from, once she offered it: this would indeed be an instance of connubial compliance. Maimonides, on the other hand, sees Adam to have been moved by greed.

Womankind has been at times vilified for what happened in the Garden. Thus, “Eve’s flesh” can mean *erring woman*, as in Shakespeare's *Twelfth Night*. Perhaps much more significant than the fact that it was the woman who first fell is the fact that she is shown to be fully human, that she can (in effect) act for, and be taken to act for, all mankind. We do not need to be given Adam’s motivation in the detail that hers is given: we can assume that he is moved pretty much the way she is, except for the fact that he is second rather than first. And, we can see, Adam ratifies what she does. *Adam*, we are told, does mean *mankind* or *human being*, someone who is made of earth, who is earth-bound. In a sense, of
course, Eve was to Adam what the serpent was to Eve. Even so, her motivation does suffice, in that they are “one flesh” (2:24). Certainly, both man and woman are human. After the expulsion from the Garden their similarity is emphasized (5:1-2):

This is the book of the generations of Man. In the day that God created Man, in the likeness of God made He him:

Male and female created He them; and blessed them, and called their name Man, in the day when they were created.

It has been noticed that “the woman does not explicitly speak of the tree of knowledge; she may have had in mind the tree of life.” Even so, she did take and eat from the tree she somehow knew was forbidden to them. Did she consider it the tree of life? Certainly, this “misconception” would conform with what distinguishes her from man, that she is to be, as her name indicates, “the mother of all living” (3:20). Is she intrinsically more inclined to be concerned with life, while man is more inclined to be concerned with the political order, and hence with the knowledge of good and bad?

viii.

There is one puzzling feature about the prohibition as Eve reports it to the serpent, “But the fruit of the tree which is in the midst of the garden, God hath said, Ye shall not eat of it, neither shall ye touch it, lest ye die” (3:3). Whether it was “in the midst of the garden” is a question: this is said explicitly of the tree of life (2:9); the tree of knowledge of good and bad was spoken of immediately thereafter, perhaps as if next to it. Besides, is she not a valuable witness to where the tree indeed was? Also, she may soften God’s injunction, “[F]or in the day that thou eatest thereof thou shalt surely die” (2:17), making it instead, “lest ye die.” This, too, we can understand, especially from someone whose very name reflects life.

But what of the addition, “neither shall ye touch it”? Thus, it has been observed, “There was no word concerning ‘touching’ in the original prohibition. This exaggeration on the part of the woman, says the Midrash, was the cause of her fall.” Was such an addition presumptuous? Did it thereby make the fruit even more alluring? Did it even make the rule even more difficult to obey?

But why should it be assumed (as the commentators all do, so far as I can tell) that it was Eve who made this perhaps fatal addition to the prohibition? (It can be noticed in passing that Eve does assume, both at the outset and during her “trial,” that a command made by God to Adam is essentially a command to her also: that
is, she recognizes herself to be as human as he is.) Could not the addition have been made by Adam, to impress upon her the seriousness of the prohibition, especially if he knew that she had not had the advantage of exposure to the "personality" of God to impress upon her the seriousness of the prohibition? Thus, the questionable addition, if it was that, could have been Adam's.

Besides, could not she have gotten the word herself directly from God, who had adjusted it to her tastes and circumstances? We are not told that, it will be said, but neither are we told that Adam told her. If we are to assume that someone told her something, why not assume God, and not Adam? And why not assume that it was God who added the prohibition with respect to touching? Or are we to assume that we are told, in the Old Testament, every instance that God speaks to man?

At the very least, we have raised here the question of the significance of the silences one encounters upon reading a book.\(^7\)

ix.

We see in the serpent how one mind reads, or misreads, a "book"—for, among other things, he "interprets" what God has said.

We are not told why the serpent approaches Eve and not Adam. Did he sense that the further one is from direct contact with God, the more fallible one is likely to be? Does this speak to the question of whether God did command Eve directly?\(^7\)

Nor are we told where the serpent got his information either. Had he overheard God speaking to Adam, or to Adam and to Eve? Or had the serpent otherwise heard of it, and if so, how? Or had he figured out the prohibition from the nature of things, just as we can try to figure out God's reasoning (or just as, some would say, some poet did)?\(^7\) Is there something presumptuous in the serpent's assigning a reason to God's command when God had not done so?

Nor are we told what the serpent's motivation was in tempting Eve. The following suggestion has been made over the centuries:

Nothing is mentioned about the motives which the serpent had for beginning the following dialogue. He is, however, the cleverest of the beasts and the only one, so far as we know, capable of speech. God, after realizing the insufficiency of Man, formed the animals in the hope that one of them might do as Man's helper. Perhaps the serpent, thinking himself the most likely candidate, intended to show Man the foolishness of his choice by causing Eve's downfall.\(^7\)
Is the serpent moved, then, primarily by jealousy? The first recorded sin seems to be the serpent’s. He probably would not have been persuasive if everything he had said had been wrong. Even so, is there not something fundamentally irrational, or purposeless, to wickedness? If so, this would make the serpent’s doings beyond understanding or accounting for, whether the serpent is seen as a separate being or as “the personification of the sinful tendencies in man.”

Is something like the serpent inevitable in a world where there is to be found the supreme beauty of a deliberate preference for the good over the bad? His crawling ever after suggests that he looks somewhat like he is, low and sneaky and unreliable? “Should” the forbidden fruit also have looked somewhat like it is and thus have put man on notice? Or would that have obscured the genuine attractions of the knowledge of good and bad?

God’s final word in the Garden about the serpent reminds us that the deadly temptation thus represented will always face mortal man (3:15):

And I will put enmity between thee and the woman and between thy seed and her seed; it shall bruise thy head, and thou shalt bruise his heel.

The serpent will “always” be there to strike?

V.

We return now to some general observations, having concluded our considerations of a series of points raised by the story of the Garden of Eden. My general observations at the beginning of these remarks included comments on the relation of reason to revelation, of wisdom to the fear of sin, in determining how man should conduct himself. This can be seen as a distinction between the way of philosophers such as Socrates and the way of the prophets. Thus, it has been said by a recent student of these matters, “According to the Bible, the beginning of wisdom is fear of the Lord; according to the Greek philosophers, the beginning of wisdom is wonder.” This student concludes his reflections thus:

Finally, the perfectly just man, the man who is as just as is humanly possible, is, according to Socrates, the philosopher; according to the prophets, he is the faithful servant of the Lord. The philosopher is the man who dedicates his life to the quest for knowledge of the good, of the idea of the good; what we would call moral virtue is only the condition or by-product of that quest. According to the prophets, however, there is no need for the quest for knowledge of the good: God “hath shewed thee, O
man, what is good; and what doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God."80

Is it from Socrates' point of view, then, that one asks whether Adam was better off for his expulsion? It is Socrates who understands evil to be rooted in ignorance.81 Still, if God is taken (as He must be, if the general account in the Torah is reliable) to represent goodness and wisdom, must not we say that man should not have disobeyed God, that he was not better for having done so?82 If it was truly God who gave the prohibition in the Garden, then we can hope to do no more than to try to understand something of the rationale of what was ordered: we cannot presume to question the command, to be superior to it—since God, if the story is otherwise correct, is omnipotent, omniscient and surpassingly righteous. Certainly, we cannot safely second guess a perfect God: would not something more have been provided eventually for man, to complete his humanity, if he had withstood the early temptation(s) confronting him in the Garden?

Still, we are told, the Rabbis have argued that Adam and Eve, once they were expelled from the Garden, discovered repentance—and thereby they came nearer to God outside of Eden than in Eden.83 Knowledge of good and bad does seem to be needed if man is to find his way, as Solomon did, through the world as it now is for him. The question still remains, of course, whether that way is best indicated by the prophets or by Socrates?

VI.

No doubt, there are prophets and prophets—of which we are reminded when we consider what the influence has been of this story both among the Jews and among the Christians. Any examination of their differences can be still another way of asking about the significance of "Original Sin" and of "the Fall of Man."

As for the Jews: we have seen what distinguishes Abraham, an unquestioning obedience which counteracts, so to speak, Adam's lack of obedience in a critical respect. Consider, also, how much is made by the Jews of dietary laws. Does this reflect a concern with mistaken eating? (Does the Christian concern with sexuality emphasize another aspect of the Garden story?) The body, and one's earthly existence, seem to be made less of by the Christians, who regard all food to be clean.84

The Christians do make more of Adam (in the New Testament and in works such as Milton's) than do the Jews (who make very
little of him, once they get past the opening chapters of *Genesis*). This is related to the Christian opinion that “sin came into the world through one man and death through sin, and so death spread to all men because all men sinned.”

Christians are, we have noticed, more apt than Jews (at least, Orthodox Jews) to speak of man’s fallen nature and a broken world. Should it be added that to speak of a fall not only implies there was once a golden age but also assumes that progress is something to which one can aspire? If one does not consider man to be fallen, then one’s primary concern may be to be as righteous as men have been known to be. This means, among other things, that there is, as the Midrash says, “no generation without its Abraham, Moses or Samuel.” May the Garden of Eden itself, once spoiled by Adam and Eve, become again a place of delight for the righteous man?

VII.

How one answers such questions depends, in part, on how one understands the story of the Garden of Eden. Do we see there, and in subsequent chapters of *Genesis*, God repeatedly experimenting with man, trying out first this dispensation and then that one? Or, rather than talk of God experimenting, should the sequence that is recorded in the Bible be seen as a series of opportunities offered man to work out the best possible destiny of which he is capable? Did human nature change decisively because of the disobedience in the Garden? Or have only the circumstances of man changed, for which adaptations are required?

Is there now a “way back” or a “way out” for mankind? Are Jews more apt to think of a way *back* and Christians of a way *out*? Is “paradise” still available on earth, in a rehabilitated Garden, for the man who attains (or retains) a purity of heart, for the truly pious man? Indeed, some Jews seem to have argued, death will disappear (even on earth) once mankind again achieves (under the leadership of the Messiah?) the closeness to God intended at the Creation. Christians, on the other hand, make much more of the immortal soul, a soul which is not confined to the body and hence to the earth. A different kind of paradise is anticipated. Is for us to consider these alternatives still another way of asking whether the expulsion of Adam and Eve from the Garden was good for man?
Another kind of paradise anticipates neither a conquest of death on earth nor removal to another sphere of existence, but rather depends on the highest use of the powers of the human mind with respect to moral questions and, perhaps even more, with respect to the study and grasp of eternal things. One is reminded here of philosophers such as Aristotle, who tended to see life as, by and large, a good thing, as something to be cherished. It is best for man to do good, knowing good and bad and preferring (that is, choosing and delighting in) the good. Is not this an approach which takes its bearings from the nature and hence end of man, not (as the Bible might seem to do, from man's beginnings). This anticipates the sentiment in Shakespeare's King Lear, "Ripeness is all." In any event, paradise (however it is conceived) is presented by various authorities as eminently attractive, as a place of delight. The extent to which the story of the Garden has captured the imagination of mankind is suggested by the inscription carried by one of the rooms of the fabulous Red Fort in India, "If on earth there be an Eden of bliss, it is this, it is this, it is this." But, we have also been told, paradise (at least the last time mankind was exposed to it on earth) did turn out to be a rather dangerous place. Does the prospect of a trial make the delight even more intense? Does the prospect of eternal bliss seem somewhat tamer than the adventurous human being can be content with? But this, too, may reflect our ignorance and our misshapen passions.

The story of the Garden of Eden does strike home for us—even as what our true home is, which may depend in part on what we truly are, remains for us a matter of wonder.

1-B. Lucifer and Faustus

Not is the opening word of Christopher Marlowe's The Tragical History of the Life and Death of Doctor Faustus. This negative at the beginning of the first clause is echoed at the beginning as well of the second and third clauses of the introductory sentence of the play. We are initiated thereby to the negativity which can be expected wherever the Devil prevails.

And yet the Devil, however much he stands for the spirit of negation, depends for his effectiveness, if not for his very existence, on something positive—on an affirmation of an enduring principle. At a critical moment in the career of Doctor Faustus, when he tries to turn to Christ to save his distressed soul from the consequences
of the bargain he had made with one of the Devil's agents, Lucifer appears for the first time before Faustus and us. Lucifer's opening words, offered in a successful effort to secure the hold he has on Faustus's soul, are these (The Complete Plays of Christopher Marlowe 374 (I. Ribner ed. 1963),

Caput cannot save thy soul, for he is just.

There's none but I have interest in the same.

Even Lucifer cannot do without recourse to the eternal principles Christ represents and which Lucifer himself has made a career of desperately denying. We are reminded at the outset of this play, therefore, of the profound limitations of the Devil: he can do no more than affirm nay-saying.

The play in and through which we are reminded of what the Devil tries to be and to mean draws upon the medieval story of a German scholar, Johannes Faustus, who made a pact with the Devil, giving up his soul to him in exchange for twenty-four years of remarkable magical powers. At the end of the allotted time, the Devil claimed his prize, leaving behind the dismembered body of the distinguished scholar.

Such bargaining may be a distinctively Christian phenomenon. There does not seem to be in classical Greece or Rome, for example, any comparable supernatural being of an evil disposition who is out to collect human souls. The Faustus story, which has been reworked by artists down to our day, is peculiarly appealing to moderns who see themselves as obliged to challenge long-accepted norms in their pursuit of the knowledge of good and bad.

We are familiar with the “Faustian bargains” of modern men who aspire to know and to do unprecedented things on a grand scale.88 Reworkings of the Faustus story culminate in Goethe's masterpiece, Faust, which leaves the hero saved at the last moment from the dreadful fate he had bargained for.

Perhaps Marlowe, in his Doctor Faustus, came close to expressing the thought and mood of his own troubled character and turbulent life, which ended with his murder in 1593 at the age of twenty-nine. An irreligious man, at least in reputation, Marlowe nevertheless bore himself the name of Christ (Christopher). His reputed ambivalence toward Christianity is reflected in the play he fashioned from the old Faustus story.

The intriguing character of this old story is reflected in anecdotes associated with it. For example, it was said, in the German sources, that at the end of the original Faustus's ill-spent life, his
corpse was found face-down on the earth. Nothing could be done to turn it over so as to leave its face looking up.

Marlowe's play, too, has intriguing anecdotes connected with it. It is reported that during a performance at Exeter in Elizabethan times, in a scene in which Faustus called up devils, the actors counted one more devil than the scene called for and realized that Satan himself was in their midst. In terror, they stopped the play; the audience bolted from the theatre; and the actors quit the town next morning.99

II.

Marlowe's plot is an old-fashioned one, whatever rearrangements and innovations in episodes he may rely upon. We cannot know for sure what parts in the texts we happen to have were done by Marlowe, and what by other hands. The Marlowe play itself comes down to us in more than one uncertain version; it is obviously incomplete and otherwise altered, making it difficult to read with care.

It is said that some, perhaps even many, of the things originally provided by Marlowe were censored out as theologically, perhaps also politically, questionable. It is also said that various of the comic scenes were provided by others. If so, perhaps that was done in order to try, in the playing time that had to be filled, to compensate for some of the things that had been cut.

Although we may now have little more than a rough version of the original play, we can still get from it glimpses of the modern movement that had its inception in Elizabethan times if not before in Italy. Even if various scenes are spurious, they are additions that the interpolators probably believed their audiences would consider consistent with the play as a whole. What we know of Marlowe's tempestuous career is consistent, in turn, with the spirit of this play.

The Marlowe play, we should notice, represents Faustus as clearly lost at the end, unlike what is done on his behalf by Goethe. Even so, he continued to be respected by his fellow scholars and is to be given a proper funeral by them.

Two particularly modern features of Faustus's career should be noticed. He rises from humble origins to his achievements as a scholar (p. 358). He is not tempted by the Devil; instead, he seeks out the help of the Devil, help which is consistent with his way of life or at least with his ambitions (pp. 360-65). (If he is tempted, it is by two of his fellow Germans (p. 361).) The fame he seeks, and
in some measure secures, seems to be a substitute for an immortal life on earth that he recognizes is not available for human beings.\textsuperscript{100}

III.

One odd feature of this story, at least as told by Marlowe, is that the uses to which Faustus puts his magic-derived powers are not intrinsically wicked. (The exception is what he tries to do, in desperation at the end, to the pious Old Man who had tried to save his soul—and even that episode may be provided by someone other than Marlowe.) Faustus spells out at the outset what he expects during his years of empowerment by the Devil (p. 366):

Say he [Faustus] surrenders up to him [the Devil] his soul, So he will spare him four and twenty years, Letting him live in all voluptuousness, Having thee [Mephistophilis] ever to attend on me, To give me whatsoever I shall ask, To tell me whatsoever I demand, To slay mine enemies, and aid my friends, And always be obedient to my will.

Further on (p. 380) Faustus says he wants to be “cloyed with all things that delight the heart of man” and that he will enjoy “four and twenty years of liberty.” Both delight and liberty are important to him. His liberty includes that of being able to “walk invisible to all and do what’er I please unseen of any” (p. 384).\textsuperscript{101}

It can be argued that Faustus is moved ultimately by pleasure. He does want beautiful things, but without appreciating the excellence that beauty represents. His final gift from the Devil, or by the use of his powers, is his dalliance with Helen of Troy. (His first request for action, from Mephistophilis, had been for a wife, which Mephistophilis had refused to provide him (pp. 371-72). Had the sacramental aspect of securing a wife troubled, or threatened, Mephistophilis?) Faustus is ecstatic about the encounter with Helen. Thereafter his disintegration, with its final debacle, sets in. When the Seven Deadly Sins were paraded by Lucifer for Faustus’s edification, the first was Pride, the last was Lechery—that is, Lucifer began and ended with Faustus’s distinctive failings.

By and large, though, the pleasures that Faustus resorts to are not perverse or otherwise questionable. Nor does he indulge himself in sadistic or other enormities, aside from what happens to the Old Man. Thus, he slays no enemies. Some of the uses to which he puts the powers borrowed from the Devil are prosaic; others are whimsical; still others are those of the courtier out to please and to impress his social betters, as by providing grapes out of season for a pregnant duchess (p. 400). We can see reflected here as well mod-
ern restlessness and the liberty to which that is intimately related. Also modern is the constant experimentation, the desire for novelty, perhaps even a desire to run "unnecessary" risks.

Then there are the grander projects, political and religious (with religion itself being politically oriented), that Faustus undertakes on behalf of Germany and, it seems, the Protestant reformation. Rome and the Pope are thwarted in their projects by this patriotic German. Faustus contributes as well to various worthy public-spirited enterprises; he serves as an effective medical doctor; and he instructs scholars about the heavens and other subjects in the physical sciences.¹⁰²

Mixed in with these more serious endeavors are low-down magic tricks and the conjuring up of historical personages for the edification of noble audiences. Some of the scenes in the play show plebeian characters exercising, or trying to exercise, on their base level, various of the powers that Faustus uses. Perhaps this is intended by the playwright as a commentary upon what the more impressive-looking exploits by Faustus really come down to.

A related commentary may be seen in how Faustus himself mixes the cosmic with the trivial, perhaps another symptom of modernity. Thus, the Emperor is very much impressed by what Faustus does in conjuring up Alexander the Great. But, it turns out, what the Emperor really wants to see is whether there is, as there has long been said to be, a mole on the neck of Alexander's paramour, and in this desire he is gratified to his great delight (pp. 390-91).

One must wonder, indeed, whether one difficulty with the way of life embarked upon by Faustus is that the trivial cannot be truly distinguished from the cosmic. That is, a deeply flawed judgment may be at the core of such a career as that chosen by Doctor Faustus.

IV.

The deeds that Faustus does, I have been suggesting, may not be critical to his condemnation. Certainly, most of these deeds seem innocent enough and could be accomplished today with the help of modern technology.

On the other hand, the opinions he has—the allegiance he is willing to show to the Devil, the great Nay-sayer—can be seen as treason toward the Divine Governor of the universe. Is not this an acceptance of the negativity of the Devil, which can even lead Faustus at the very end to curse his parents and his very existence
(pp. 409-10)? Nor is this allegiance mere youthful folly on Faustus's part, for he ratifies his pact with the Devil on more than one occasion during his career.

Fateful negativity may be seen as well in how Faustus moves into his alliance with the Devil: it is by a determined denial of the Trinity and by a philosophic disbelief in an afterlife (p. 365). The first and last things that Faustus gets from Mephistophilis is information about hell and about the afterlife implied by that institution (pp. 370-71, 406f).

That it is Faustus's ideas that make him vulnerable is suggested by the opening and closing passages of the play. His bookishness is critical; he has risen by scholarship and he wants, as is often seen in scholars, to go ever further in his studies, even beyond prudent limits. At the end, the last thing Faustus says is that he would destroy his books if he should be spared.103

Vital to Faustus's fate, then, is the issue of his faith. (That is the way the pious Christian would put it, whereas the Classical thinker would have preferred to put it in terms of judgment.) Faustus's faith, or lack of it, reflects his character, his passions. Early on Mephistophilis, although pressed by Faustus who reminds him of their pact, refuses to say who made the world (p. 374). This refusal by Mephistophilis is related to Pride being the first of the sins: the Devil and his minions are constitutionally unable to recognize the primacy of God (p. 378). Similarly, Lechery as the last of the sins portrayed anticipates the Helen episode (a succubus episode?) being last, and perhaps most critical, in the career of Faustus before his final fall (p. 376).

The refusal of Mephistophilis to say who made the world leads to the great crisis of the soul for Faustus, that crisis which in turn leads to the dramatic appearance of Lucifer with his threats and cajolements. Faustus can talk of paradise and the Creation—but Lucifer will have none of that. Instead, he provides the show, for Faustus, of the Seven Deadly Sins (pp. 375-76). These sins seem to be the devilish counterparts to the attractions of paradise—and such a show, if not art in general, is the Devil's counterpart to divine Creation.104

True, the sins as presented here do not appear to us as attractive. But Faustus is evidently impressed, perhaps by the very fact that such things can be conjured up in this fashion. The sins offer to satisfy here on earth the desires legitimately satisfied in paradise—and to do so when and where the accomplished man wills.

Evidently, Faustus's desires are such that he cannot appreciate
the folly of his undertaking, even though he had made at the outset
(p. 374) the right inquiry, “Now tell me who made the world” (p.
374). Why does not Faustus turn away from the Devil when he
fails to get his vital question answered? Lucifer does threaten him;
he also reminds him of his great promise—but Faustus could have
countered with a reminder of the Devil’s original promise to an-
swer all inquiries.

Perhaps at the heart of Faustus’s response here (and earlier,
when he first sees Mephistophilis in his native ugliness) is that he
simply wants to go with the Devil, which is to say that his charac-
ter is seriously flawed. (This determination may be seen also in
Faustus’s refusal to adjust, in time, his opinions about the afterlife,
a refusal that does not make sense in the light of what he learns
from Lucifer and Mephistophilis about their existence and inter-
est.) Did Marlowe want us to consider these issues as we have
been considering them here, including the issue of what Christian-
ity has come to when someone as gifted and respected as Faustus
can deliberately turn away from it despite the revealing equivoca-
tions of the Devil?

Faustus wants to be God-like in his powers (pp. 359, 362, 375).
But, it turns out, he is Devil-like, and that means most of all,
presumptuousness. Does not it also mean foolishness? Is it not
odd, moreover, that Lucifer should want damaged, or inferior,
souls—or that people believe that there is someone who wants and
gets such “prizes”?106

Is it truly in Lucifer’s (or anyone else’s) interest to collect, and
then to torment, the souls he does? Indeed, does the very “con-
cept” of Lucifer make sense, especially as a being who had once
known God and still was able to defy Him? Certainly, there is
something deeply dubious about someone who must rely upon a
just ordering of the universe if he is to be able to secure the things
he is “entitled” to as a result of his subversion of justice and the
other virtues.

Some would argue that to question the existence of Lucifer is, in
effect, to question as well the existence of God. Or is it instead to
see God in His perfection?

V.

Although we do see Lucifer in this play, we do not see God. The
closest we come to Him is in the form of the Good Angel who
appeals to Faustus to save himself, while the Bad Angel encourages
him to continue in the self-destructive path he has chosen for himself.

There are five encounters by Faustus with the Good and Bad Angels, four of them early in the play, the fifth at the very end after there is no further possibility of repentance by Faustus. There is a struggle between angels for Faustus's soul during the first third of the play. After the fourth encounter, Lucifer appears on stage to move Faustus to confirm his allegiance. The remainder of the play, about two-thirds of it, depicts the notorious career of Faustus. After that comes the fifth encounter with the Good and Bad Angels, ratifying Faustus's impending collapse. Shortly thereafter the play ends.

Some scholars suggest that the depictions of the angels are not Marlowe's. But they do serve to accentuate, or dramatize, Faustus's character and interests. For most if not all of the play, it should again be noticed, Faustus is on his own.

In the first encounter, the Good Angel warns Faustus against being tempted by books of magic, lest he have “God's heavy wrath upon [his] soul.” He is counseled to read the Scriptures instead (p. 360). The Bad Angel counters with a prospect that can serve as the motto for the enterprising modern (p. 360):

Go forward, Faustus, in that famous art Wherein all nature's treasury is contained. Be thou on earth as Jove is in the sky, Lord and commander of these elements.

In the second encounter, the Bad Angel again urges Faustus to go forward “in that famous art,” which the Good Angel characterizes as that “execrable art.” He is urged by the Good Angel to “think of heaven and heavenly things,” while the Bad Angel urges him to “think of honor and wealth” (pp. 368-69).

In the central encounter, Faustus is assured by the Good Angel that if he repents, God will pity him. The Bad Angel, on the other hand, both denies that God would pity him if he did repent and correctly predicts that, in any event, Faustus never would repent (p. 372).

In the fourth encounter, the Bad Angel insists that it is too late for Faustus to repent, while the Good Angel insists that it is never too late. If he repents, the Bad Angel warns Faustus, devils will tear him to pieces. No, the Good Angel assures him, only if he repents will he be safe. There seems to be here still the possibility of repentance—and this is when Lucifer, invoking justice, threatening punishments, and offering blandishments, arrives to take a firm, and permanent, hold of Faustus (p. 374).
The career of Faustus follows—and then we have the fifth encounter with the Good and Bad Angels at the end of the play. The Angels are by then agreed that Faustus is hopelessly lost, with the Good Angel finally leaving him. Shortly thereafter Faustus, after bitter and fearful lamentations, is dead, having been shown the various tortures awaiting him (pp. 408-09). This is knowledge of good and bad “in spades.”

The key question in these angelic encounters is whether Faustus is going to be saved. That depends on whether he will renounce his alliance with the Devil and sincerely repent. The Bad Angel offers immediately the pleasures of the world. The Good Angel, in urging Faustus to repent, is exhibited as preeminently obedient. It is again and again noticed in the play that pride, or presumptuousness, led to the fall of Lucifer and his lieutenants.

VI.

Perhaps the most disturbing thing about the entire play, as well as about Faustus’s encounters with the angels, is that virtue is not presented as something good in itself. This is not unrelated to Mephistophilis’s last remarks to Faustus (p. 408):

What, weep’st thou? ‘Tis too late. Despair! Farewell!
Fools that will laugh on earth must weep in hell.

This, too, suggests that virtue is not conducive to human happiness on earth, that it is not truly or fully good in itself but rather for its consequences.108

Of course, it is never said that virtue is bad in itself. But it is presented as requiring the surrender of pleasures and other such goods here.109

Virtue is offered, or advocated, as something good, if at all, for its long-term rewards—in the form of the enjoyment of heavenly pleasures and bliss and the avoidance of perpetual pains. When virtue is presented thus, it is not surprising that it is keyed especially to faithfulness (as it is in the pious Old Man), while vice is keyed to infidelity (or to allegiance with Lucifer).

At no point, then, is it said in the play that virtue is in itself attractive or noble or otherwise choiceworthy for its own sake, that it exhibits an excellence that should be desired, no matter what the external consequences may be. Indeed one may wonder—perhaps, even, Marlowe wants us to wonder—whether the virtues of antiquity are, from the Christian perspective, little more than the splendid vices that St. Augustine called them, especially if they divert man from a recognition of his complete dependence on God.
When this approach is taken, is there not the tendency to reduce all of the virtues to that of obedience to God, or piety? But, we should at once be reminded, vice is shown as ugly in this play. Both Mephistophilis and Lucifer, when not disguised, are painfully ugly (just as Satan is in Dante’s *Inferno*). The logical extension of this is not developed, however, which would display virtue as intrinsically beautiful. Rather, the most beautiful thing presented in the play is the apparition of Helen—and that is, to say the least, morally ambiguous in these circumstances (pp. 403, 405). The fallen angels are described in one fashion or another at a dozen places in the play. Much is made of their pride, their self-centeredness, and their self-pleasing. In short, the negative, or what is to be avoided, may be more effectively presented in the play than the affirmative, or what is to be sought. This, too, may be a modern propensity.

Yet the inherent integrity of virtue is assumed in the play, even though the implications of this assumption are not spelled out. The fact that Faustus is literally dismembered at the end, however, does point up the destructive, or disintegrating, effect of vice. Even the Devil himself must depend on justice as the basis of his claims on Faustus. We have seen that he and his cohorts can become indignant when Faustus threatens to deny them what is owed them: the soul which they have earned and which had been counted upon to enlarge their domain. Faustus, too, sees himself as just, or at least as not-unjust. He also sees himself as entitled to the powers that he seeks and exercises.

For the wicked, whether devils or humans, to rely on justice reveals a profound self-contradiction in them, in their very being. They truly do not know what they are doing. The learning they may have cannot be recognized as wisdom or prudence but rather as cunning, a term that is applied on several occasions to Faustus, including by Faustus himself.

Granted, it may be difficult to show virtue as always choiceworthy for its own sake, especially in dramatic productions. There can be something salutary in a reminder of the practical consequences of vice, including the consequences of punishment here or elsewhere for one’s misconduct, however well that misconduct seems to be hidden from public view.

Philosophy, properly understood, has always argued for the intrinsic choiceworthiness of virtue. But that which Faustus calls philosophy, and which he has presumably mastered, easily becomes an emphasis upon natural philosophy, or the natural sci-
ences—and that, in turn, it is tempting to harness to technology. This is related to the tendency in the play to equate *virtue* with effectiveness.\(^{116}\)

It is nature, at the foundation of genuine philosophy, which holds the secret of the status of virtue. But it is evident in this play that nature does not provide a guide. Thus, in the five angelic encounters, only the Bad Angel uses the word *nature* (this speech is quoted earlier by me). The Bad Angel’s use of *nature* is the first, and decisive, use of the term in the play. For him, as for much of modernity, nature is something to be exploited, not something to take one’s bearings by (p. 360). Later, technology, in the form of fire, is used to overcome nature (in the form of the reluctance of Faustus’s blood to flow for him to use in signing his pact with the Devil; the term *nature* is not used there) (p. 370). Perhaps nature would have asserted herself in a salutary manner for Faustus if he could have taken a proper wife—but that was not to be.\(^{117}\)

Philosophy is not seen in the play as an aid to virtue. In fact, it is related to Faustus’s dangerous bookishness. One can be reminded here of St. Augustine’s criticism of an ancient philosopher: “It was, no doubt, difficult for so great a philosopher either to acknowledge all this society of demons or to censure them with confidence, whereas any Christian old woman would have had no hesitation about the fact of their existence, and no reserve about denouncing them.”\(^{118}\)

VII.

However much Faustus and the Devil rely upon justice and the sanctity of promises and compacts, they are ultimately not moved by them. They cannot truly rely upon justice: that would be against their nature, or inclinations.

Rather, much is made by them instead of *resolution*.\(^{119}\) The fallen angels were resolute: they simply would not submit to God; presumably, they persist in their original disobedience. Resolution is thus intimately related to willfulness.

Faustus is explicitly concerned with resoluteness. In a way, resoluteness is for Faustus the distillation of all the virtues. It can be contrasted by him to baseness or base despair (p. 373). Is there not, in such an emphasis upon resoluteness, something distinctively modern? It has found expression in existentialism, providing a respectable way of dressing up self-assertiveness. Is not this the contemporary response to the desperate awareness of abandonment?
Socrates could be resolute, of course, but not simply for the sake of resoluteness. Winston Churchill can include resoluteness in the epigraph for his history of the Second World War—but it is linked by him explicitly to war. His complete epigraph reads,

In War: Resolution
In Defeat: Defiance
In Victory: Magnanimity
In Peace: Good Will.

Is there any place for good will in the Faustian scheme of things? Does the modern emphasis upon resoluteness work from a perspective which sees mankind as essentially at war all the time? The Old Man, too, is shown as resolute—but that can be understood as commendable, considering the faith that he is determined to hold on to (p. 406).

Perhaps, indeed, it is because the faith had meant so much for so long, and hence the determination to stand by it, that resoluteness has become so important in modernity. This steadfastness mimics, in a way, that of the Christian martyr. Thus, this can become the modern virtue, the new virtue in place of the old ones: it exhibits something of the appearance of the old virtues as things that are attractive for their own sake. But the hollowness of resoluteness as an end in itself is exposed by the stark, even unseemly, terror to which Faustus is reduced at the end. There is nothing at his center around which he can “collect” himself. The dismemberment of Faustus’s body is the physical counterpart to the collapse of his soul in the face of his final adversity.

All this reflects the pervasive sense of the play, however muted, that the virtuous man is a whole, someone of integrity, and hence truly self-sufficient, which self-sufficiency is something for which the ambitious scholar may strive in a misguided manner. Does the restless playwright thereby acknowledge in his work as an artist something that he cannot bring himself to live up to as a man?

Perhaps, that is, Christopher Marlowe was astute (or inspired) enough, and man enough, to recognize that his uncompromising play properly called his own tempestuous life into question. We can be reminded here of Faustus’s parting from his fellow scholars the night of his immediately impending death, the last contact he has on earth with other human beings. One of his colleagues asks, “O, what may we do to save Faustus?” To this Doctor Faustus generously replies, “Talk not of me, but save yourself and depart” (p. 408).

We can be reminded as well of Mephistophilis’s honest outburst
when he is asked by Faustus, during their first encounter, how it comes that he is here on earth if he has been (as he reports) condemned perpetually to hell—an eloquent (however despairing) outburst by a fallen angel which can teach us more than it evidently did the ill-fated Faustus (p. 366):

Why this is hell, nor am I out of it. Think'st thou that I who saw the face of God And tasted the eternal joys of heaven Am not tormented with ten thousand hells In being deprived of everlasting bliss? O Faustus, leave these frivolous demands Which strike a terror to my fainting soul.

2. Clytemnestra, Electra, and Orestes

2-A. The Choruses in Aeschylus' Oresteia

I.

Aeschylus' trilogy, the Oresteia, is, according to A. C. Swinburne, perhaps “the greatest achievement of the human mind.” I consider on this occasion the question of motivation in the Oresteia, primarily that of the Chorus of slave women in The Libation Bearers, the second play of the trilogy.

But one cannot properly talk about what happens in one play in this trilogy without at least touching upon the other two. An awareness of the whole is essential for proper consideration of any part.

Consider the end of the Agamemnon, the first play of the trilogy. The Chorus there taunt Aegisthus when he parades before them as one of the murderers of Agamemnon. They taunt him as a “woman,” skulking at home while real men fought at Troy (Agamemnon I. 1625). The Chorus cannot, will not, believe that Aegisthus can be their master (Ag. II. 1633-35). Aegisthus explains himself by saying that the woman’s role was needed in the killing of Agamemnon if he was to be safely snared (Ag. II. 1636-37). Even so, that role in the slaying continues to be stressed, in disparagement, by the Chorus (Ag. ll. 1643-45).

Perhaps the Chorus speak as they do, in the Agamemnon, partly because they are ineffectual old men: after all, they had been, even ten years before, too old to go to Troy. Their age and lowly status are sneered at by Aegisthus (Ag. ll. 1619-20). Clytemnestra intervenes to try to moderate the struggle between Aegisthus and the Chorus (Ag. I. 1654). She speaks more respectfully to them as Elders (Ag. ll. 1657-61). She counsels acceptance of what she says, labelling her counsel as womanly (Ag. I. 1661) In this role she
reminds one somewhat of Athena at the end of *The Eumenides*, the third play of the trilogy.

The reconciliation that Clytemnestra seeks is at best partial. Aegisthus still resents what he considers the Chorus's insolence (Ag. II. 1663-65) And the Chorus insist that it is not like Argives to cringe before a knave. The Chorus's last word in the Agamemnon is that of disparagement of Aegisthus as a cockerel beside his hen, not as someone independent and truly manly (Ag. I. 1671)

II.

The Chorus of Argive elders in the Agamemnon did sense correctly, one can say, that their status under a rule other than Agamemnon's would be dubious. They can be understood to have been transformed, by the time of The Libation Bearers, into a Chorus of subjugated slave women serving the household of Clytemnestra and Aegisthus.

Women are referred to by each of the first three speakers in The Libation Bearers. Orestes, at the very beginning of this second play in the trilogy, sees a throng of women coming out to the tomb of Agamemnon (The Libation Bearers II. 10-11); he wants to see what this band of suppliant women are up to (Lib. B. II. 11-20). The Chorus are thereupon heard to consider themselves mistreated women; and they refer to Clytemnestra as a godless woman, as they invoke still another female, mother earth (Lib. B. II. 21-46). Elektra begins her first speech in the play, immediately thereafter, by addressing the women of the household (Lib. B. I. 84).

The ambiguous status of women is to be seen throughout the play. The women in this play have far more lines than the men. They figure very much in the action, far more in a sense than does even Orestes. And yet they are repeatedly put in their place, as can even be seen in the disparagement by Orestes (to women: the Chorus and his sister)—his disparagement of Aegisthus and Clytemnestra as "this brace of women" (Lib. B. I. 304).

III.

One can see throughout the play, as well as throughout the trilogy, the tension between male and female. Clytemnestra and Orestes can debate the contributions of, and the impositions upon, men and women in the community (Lib. B. II. 911-21). And, of course, Clytemnestra can invoke the natural respect a son has for his mother (Lib. B. II. 896-98). The Chorus had anticipated this invocation: they had made much more of the Olympian gods, who
tend to be male in their stance, than of the primitive earth divinities, who tend to be female; they had made more of fathers than of mothers, of the male than of the female (Lib. B. II. 783-837). They had counselled Orestes that if Clytemnestra should plead "Son" to him, he was to shout "Father" in response to her (Lib. B. II. 826-30).

Clytemnestra, I have already indicated, can be thought of as the one character in the trilogy, before the efforts of Athena in The Eumenides, who attempts to bridge somewhat the gulf between male and female. She is a wife (the Greek word for wife is also the word for woman); but whether she can be thought of as a loving wife, which is what women are supposed to be, is, to say the least, questionable (Lib. B. II. 89-90). She does seem to speak to and of Aegisthus with affection, both in the Agamemnon and in The Libation Bearers.

Even so, Clytemnestra does seem more manly than Aegisthus. True, she defers to Aegisthus when she first talks to Orestes when he appears in the guise of a stranger: she defers to the men of the household if there is serious business to be discussed with outsiders (Lib. B. II. 668-73). But one suspects that she is playing a role here, just as she had done in the Agamemnon when she had welcomed her husband home and just as she is to do later when she laments upon hearing of Orestes' supposed death (Lib. B. II. 691-99).124

Clytemnestra is more manly than Aegisthus. We hear shrieks when Aegisthus is killed by Orestes (Lib. B. I. 869). Not so when Clytemnestra is killed: in fact, when she realizes what is happening, she calls for a battle-ax (Lib. B. II. 887-89).

IV.

The play is half over before the Chorus of slave women are given a conventional choral speech to deliver. In that speech much is made by them of the consequences of the conduct of overbold men and of passionate women (Lib. B. II. 585-651). After the Chorus recount the vivid stories of various women who went wrong, especially in marriage, the action can proceed (Lib. B. I. 653). This recollection serves to remind us that the proper sphere for men is the city, that for the women is the household—with overreaching a serious failing of men and undue passion a serious failing of women.125

It may be because this chorus of women do "know" the proper place of women, in subordination to men, that they can resent as
much as they do the rule of Clytemnestra and Aegisthus, which is
for them really the rule of Clytemnestra, even though we realize
that Aegisthus is the one who carries in his veins the blood of the
royal house of Pelops.

Various things the women say indicate their Eastern origins
(e.g., Lib. B. ll. 423-24). Perhaps they come from Persia or else-
where in the East. Perhaps they even come from Troy: if so, they
were part of the booty of Agamemnon, that wealth brought home
from Troy which is referred to in the play (Lib. B. ll. 135-38). If
they were brought to Argos from Troy, they may have aroused in
Clytemnestra the resentment that she seems to have had all along
toward anything connected with Troy. (Consider, for example,
how the captive Cassandra was regarded and treated by her in the
Agamemnon.)

Wherever the Chorus came from, they claim that both West and
East share the same law (Lib. B. ll. 400-04). This is so if the law is
generally what they say it is, a law which makes much of retribu-
tion. This means, among other things, that the Chorus can speak
of the just retribution which came to Priam and his sons, which
retribution is now visited on Clytemnestra and Aegisthus (Lib. B.
ll. 935-71).

V.

It is late in the play when the Chorus speak thus of Troy. When
Orestes had mentioned the overcoming of Troy as a mark of Aga-
memnon’s spirit, they in their response did not mention Troy but
emphasized hate returning for hate, and this is called justice (Lib.
B. ll. 297-314).

The Chorus do seem reconciled to their fate: they can recognize
“Almighty Destinies” (Lib. B. l. 306). This, it seems, accounts for
their situation. They are somewhat reconciled to their fate only if
they have an appropriate master. The male is preferred by them to
the female, just as they recognize Zeus as “father of Olympian
gods” (Lib. B. ll. 783-84). They do not consider themselves to have
been treated kindly by their current mistress (Lib. B. ll. 22-84).
Besides, Orestes, if he is supported by them, would owe them spe-
cial consideration.

Generally, the Chorus seem to say, a woman is not a fit ruler.
They seem to assume that a city thus ruled is not of sufficient stat-
ture to dignify their subjugation enough to make it endurable.
Otherwise their lot is simply a bitter one (Lib. B. ll. 76-84). Aga-
memnon can be referred to by them as a king (Lib. B. ll. 354-62).
A royal title is never given by them to Clytemnestra (nor, of course, to Aegisthus). Orestes can ask, when he appears as a stranger at the palace, for the *Kyriosidomato*, the lord of the house (*Lib. B. I. 658-67*). Agamemnon is referred to by the Chorus as despoti, or their fallen lord (*Lib. B. I. 153*). The Chorus refer to Clytemnestra and Aegisthus as kratountas, those who hold us (*Lib. B. I. 264*); strangely, the same term, kratousi domaton, or holder, can be used by Clytemnestra when she refers to Aegisthus (*Lib. B. I. 716*). Does this reveal what she really thinks of him? One cannot help but wonder whether this pair always doubted their legitimacy. Did they hold only by sufferance, so to speak (*Lib. B. II. 535-37, 942-45*)?

The Chorus, it would seem, consider themselves held by unnatural masters—and this contributes to their frenzy, a frenzy that is perhaps grounded in the fact that they are foreign women. The Chorus's central speeches in the play (numbers thirty and thirty-one of sixty speeches) have them telling Orestes how his father's corpse had been mutilated before burial and then urging Orestes and Electra to be firm and hard in what lies ahead (*Lib. B. II. 439-44, 451-55*). It is the Chorus who use the most brutal and provocative language in the play. Certainly, they are less restrained than Orestes, and they reinforce the tendency in Electra to let herself go (*Lib. B. II. 181-82*.) Again and again they insist that the key to justice is revenge (*Lib. B. I. 123*) Orestes, too, can come to speak of justice as dependent on reciprocity (*Lib. B. II. 556-59*). But he can also make much of justice as obedience to a god's command (in this case, Apollo's), especially since he believes that it is better for one to hurt another than to be hurt oneself by that god (*Lib. B. II. 269-305*).

But it should be noticed about the Chorus that they do respond in a more restrained way than does Electra to Orestes' wish that his father had died a hero's death at Troy (*Lib. B. II. 354-62*). Electra does not go along with him: she wishes that her father had come home and killed his enemies before they killed him (*Lib. B. II. 363-71*). The Chorus, on the other hand, imagine how the great fallen king would have been received in Hades by his fallen companions if he had died at Troy. Perhaps their uncharacteristic preference here for the milder alternative is moved by their awareness (never made explicit) that if Agamemnon had been killed at Troy, that city might never have fallen and they might not now be enslaved (whether they were taken at Troy or elsewhere during the long campaign by Agamemnon).
One must wonder whether the Chorus ever appreciate Orestes’ motives in his attack on his mother. Theirs is bound to be, it seems, a bitterer, pettier, more limited view of things. One would expect women, and especially foreign women, we seem to be told, to be more family-minded, less political, in their interests and allegiances.\footnote{127}

Much is made by the Chorus of order, an order firmly grounded in a kind of justice (Lib. B. ll. 783-837). Such an order can lead to what they call liberty, a liberty which they can share as beneficiaries of orderly rule. After Orestes has killed Clytemnestra and Aegisthus, the Chorus can assure Orestes he has done well, liberating Argos and so forth (Lib. B. l. 1043).

VI.

The Chorus had been instructed by Orestes, as he proceeds to execute his plan, that they should speak only “in the way that will help”; otherwise they are to remain silent (Lib. B. ll. 580-84). He does not seem to expect much, if anything, from them. He does not even allude to their grievances when he lists the grievances against Clytemnestra and Aegisthus (Lib. B. ll. 246-63). Nor are their grievances noticed later by Electra when she prays to her father (Lib. B. ll. 332-39). Similarly, when the Chorus counsel Electra on what to say when she is to pour the libation at her father’s tomb, she is to ask for someone “to kill them [Clytemnestra and Aegisthus] for the life they took” (Lib. B. l. 121) Cassandra, of course, does not figure in anyone’s reckoning on this occasion.

Even so, this Chorus does get involved in the action. Few if any other choruses in Greek tragedy do as much as the Chorus in The Libation Bearers. For it is they who, on their own, improvise the strategy that will induce Aegisthus to return without his armed retinue to the palace upon being bidden by Clytemnestra. That is, it is they who instruct the nurse, another foreign slave woman, to alter significantly the message she is to carry from Clytemnestra to Aegisthus (Lib. B. ll. 770-73)

Perhaps it should even be said that this decisive intervention by them is indeed a blow for liberty: for they have affected, or at least they seem to have affected, the course of events in Argos more than ordinary citizens there have done. To act thus is to be, if only for a moment, rulers and not mere slaves, and hence free.

Their boldness takes them only so far, however. The Chorus stand aside, after Aegisthus’ death, lest they be blamed (Lib. B. ll. 870-74). But this may be only “realistic” on their part: they did
what they could do, and there is no sense in now courting trouble for its own sake. Surely one cannot be free if one does not sense the limits of one's powers as well.

It may be the Chorus, more than the others in The Libation Bearers, who sense that there are likely to be troubles after the killing of Clytemnestra. This may be seen early in the play; but they seem to suppress their foreboding (Lib. B. ll. 463-78). They do say after the killing of Clytemnestra that the House of Atreus is now free from the afflictions it had suffered (Lib. B. ll. 961-71). But this may be due to the euphoria following immediately upon the successful execution by Orestes of his plot. After they see the bloody robe of Agamemnon, they observe that no one may escape scatheless, that one tribulation follows another (Lib. B. ll. 1018-20). It is immediately after this that Orestes begins to see the Furies.

The Chorus seem, by the end of the play (which is shortly thereafter), to have been somewhat tamed. Certainly, they sum up, in a rather sober manner, the three-fold tempest that has shaken the House of Atreus.²

VII.

It does seem fitting that Orestes should first “see” the Furies as he is talking to the Chorus at the end of The Libation Bearers. The Chorus in this play do not see the Furies; neither do we on this occasion. What we can see are the Chorus—and, it can be said, it is really the Chorus that Orestes can see as the Furies. After all, the Furies, too, are female (more or less), garbed in black, “foreign,” and implacable or fierce. They too can be referred to as the women who “serve” this house (Lib. B. ll. 10-11, 84, 719, 1048).

The Chorus of slave women are more like Electra than they are like Orestes—or, rather, Electra is more like them than is Orestes. They, unlike Orestes, are more interested in family and “personal” matters than in political, including dynastic and property, matters.

Electra does not have anything to say in The Libation Bearers after the killings. Nor do we ever hear either Electra or the Chorus speaking with Clytemnestra. Are Electra and the Chorus counterparts, so to speak, of Clytemnestra? Do they represent the Clytemnestra element on Orestes’ side of this conflict? Aeschylus’ Electra, it can even be said, existed only in her hatred of her mother. She never expressed any of the reservations about the killing of a parent that Orestes did. She is not permitted to exult over the corpses as
Clytemnestra had done in *Agamemnon*. She dies, so to speak, along with Clytemnestra. The importance of the Chorus is pointed up not only by all they have said and done, and especially by their timely intervention in the action, but also by the very fact that they replace Electra in the second half of the play.

VIII.

There is something enduring about this Chorus of slave women. The successors to the Chorus of slave women in the *Libation Bearers* are, in the structure of this trilogy, the Furies in *The Eumenides*. Thus, there is a movement (a sort of decline) from the Chorus of Argive elders in the *Agamemnon* to the Chorus of slave women in *The Libation Bearers* to the Chorus of Furies in *The Eumenides*.

Perhaps, indeed, one can say that the motivation of the slave women in *The Libation Bearers* cannot properly be understood without probing the psyche of the Furies. But that, too, must be reserved for another occasion. We can notice, however, that there is a second chorus that emerges in *The Eumenides*, a silent chorus of Athenians, both men and women. This mixed chorus points to what may be needed to resolve, or at least to ameliorate, the struggle evident throughout the *Oresteia*.

IX.

The male-female struggle, we have noticed, runs throughout the trilogy. It is reflected in the distinction between the Olympian and the earth divinities, between the new and the old, and between the city and the family.

It takes Athena—who is (and considers herself to be) peculiarly, perhaps even uniquely, associated with both the male and the female—to resolve this struggle as well as it can be among human beings. Male dominance seems to be recognized. (It may even be suggested by the very name of the trilogy.) But there is still a significant place recognized for the female element.

The Furies are transformed, with their consent (however much the decisive persuasion was reinforced by judicious threats), into benevolent females serving the household. The Furies in *The Eumenides*, like the slave women in *The Libation Bearers*, seem to be sobered by their experience, by their need to come to terms with the new order.

Perhaps it can be said of both sets of females in the two plays that they are eventually liberated from implacable passions which,
however vital to humanity at one time, have outlived their usefulness, at least in their most primitive form.

2-B. The Character of a Matricide

I.

In The Libation Bearers of Aeschylus, we have noticed, Clytemnestra and Electra never appear on stage at the same time. In the Electra plays of Sophocles and Euripides, on the other hand, mother and daughter do appear together and talk to one another. How is Aeschylus' arrangement of things to be understood?

Clytemnestra and Electra seem to be, we have also noticed, quite similar women in critical respects which distinguish them from Orestes (their son and brother, respectively). Orestes does appear with each of them—and perhaps may best be understood as in fundamental opposition to both of them, so much so as to make it plausible that he should be singled out for a fate radically different from that suffered theretofore in the House of Atreus.

Electra, it is true, does not exhibit in The Libation Bearers the bitter vindictiveness evident in the Sophoclean and Euripidean versions of this story. Even so, there is a decisive difference between Electra and her brother. Orestes addresses his murdered father (Lib. B. ll. 345-53):

If only at Ilium, father, and by some Lycian's hands you had gone down at the spear's stroke, you would have left high fame in your house, in the going forth of your children eyes' admiration; founded the deep piled bank of earth for grave by the doubled water with light lift for your household . . .

The Chorus (of serving women) pick up Orestes' theme and seem to endorse it. Electra, however, wishes a different fate for her father (Lib. B. ll. 363-71):

No, but not under Troy's ramparts, father, should you have died, nor, with the rest of the spearstruck hordes have found your grave by Scamandrus' crossing. Sooner, his murderers should have been killed, as he was, by those they loved, and have found their death, and men remote from this outrage had heard the distant story.

The Chorus dismiss Electra's sentiments here as "dreaming"—and remind both of them of the killing to be done.

Early in the play, Electra had expressed the prayer, "And for myself, grant that I be more temperate of heart than my mother; that I act with purer hand" (Lib. B. ll. 140-41). But this was when she was most conscious of her helplessness. She speaks in a differ-
ent vein when she is united with Orestes and can look forward to
the revenge she longs for (*Lib. B.* ll. 420-22):

So let her [Clytemnestra] fawn if she likes. It softens not,
For we are bloody like the wolf And savage born from the savage
mother.

Although Electra portrays both Orestes and herself like "the sav-
age mother," what she says applies more to herself than to him, as
is evident upon comparing the passages I have quoted about the
wished-for fate of Agamemnon.

Orestes seems to see all this from the man's viewpoint: a hero's
death and burial are much preferred—and thereby the avoidance
(for himself included) of bloody business at home. But Electra is
very much her mother's daughter: would not Clytemnestra, too,
have genuinely mourned the death of Agamemnon at Troy, a death
which would have deprived her of revenge?

Clytemnestra and Electra are so much alike that only one need
appear on stage at a time. The fact that there is not even a refer-
ence to Electra after she leaves the stage suggests that she "dies"
with Clytemnestra. Or, put another way, this Electra has no
meaning after Clytemnestra dies. Thus we see Orestes dealing not
only with Clytemnestra as victim but also with Clytemnestra as
ally, in the form of Electra.

II.

All this bears upon the conduct and fate of Orestes. He may, we
have seen, share some of Electra's passions and motives—but they
are not decisive with him. He may even sense that Electra needs to
be protected from further participation in the matricide to which
he is dedicated. He directs her to go indoors and to keep watch
(*Lib. B.* ll. 554, 579). But she is not involved later in the manner
that the Chorus is. A matricide by Electra might have been impos-
sible to purge: she had not been commanded, in the manner that
Orestes was, by Apollo; rather, she relied only on what we may call
"human reasons," reasons of the kind her mother had had in kill-
ing Agamemnon. Another way of putting the difference may be to
say that Electra has been corrupted by having lived in Argos with
Clytemnestra and with the curse of the House of Atreus, whereas
Orestes has been fortunate to have lived elsewhere (and, indeed, in
the vicinity of Apollo's shrine?) during his formative years.

The Chorus counsel Orestes (*Lib. B.* ll. 826-30):

Be not fear struck when your turn comes in the action but with a
great cry Father when she cries Child to you go on through with
the innocent murder.

But when the decisive moment comes—a moment which leads to
Orestes’ only hesitation and to Pylades’ only speech in the play—,
recourse is had by Orestes not to the “Father” counselled by the
Chorus but to the name of Apollo (Lib. B. ll. 896-903):

**Clytemnestra:**
Hold, my son, Oh take pity, child, before this breast where many
a time, a drowsing baby, you would feed and with soft gums
sucked in the milk that made you strong.

**Orestes:**
What shall I do, Pylades? Be shamed to kill my mother?

**Pylades:**
What then becomes thereafter of the oracles declared by Loxias
[Apollo] at Pytho? What of sworn oaths? Count all men hateful
to you rather than the gods.

**Orestes:**
I judge that you win. Your advice is good.

Thus, Apollo is set above whatever tie Orestes may have not only
to his mother but also to his father and sister. When Orestes
comes to begin his justification of the matricide, he stresses the
command given him by Apollo (Lib. B. l. 1030).

**III.**

I have observed that human reasons cannot suffice for matricide.
Perhaps the same can be said as well about what Agamemnon did
to Iphigenia (albeit with some degree of divine sanction), about
what Clytemnestra did in turn to Agamemnon, and about what
Electra would like to do to Clytemnestra. Such reasons are “un-
derstandable”—but they leave a pollution which cannot be
cleansed but (if anything) somewhat expiated. Only a god’s com-
mand can justify matricide, just as only a divine command can jus-
tify what Abraham was prepared to do to Isaac. (No other pious
Jew is expected to do on his own what Abraham tried to do to his
son.)

That is to say, one cannot reason to the conclusion that one’s
parent should be killed: this highly questionable act cannot be ar-
rived at by analysis and calculation. For this reason, one can ar-
gue, Apollo’s reason (or Zeus’, if Apollo is primarily his agent)
must remain mysterious. Otherwise, men too can reach such con-
clusions on the same basis.¹³⁰

Orestes’ deed is not a precedent for men thereafter: a son can
(should?) insist, the next time such a problem arises, “Apollo must
speak to me as he did to Orestes! Otherwise, I will commit no
matricide.” That is, the impious act of matricide (or patricide) can
be excused only by the piety of conforming to a god’s decree—to
the decree of a god with authority to govern the affairs of men.
The *Oresteia* can be said to confirm and even reinforce the prohibi-
tion of parent-killing. Or, put another way, it has always been rec-
ognized by the thoughtful that the rule of the truly wise is superior
to the mere rule of law.

One wonders why Apollo insisted upon having Clytemnestra
killed and why she should have had to be killed by Orestes (and
not, say, by Pylades). Perhaps we are meant to notice both that
Apollo does not give reasons and that Orestes does not ask why he
should have been chosen. Perhaps we are also meant to notice that
Orestes is, like Abraham, truly a pious man in that he does not
question the divine message.

Men cannot help but wonder about why the gods move as they
do, if only to assure themselves that the manifestations that are
said to be the movements of gods are indeed so. The poet, at least,
claims to know something critical about how the gods can be ex-
pected to act. We must reserve for another occasion, however,
whatever speculations we may dare to entertain about why it is
that Apollo moves as he does to bring to a close in this manner the
curse of the House of Atreus. It suffices to notice here that Orestes
is in many ways a stranger to Clytemnestra (with his nurse more of
a mother to him in some ways) and that he can say in response to
Clytemnestra’s observation, “I think, child, that you mean to kill
your mother,” “No. It will be you who kill yourself. It will not be
I” (*Lib. B.* ll. 923-24).\(^{131}\)

2-C. *The Hunting of Orestes*\(^{132}\)

I.

In *The Eumenides*, the final play in the *Oresteia* trilogy, there are
to be found a few lines which make up one of the richest passages
in ancient dramatic literature. These are the lines about Orestes
addressed by the Ghost of Clytemnestra to the sleeping Furies in
the Temple of Apollo at Delphi (*The Eumenides* ll. 111-13):

[H]e is out and gone away like any fawn so lightly, from the very
middle of your nets, sprung clear, and laughing merrily at you.

To speak as I have of these lines may only mean that I have been
infected by the extremism that Clytemnestra represents in this
play. Even so, to speak thus is to be, as with her, not without
effect. At the very least, we can work from this passage, and from
the speech in which it is found, to some perhaps useful suggestions about the entire play, if not about the trilogy as a whole.

II.

In the first play of the trilogy (Agamemnon), it will be remembered, the conqueror of Troy returns to his native Argos, after a decade at war, to be greeted by his wife Clytemnestra and thereafter to be slaughtered in his bath by her and her lover, Aegisthus. The sacrifice by Agamemnon of his daughter Iphigenia, at the outset of the war, had driven his wife to take revenge on him.

In the second play of the trilogy (The Libation Bearers), Orestes, the son of Agamemnon and Clytemnestra, returns home in disguise, makes common cause with his sister Electra, and thereupon (with the assistance of his comrade, Pylades, and of the Chorus of slave women) slaughters his mother and her lover. It is insisted throughout the play that this matricide is ordained by Apollo.

The action of the third play (The Eumenides) is conveniently summarized for us in the argument provided in the Loeb Classical Library edition of the trilogy:

The priestess of Apollo discovers Orestes as a suppliant in the inner shrine of the god at Delphi, and fronting him the Erinyes [Furies] of his mother, a band of fearsome creatures who, weared with the pursuit of the fugitive, have fallen on sleep. Under promise of his support, Apollo bids Orestes flee to Athens, where he shall submit his case to judgment and be released from his sufferings. The ghost of Clytemnestra rises to upbraid the sleeping Erinyes because of their neglect, whereby she is dishonored among the other dead. Awakened by her taunts, they revile Apollo for that he has given sanctuary to a polluted man whom they rightly pursue by reason of their office—to take vengeance on all who shed kindred blood.

The scene shifts to Athens, whither [Orestes'] pursuers have tracked their prey. Orestes, clasping the ancient image of Pallas [Athena], implores her protection on the plea that the blood upon his hands has long since been washed away by sacred rites and that his presence has worked harm to none who have given him shelter. The Erinyes chant a hymn to bind the soul of their victim with its maddening spell. In answer to Orestes' call, the goddess [Athena] appears and with the consent of the Erinyes undertakes to judge the case, not by herself alone but with the assistance of a chosen number of her best citizens who are to constitute the jury.

The trial opens with Apollo present as advocate of his suppliant and as representative of Zeus, whose commands he has merely to
set forth in all his oracles. Orestes, he declares, slew his mother by his express behest. The accused confesses to the deed but urges in his defence that in killing her husband Clytemnestra killed his father and that his accusers [the Erinyes] should justly have taken vengeance upon her. On their rejecting this argument on the ground that the murderess was not blood-kin to him she murdered, Orestes denies blood-kinship with his mother; in which contention he is supported by Apollo, who asserts that the father alone is the proper parent of the child, the mother being only the nurse of the implanted seed.

Athena announces that the court, the first to try a case of homicide, is now established by her for all time to come. The jury cast their ballots; and the goddess, declaring that it is her duty to pronounce final judgement on the case, makes known that her vote is to count for Orestes, who is to win if the ballots are equally divided. Proclaimed victor by the tie, Orestes quits the scene; his antagonists threaten to bring ruin on the land that has denied the justice of their cause. It is the part of Athena by promises of enduring honors to assuage their anger; and now no longer Spirits of Wrath but Spirits of Blessing, they are escorted in solemn procession to their sanctuary beneath the Hill of Ares.133

III.

Our concern on this occasion will be in large part with what Clytemnestra had to say, through her Ghost, to the sleeping Furies. Orestes has fled to Athens, where (it is said in the summary) “he shall submit his case to judgment and be released from his sufferings.” It is thereupon said in the summary, “The ghost of Clytemnestra rises to upbraid the sleeping [Furies] because of their neglect, whereby she is dishonored among the other dead.” The only thing that really matters, it seems, is what happens on earth. (This is, in effect, what Achilles in Hades says to Odysseus in Book Nine of Homer’s Odyssey.)

What we have here is Clytemnestra’s petition for redress of grievances. This petition, addressed by the Ghost of Clytemnestra to the sleeping Furies, consists of some forty lines. These lines have been rendered in this fashion (Eum. ll. 94-139):

*Clytemnestra*:
You would sleep, then? And what use are you, if you sleep? It is because of you I go dishonored thus among the rest of the dead. Because of those I killed my bad name among the perished suffers no eclipse but I am driven in disgrace. I say to you that I am charged with guilt most grave by these. And yet I suffered too, horribly, and from those most dear, yet none among the powers
is angered for my sake that I was slaughtered, and by matricidal hands. Look at these gashes in my heart, think where they came from. Eyes illuminate the sleeping brain, but in the daylight man's future cannot be seen.

Yet I have given you much to lap up, outpourings without wine, sober propitiations, sacrificed in secrecy of night and on a hearth of fire for you, at an hour given to no other god. Now I watch all these honors trampled into the ground, and he is out and gone away like any fawn so lightly, from the very middle of your nets, sprung clear, and laughing merrily at you. Hear me. It is my life depends upon this spoken plea. Think then, o goddesses beneath the ground. For I, the dream of Clytemnestra, call upon your name.

(The Furies stir in their sleep and whimper.)

_Clytemnestra:_
Oh, whimper, then, but your man has got away and gone far. He has friends to help him, who are not like mine.

(They whimper again.)

_Clytemnestra:_
Too much sleep and no pity for my plight. I stand, his mother, here, killed by Orestes. He is gone.

(They moan in their sleep.)

_Clytemnestra:_
You moan, you sleep. Get on your feet quickly, will you? What have you yet got done, except to do evil?

(They moan again.)

_Clytemnestra:_
Sleep and fatigue, two masterful conspirators, have dimmed the deadly anger of the mother-snake.

(The Chorus start violently, then speak in their sleep.)

_Chorus:_
Get him, get him, get him, get him. Make sure.

_Clytemnestra:_
The beast you are after is a dream, but like the hound whose thought of hunting has no lapse, you bay him on. What are you about? Up, let not work's weariness beat you, nor slacken with sleep so you forget my pain. Scold your own heart and hurt it, as it well deserves, for this is discipline's spur upon her own. Let go upon this man the stormblasts of your bloodshot breath, wither him in your wind, after him, hunt him down once more, and shrivel him in your vital's heat and flame.

Only after the Ghost concludes her protest and exhortation and then disappears do the Furies awake, revile Apollo for his intervention and leave in pursuit of the fleeing Orestes.
At the heart of Clytemnestra's forty-some lines are to be found the lines which make up, I have suggested, one of the richest passages in ancient dramatic literature (Eum. ll. 111-13):

[H]e is out and gone away like any fawn so lightly, from the very middle of your nets, sprung clear, and laughing merrily at you.

One interesting feature of these lines is that they direct attention to the hubristic character of what Orestes is seen to have done and to be doing. Clytemnestra here is particularly sensitive to what constitutes insolence in such circumstances. Her perceptiveness (or, if you will, Aeschylus') may be confirmed by Aristotle's discussion of anger in the Rhetoric. Hubris, he says,

consists in doing or saying things that cause shame to the victim, not in order that anything may happen to you, nor because anything has happened to you, but merely for your own gratification. Hubris is not the requital of past injuries; that is revenge. As for the pleasure in hubris, its cause is this: men think that by ill-treating others they make their own superiority the greater. Aristotle concludes his discussion of anger with a long series of instances of the kind of persons with whom men grow angry. "First," he says, "come those who laugh at them, or sneer at them, or make scornful jests about them; for such persons insult them [commit hubris]." Indeed most, if not all, of the other instances in this long list can be understood as forms (some concealed, others implied, still others in variant forms) of the open laughing and mocking described in the first instance I have just noticed. This is, it can be said, the crudest (and hence, in a way, the purest) form of hubris. It is precisely this form which is to be found at the heart of Clytemnestra's petition. It is bad enough for Orestes to escape, but to treat the Furies so cavalierly is (Clytemnestra suggests) insufferable.

It is no wonder then that this image of the mocking Orestes should be central to Clytemnestra's account. But it is not this alone which justifies my suggestion that this is one of the richest passages in ancient dramatic literature, but something else vital to these lines: this description is not really of Orestes but rather of Clytemnestra herself! Orestes is doing anything but laughing merrily at his escape; he is certainly not mocking the Furies. Rather, he is still what he was at the conclusion of The Libation Bearers, a man suffering from the inevitable torments of his matricide, a man who is haunted and desperate. Clytemnestra's description of Orestes is, I have suggested, a description of Clytemnestra herself—that
is to say, it is a description of an Orestes fashioned in Clytemnestra's image: she would laugh merrily and skip derisively if she could have her revenge and escape. She thus sees others through her vengeful psyche.

Consider, for example, Clytemnestra's remarkable exultation, in the first play of this trilogy, upon killing Agamemnon (Ag. ll. 1372-98). She "lives" for and in such revenge. Thus, in The Eumenides she can urge the Furies (we are back at the center of her petition in The Eumenides), "Hear me. It is my life [that] depends upon this spoken plea" (Eum. ll. 113-14). These lines reveal Clytemnestra's character most graphically, illuminating thereby everything she has said and done in the trilogy.

Clytemnestra is completely self-centered in her petition to the Furies. She is concerned only for herself. She does not care at all for Orestes as a son, at least so long as he is alive and a threat to her. She never refers to Agamemnon (except perhaps by implication, in the opening lines of her petition) or to Aegisthus her lover. She wants self-gratification only in the form of revenge. Critical to her petition is the fact that a woman has been slain by her child. Even so, there is something monstrous in her: her affront, when Iphigenia (who is not mentioned either) was sacrificed for a political cause, has led her into a career that finds her pursuing relentlessly another child of hers for a personal cause. Only her suffering matters: those who thwart her self-gratification are seen to be scorning and challenging her, thereby inviting even more of her enmity.

V.

Orestes' matricidal deed has unleashed primitive forces, which are seen not only in Clytemnestra's passion but also in the physical forms of those to whom she looks as allies. There are various indications even in Clytemnestra's petition of the primitiveness of the Furies and their concerns. No wine is used in their sacrifices, it seems, perhaps because their sacrifices are very old, dating back before men developed agriculture and cultivation of the grape. The darkness of the hour of sacrifice for the Furies is indicated, perhaps also the secretiveness. Elsewhere in the play, the Furies invoke their mother, Night (Eum. l. 322). These divinities are to be contrasted to the divinities around Zeus, such as Apollo and Athena. The Furies are more or less female, very old, ugly, dark; the Olympians are male in their inclinations, young, beautiful, shining. There is about the Furies something unreasoning, unre-
lenting, instinctive (even if, at times, self-defeatingly so?). The
mother-snake, which burrows into the ground, is connected with
them. Something of their primitiveness may also be indicated by
their lack of inventiveness: they are the only ones in The Eumeni-
des who repeat speeches (Eum. ll. 778-93, 807-22). The upper
gods, it can be noticed, were often worshipped on “high places”;
the way to reach the lower powers was by scooping out a hollow in
the ground to receive the offerings for them.

The primitiveness of the Furies’ concern may be seen as well in
the insistence throughout the play on hunting motifs, on the almost
instinctual hunting dogs which Orestes’ deed has unleashed. We
have already seen that Clytemnestra has likened Orestes to an es-
caping fawn. The Furies see themselves as the hound pursuing a
bleeding fawn (Eum. ll. 245-48). Even while they sleep, their
moans represent the whining and growling of hounds. Perhaps
it should also be said that such primitiveness can be expected to
continue to manifest itself in dreams long after it has had to be
repudiated in everyday life.

The strength of these primitive forces may be seen in Apollo’s
rationalization during the course of Orestes’ trial: he suggests that
the true parent of a child is the father, that the female merely nour-
ishes the seed planted by the male (Eum. ll. 608, 658, 736). Still,
Aeschylus and his contemporaries must have observed what we see
all the time, that there are some children who very much favor
their mothers or their maternal grandparents. The Furies do see
themselves as assigned to deal with those men of proud thoughts
who flaunt themselves (Eum. l. 368). (This again reminds us of the
central lines of Clytemnestra’s petition.) Whether Orestes is such a
man is another question. Certainly he, in his reliance on Apollo, is
confident (Eum. ll. 593-96). But does Clytemnestra misread such
confidence (if not even piety) as arrogance, because of the condi-
tion of her own soul?

Arrogant men do have to be guarded against. Consider the ju-
risdiction of the Furies: the irreverence exhibited toward the di-
vine, the stranger, or a parent (Eum. ll. 270-72). Stranger and
parents are obviously quite vulnerable to the assaults of the arro-
gant. Are they not in need, then, of special protection? Violence,
the Furies argue during the trial of Orestes in Athens, “is the child
of vanity; but out of health in the heart issues the beloved and the
longed-for prosperity” (Eum. ll. 532-37). They plead for a kind of
moderation, as does Athena (Eum. ll. 527, 696). To recognize the
virtue of moderation is to encourage reasonableness.
VI.

There is in Clytemnestra’s petition no reasonableness, no recognition of any justification or right on Orestes’ part. No doubt, a good deal can and should be said for mothers generally. But Clytemnestra’s case does seem to be special, as is evident in that Apollo did issue, presumably on the authority of Zeus, an explicit command that her son kill her. The dubiousness of her case is even recognized at the outset of her petition (Eum. ll. 95-96), when she reports that she is “dishonored . . . among the rest of the dead.” She is correct about what her reputation had become and was to be. Thus, a Roman lady in Cicero’s time could be disparaged as a “fourpenny Clytemnestra,” for having murdered her husband.3

In any event, Clytemnestra’s fellow-dead evidently regard what she had done to Agamemnon as worse than what had happened to her at the hands of Apollo and Orestes. Does not this anticipate the final disposition of the controversy?

Still, that there is something to Clytemnestra’s complaint may be seen in the fact that a place has to be found for the Furies in Athens, once Orestes has been vindicated.139 I have noticed various conflicts—or one conflict with multiple facets—in the relations between the Furies and the Olympians (Eum. ll. 149-77). In conflict here are the old and the new, the indoor and the outdoor, the female and the male, the dark and the light, the underground and the aboveground.140

It can never be a question of eliminating completely either side of any of these pairs. Rather, it is a question, in each instance, of dominance. We see here the ascendancy of the city—the city and its gods, the Olympians—over the family. Apollo was indignant with Clytemnestra over the killing of Agamemnon, a highborn man invested by the gods with the scepter of rule. That he was done in at the hands of a woman using nets only made matters worse (Eum. ll. 625-39). But the city in its ascendancy is generous, as well as apprehensive, in dealing with the Furies. Indeed, one can say, the city is generous because it (guided by Athena) is properly apprehensive, aware of the primitive elements in the soul that the Furies minister to. So a place does have to be found for the Furies in Athens, with the transformation of the primitive forces of vengeance into supports for institutionalized love. Certainly, the new gods stress more than the Furies did the benefits and privileges of spouses and of love connections (Eum. ll. 213-24). The Olympians themselves did marry and beget children, unlike the repulsive Furies. The political context of these generative activities is
stressed. Much more is generally made by the Olympians of political life, of the "outdoor" life of men, so to speak—and of the civic virtues related to such a life. It is not inconsequential in the Oresteia that Orestes is recovering his royal patrimony and that Argos will ever after have a special regard for Athens.\textsuperscript{141}

The Furies, in their traditional role, remind us of passions and disruptions that precede the city and upon which the city is built. Still another set of reservations, also useful to keep in mind, is generated not by the primitive Furies who precede the city but by cosmopolitan men who consider themselves to have transcended the city. I can do no more than to indicate here another complaint against Orestes, Apollo and the like, or at least their natural successors. It is not a complaint that Clytemnestra can make, considering her temperament, but still it should be kept in mind in evaluating what is presented in the Oresteia. This complaint is conveniently found presented for us, albeit from the perspective of Descartes, in an essay on political philosophy:

While the pagan writings [the moral teachings of the Stoics, but also those of Platonic and Aristotelian political philosophy] contain many "exhortations to virtue which are most useful," the "superb and magnificent palaces" of virtue are "built on sand and mud." What the pagans "called by such a beautiful name," i.e., "virtue," is "often only insensibility, or pride, or despair, or parricide." Pagan virtue which claimed to be a mean, and the excellence of man, is therefore often an extreme, and an inhumane, presumptuous, poor-spirited, and even criminal extreme.\textsuperscript{142}

Such sentiments should be kept in mind, I have suggested, in assessing and hence truly seeing what Orestes has and has not done.

VII.

Now, a final word about Clytemnestra. I have suggested that she cannot be rehabilitated. By the time of The Eumenides she is no more than a ghost, a kind of dream for the Furies. In the first play of the trilogy, she (in her full strength) scorns dreams; in the second play, she is (on the eve of her death) terrified of her dreams; and in the third, she has become a dream. In The Eumenides the Furies do not begin to speak and act until Clytemnestra goes. They replace her—or, rather, they are always, and she is replaced by them in this situation. Clytemnestra disappears, sinking into the ground, it seems, once her grievances are vented. A place can be found for the Furies, properly reconstructed. But Clytemnestra can only be herself.\textsuperscript{143}
She is never referred to by name after her ghost disappears. Agamemnon is named by Orestes, when he identifies himself in Athens; and Orestes himself is several times referred to by name. But Clytemnestra's name is used only once in the play, and that once by herself in the petition we have examined (Eum. I. 116). One consequence of such a desire for revenge as possessed her, it seems, is that the desire for revenge becomes dominant and her personality becomes secondary or virtually nonexistent. Thus, she becomes almost incoherent in her passion. Everything is seen by her in terms of her desire for revenge, including, as we have seen, the depiction of Orestes as merrily fleeing retribution.144

Clytemnestra as a "personality" has no just claim, only Clytemnestra as a mother. But is it the personality (or individual psyche) that wants revenge, not truly the mother? Is she virtually destroyed because of what she did to her husband and what she wants to do to her son? Is not everything in the world reduced by her to a hunt, to the demands of the chase, first against her husband, later against her son? All that which is not hunting—including, it would seem, those things for the sake of which one ordinarily hunts, those things which are at rest, the things which endure—all that which is not hunting is forever beyond her range.

2-D. Queries About the Oresteia

I.

The Oresteia of Aeschylus was first performed in Athens in the spring of 458 B.C., a couple of years before the playwright's death. Ever since then, we are told, this trilogy "has been regarded by all sensitive critics as one of the most (if not the most) magnificent and powerful achievements of man in drama."146

The complexities of the trilogy—the only trilogy that has survived intact from ancient Greece—are testified to by its repeated references to nets, hearkening back to the net in which Agamemnon was enmeshed so that he could be safely killed by his wife Clytemnestra with the aid of her lover Aegisthus. All of the characters in the trilogy, it seems, are caught in a complicated web, which has been generations in the weaving, which it will take considerable skill and patience to unravel.

An initial inquiry, which could be instructive to consider but which we will do little more than touch upon here, is what Aeschylus had to work with in fashioning his trilogy. His purpose, or understanding of things, might be better grasped by us if we knew the various accounts he had received about the House of Atreus.
Related to this approach are what historians suggest about the political circumstances of Athens at the time this trilogy was first presented and what anthropologists suggest about the centuries-long movement in the Mediterranean world from matriarchy to patriarchy. We can do little more than notice to the extent we have, however, the first of the queries that suggest themselves here, What did Aeschylus have to work with in preparing this trilogy?

II.

Our overall concern on this occasion is with the trial of Orestes for matricide. Our second query here is, Why does not Apollo, who had ordered the matricide, suffice to protect Orestes permanently from the Furies evoked by his mother’s blood?

Apollo is a party to the dispute in *The Eumenides*: it is his decision that is being judged. If he should undertake to settle Orestes’ fate, it would be (or at least would appear to be) merely another exercise of superior force by the new gods in subduing further the old divinities that the Furies represent. Force is evident in the harsh way that Apollo talks to the Furies in his temple at Delphi, where Orestes had gone for ritual purification (*Eum.* II. 179-97).

The new gods make much of the city and of political rule, or the life “outdoors.” The Furies, on the other hand, make much of blood and the family, or the life “indoors.” For Apollo, Clytemnestra’s primary offense is not that she killed her husband but rather that she had destroyed a king established by Zeus.\(^{147}\)

Clytemnestra’s destruction of a king is carried out when she has him once more indoors—that is, in the bosom of his family. She must resort to stratagem and a private killing because of his vastly superior strength outdoors. But even outdoors she conquers him to the extent of “making” him walk a purple carpet against his will, thereby leading him in the most dramatic fashion possible for her to the bloody sacrifice she plans (*Ag.* II. 905-13). In this and other ways she so challenges political rule that Apollo must take offense, even though Apollo is not remembered as a champion of Agamemnon at Troy.\(^{148}\) The kind of subversion of the political order practiced by Clytemnestra seems to be troublesome for Zeus.

III.

Our next query is, What is the role of Electra in the trilogy? Hers is, we note at the outset, a role quite different in Aeschylus’ work from the roles of Electra in the variations upon this story subsequently provided by Sophocles and Euripides.
We have seen that Electra is kept out of the way for the actual killing. Neither Electra nor Clytemnестra before her (in killing Agamemnon) is ever Apollo’s agent. Electra’s motives are “human,” not divine. Her longtime hatred of her mother is independent of whatever Orestes had been commanded by Apollo to do. Orestes is moved ultimately by that command, however much he is moved also by a desire for the throne belonging to him as heir to the House of Atreus. Electra has nursed various grievances against her mother over the years.

When the brother and sister invoke their father’s spirit at his grave, Orestes addresses Agamemnon more as a king, Electra addresses him more as her father (Lib. B. II. 332, 345). Similarly, in the preceding generation, Agamemnon, in what he had done in sacrificing his daughter, had been moved primarily by political concerns, while Clytemnестra, in killing her husband, had been moved primarily by personal concerns.

Both Electra and the spirited Chorus of slave women in The Libation Bearers are counterparts to Clytemnестra in their fierceness. The fierceness of Clytemnестra had been expressed, it seems, in her mutilation of Agamemnon’s corpse and in her killing of Cassandra, which can be seen as a mixing of blood lust and sexuality (Ag. II. 1444-47; Lib. B. II. 439-43). Such a mixing may underlie the resentment of a father-worshipping Electra who has long been suppressed by her domineering mother.

The troubling correspondence between Clytemnестra and Electra may be reflected in the fact that the two women never speak to each other, or even appear together on stage, in Aeschylus’ version of the story. Electra is well out of the way before Orestes acts against his mother. (Electra leaves at line 584. Orestes first sees Clytemnестra at line 668 and prepares to kill her at line 930.) Electra is not heard of again after the death of Clytemnестra: it is as if she has no further reason for “existence” once Clytemnестra is killed.\[149\]

IV.

We must next consider, Why is Athens the site of the great trial to which Orestes and, in effect, Apollo are subjected? In the oldest tradition known to us upon which Aeschylus drew, that of Homer, Athens did not figure as much of a city. Argos, as the source of the commander of the Acheans at Troy, was much greater. This was several centuries before the time of Aeschylus. Some scholars, in attempting to explain the emphasis placed here upon Athens, make
much of the political situation in Athens toward the end of Aeschylus’ life, a life which had had as its most dramatic event the great victory of the Greeks, under Athenian leadership, against the Persians. The Oresteia was first produced at a time when it seems to have been very much in Athens’ interest to cement its relationship with Argos.

But there are indications enough within the trilogy itself to account for the recourse to Athens by the contending parties. Argos, the city of Agamemnon, is where the pollution of matricide had occurred. Besides, there had been in that city generations of strife within the House of Atreus. Delphi, another possible site for the trial of Orestes, is Apollo’s place, and he is a party to the dispute. Besides, Delphi was more “religious” than “political” in its orientation. Athens, on the other hand, is identified as the place where speeches, or rhetoric, can make a difference (Eum. ll. 80-82). And it is rhetoric which, for all of its deviousness, is particularly concerned with the pursuit of justice, giving it its vitality. Athens, in her efforts at reconciliation, invokes Zeus of the Assembly (Eum. II. 968-75). This can remind us of the workings of the Athenian assembly in a democratic era, the era of Aeschylus.

Rhetoric is also seen in the uses made of persuasion in The Eumenides. The only substantial persuasion in the trilogy theretofore had been when Clytemnestra had prevailed upon Agamemnon to submit to the purple carpet (Ag. II. 905-13). Later, Clytemnestra came close enough to persuading Orestes not to kill his mother that Pylades had to remind Orestes of Apollo’s mandate (Lib. B. II. 896-903).

The specialness of Athens is also suggested by the evenly divided votes cast by the Athenian jury in the trial of Orestes. The Athenians seem to appreciate what can be said on each side of this momentous conflict. Is the prudence of the Athenians reflected in the fact that they “deliberately” leave this matter, finally, for Athens to decide (Eum. II. 707-10)?

The choice of Athens as the site of the trial may turn ultimately upon the need to have Athena herself resolve this conflict. Athena, by the fifth century, is made as much of in Athens as anywhere else in the Greek world.

V.

Our next query is, Why is Athena needed? The simple answer may be because only she among the gods, with the possible exception of Zeus, can do what is needed and do it in the way it is done
here. It is instructive how Apollo and Athena in turn speak of and to the Furies when they first confront them in *The Eumenides*. Apollo is consistently harsh, unable to say a civil word to them. Athena is struck by their bizarre appearance, but she is still open to what they have to say for themselves (*Eum.* ii. 405-14, 644). She can, in talking with them, both cajole and threaten. Apollo can only threaten, and it is not clear whether his threats can restrain the Furies to the extent that Athena wants to restrain them (*Eum.* ii. 794-807).

The reliance upon Athena is related to the superiority of rule by the truly wise. Also, she reminds the Furies that she has access to Zeus’ thunderbolts, an access that may follow naturally from her wisdom (*Eum.* ii. 826-29). Is the female, implacable though the Furies first appear to be, shown to be intrinsically more moderate than the male in talking to others (*Eum.* ii. 881-91, 968-75)? Even the “mannish” Clytemnestra is shown, at the end of the first play, to be better than Aegisthus in talking with the angry Chorus of Argive elders. Athena knows there are at least two sides to every controversy (*Eum.* i. 428). The Furies seem to be challenged, in turn, by Athena’s suggestion that they should want to act justly as well as to be called just (*Eum.* ii. 430-31).

However much Athena identifies herself with the male cause, she does have a female aspect. She can bridge, therefore, the gulf between male and female in a way that no one else in the trilogy can. Eventually, Athena can even offer to share with the Furies some of her sovereignty in Athens (*Eum.* ii. 832-36).

VI.

Our next query is, Why does Athena vote as she does? The simplest answer may be because this is in accordance with the will of Zeus Himself, who has ordained all these matters. She certainly will not, perhaps cannot, defy that will as she understands it. Even the willful Clytemnestra had, in the first play of the trilogy, invoked Zeus as “accomplisher” (*Ag.* ii. 973-74).

Athena’s disavowal of the female element in herself can strike us as somewhat forced, if not even as bizarre (*Eum.* ii. 734-43). But however she repudiates the female element, she cannot simply do without it—and so she secures a place in the city for the Furies, who are representatives of the female element in its most primitive form. If there is to be a city, the political or male element must be dominant; but it cannot be exclusive, without risking the very foundations of human life and hence the city itself.
Judicious balancing is needed for a proper resolution of that conflict in the House of Atreus which had seen political rule undermined by intra-family passions in one generation after another. Athena's vote in the trial of Orestes is more complicated than the yes or no of which a jury is capable. She can say more than the jury can, both warning and enticing the Furies as she finds a place for them in the political order which is to replace the old order in which blood ties had been dominant.\textsuperscript{155}

VII.

Our final query about the \textit{Oresteia} on this occasion is, How are things left at the end? That is, what does Aeschylus really expect for the long run? Does he work from the fact, if fact it be, that there is no further intrafamily killing in the tradition from which he took his story?\textsuperscript{156}

Aeschylus knows that it is folly to attempt to eliminate the Furies altogether from the life of a community. In fact, Orestes himself promises, in effect, in his last speech of the trilogy, that he will play a Furies-like role if any future generation of Argives should ever repudiate the debt that he now owes to the Athens that secured his salvation (\textit{Eum.} II. 762-77).\textsuperscript{157}

We can endorse here what some anthropologists suggest about the movement evident in this trilogy—the centuries-long movement from feud to law, from family to city, from old to new. We add the suggestion that what Agamemnon and Clytemnestra did in turn—one acting for the political order, the other for the family order—are deeds of a fundamental character, pursued regardless of the consequences to themselves personally.

However astutely Athena worked things out on this occasion, such matters do have to be reworked as circumstances change. Further study of these plays is required in order to determine what hope Aeschylus truly held out for mankind, and what reservations he had about both men and gods, in the age of the Olympians, an enlightened age that is still with us in critical respects. \textit{Have} the eternal Furies, the dark recesses of the human soul being what they are, been adequately provided for as well as guarded against by the wisdom of Athena in the service of the will of Zeus?

3. \textsc{Jonah and the Ninevites}\textsuperscript{158}

I.

The \textit{Book of Jonah}, a particularly vivid Biblical account of re-
pentance, is read as part of the service on the afternoon of Yom Kippur, the Day of Atonement for Jews. Thus, it is said in a famous sermon on *Jonah* by the preacher in Melville’s *Moby Dick*—that although one should not sin like Jonah, if one does sin, then one should repent as did Jonah.\(^5\)

One may wonder, of course, how much Jonah truly repents. Much more striking, perhaps, is the repentance by the Ninevites after hearing the preaching of Jonah. (The other characters in this story had nothing, so far as we know, to be penitent about aside from the problem of the divinities they happened to worship.) Contributing to the remarkable nature of this Israelite story of Ninevite penitence is the fact that the Ninevites (or Assyrians) were enemies of Israel. Is there an indication that Jonah did not want to serve enemies thus? Or that he longed for their destruction? Or should we simply say that he did not understand how he was serving Israel by ministering to the Ninevites?

It is indicative of the “ecumenical” character of God’s concern that this book should be used as it is at the Yom Kippur service. Do the Jews, as well as God, mean for this to be noticed?

II.

One can wonder what moves Jonah both at the beginning and at the end of this book. He evidently wants God to be more implacable, or less available, for the Ninevites than he had wanted Him to be for himself. (Had he really thought he could escape God’s command and sanctions?)

But Jonah’s intriguing character or career is not our primary concern on this occasion. Rather, we are much more concerned about what is said, or at least is taken for granted, in the *Book of Jonah* about rules and standards (or “the rule of law”) and about the consequences of disregarding such rules and standards.

Since the character and career of Jonah do seem critical concerns of the author, one cannot fully understand the book as a whole (or any important facet of it, such as what is said there about rules) without taking Jonah himself into account. In any event, one cannot help but wonder what character is presupposed by the gift of prophecy that Jonah evidently exercised.\(^6\)

III.

“Everyone” knows the story of Jonah: many more people “know” the story than have read the *Book of Jonah*. Even so, what
the story "says" depends in large part on the preconceptions one brings to it.

Christians (including the earliest Christians, if not Jesus himself) see the Book of Jonah primarily as a prefiguration of the story of the Crucifixion, Burial (for three days), and Resurrection of Jesus. So massive may such an interpretation, or later development, be that the original intention of the author (at least as his original readers understood it) can be lost.

Some Christians even go so far as to see the story as literally true. Arguments are heard from time to time about what kind of fish this would have had to have been (to have had a large enough mouth and stomach) and what the physical effect would be upon a man thus swallowed and held.

Where the early Christians saw the story primarily in terms of their faith, and where medieval Jews such as Maimonides saw it primarily in terms of their way of life, cannot we consider what it says to and (more important for our purposes) about all mankind?

IV.

Nineveh is judged by God to be wicked—and the Ninevites themselves are moved by Jonah's preaching to recognize their evil ways and to turn away from them (Jonah 3:3-9). Does not genuine wickedness require that one sense, at least before one becomes altogether hardened, that one is not acting as one should? Violent madmen or fierce animals may not be truly wicked, however dangerous and destructive they may be. The same may be said of tornadoes or earthquakes. An element of understanding is required if wickedness is to be diagnosed—and certainly if preaching is to be resorted to.

The Ninevites were held accountable for standards which most of the rest of the world respected as well. But the rest of the world is usually not dramatically threatened with destruction: there does seem to be something distinctive about the moral condition of the Ninevites. Do most other peoples, most of the time, conduct themselves better than the Ninevites did in the time of Jonah?

All this suggests that most people most of the time do have access to the moral standards by which they should live. This access seems to come more or less naturally for them, certainly not by means of any genuine revelation of the kind provided on a systematic basis through Moses and the other prophets recorded in the Bible. Is it not even implied by the Bible that there are moral stan-
V.

In the ordinary course of things, it can be said, wickedness brings its own punishment (that is, deprivation) with it. This, too, is natural—as is the ability of the reason to perceive the connections between wickedness and punishment.

But wickedness can so distort one's understanding as to conceal from one the harm one is doing to oneself as well as to others. Besides, the fruits of wickedness may be so plentiful and attractive, at least in the short run, as to beguile the reasoning of the wicked and the judgment of observers. In this and other ways the wicked can harm not only themselves but also others, if only as bad examples. Especially is this so when wickedness is practiced on a large scale. The community is usually a moral teacher, in that it is a visible manifestation of the law. But the authority of the law, when devoted to the cause of wickedness, can be particularly pernicious. And so dramatic destruction of a city is sometimes called for, destruction that does not wait for nature to take its course. Something dramatic may be required when a widely known city is remarkably wicked, especially when its destruction can serve to instruct others about the perils of wickedness.

The destruction of Sodom and Gomorrah not only saved the people of those two cities from further wickedness but also served the rest of mankind, especially when the story of their destruction was perpetuated and explained in an authoritative manner. Books of revelation, which reveal doings of God that are not otherwise apparent to the reason of most men, can be said to transcend nature. Without such revelation, it can also be said, most men could not appreciate the full effects either of wickedness or of virtue.

The full scope of revelation for people may be seen in accounts of what is yet to come, along with accounts of what has already happened. That is, both prediction and explanation (or "history") are to be seen in revelation. The natural understanding rarely provides such dramatic accounts.

But it may seem only fair, before dramatic (or supernatural) means are resorted to in response to wickedness, that some extraordinary effort be made on behalf of those about to be destroyed. And so, the "forty days" warning is sent by God to the Ninevites. This is the kind of direct and explicit information that
nature does not supply. Not only may it seem fair that such an extraordinary development should be predicted, but its prediction and fulfillment do tend to make a considerable impression upon others who hear about what has happened.

But, someone might ask, why was not a special warning also issued to the people of Sodom and Gomorrah? The answer could be that they too had had a sufficient dramatic effort made on their behalf—in the form of the argument made to God by Abraham to spare the city, an argument which depended for its success on the existence there of a saving remnant among the people. Perhaps prophecy depends as well on such a saving remnant—on a few who can be receptive to the divine word. If there is not a receptive element in the community, the efforts of an Abraham or of a Jonah can have no effect. If, on the other hand, the Abraham-test is passed by a people, then the Jonah-effort can usefully be made.

These are determinations made by God or by His prophets. That there should have to be such determinations suggest the limits of ordinary reasoning and hence of nature in the everyday world. From the Christian point of view, it can be said that the world needed to be prepared, through a proper development of the people of Israel, before Jesus could usefully appear to perform his mission.168

One way or another, people need to be taught that there is available a punishment to fit each crime. Consider, by way of illustration, a sign I saw in a Mennonite shop in a small Ontario small town a couple of days ago:

Notice to Shoplifters: His eye is on the sparrow—and you can be sure He is watching you, too.

This, too, can be considered prophecy of sorts, in however low a key.

It should be evident from these observations how prophecy can be useful for deterring misconduct, even though it may not be absolutely needed for good conduct. Does not the Bible itself, especially the Old Testament, recognize that there have been, and still can be, good men and women who have not had the benefit of genuine revelation? But the Bible does seem to raise the question of whether the very best human being is possible without genuine revelation, whatever the lawgivers and poets of pagan peoples have relied upon for their guidance. This is, in effect, a question about the status among us of piety.

Is revelation needed, then, primarily for the “extreme” cases—
for the most complete piety and for the most disturbing wickedness?

VI.

The limits of ordinary reasoning in extreme cases and the attractions of divine intervention may also be seen in the sort of “situation” faced by the sailors on the ship with which the fleeing Jonah had booked passage. These sailors are confronted by a terrible storm (1:4-5). So far as they can tell, we are told, it is not for anything they had personally done. Should they have noticed that something was wrong with Jonah? Should they have investigated him more carefully? The author does not suggest this, although Melville’s preacher seems to do so in his effort to make sense of everything.169

The sailors, when all their efforts seem about to fail in the face of an implacable (if not even determined) storm, resort to prayer (each man to his own god) and thereafter to the casting of lots (1:5-7). The prayers prove ineffective, unless it is understood that such prayers were a necessary prelude to a useful recourse to lots, which recourse may be considered a kind of revelation-on-demand.170

The lots proved most revealing—and Jonah, upon having been thus pointed to, confirms that he is indeed the target of the storm (1:7-10). He recommends that he be thrown overboard (1:10-11). The sailors, however, are remarkably restrained: they refuse to act at once on what Jonah reveals; rather, they turn again to vigorous rowing, in order to save the ship without recourse to the desperate measure recommended by Jonah (1:13-14). These sailors have long intrigued me. They seem such a decent, reasonable crew. Even so, must not the author of the Book of Jonah implicitly regard them as impious—or, at least, as not pious—in their desperate efforts to avoid the harsh necessity imposed upon them by the divine will?171

The sailors are much moved by the cessation of the storm upon the “sacrifice” of Jonah to the sea. They are at once converted, it seems, to the worship of the God of Israel (1:15-16). We are not told how this changes them: would they, for example, be more prompt thereafter in despatching a Jonah?172

We can see in the experiences of the sailors the uses of revelation in making sense of what is today called “the human condition,” that state of existence which finds terrible (and even seemingly inexplicable) things happening to good people. Revelation was needed both in order to permit the sailors to understand what was
happening to them and in order to guide them as to how to act to save themselves. The salvation of oneself in such circumstances, the pious man would add, need not be considered limited to securing access to physical survival: it may suffice that one is permitted to understand, by virtue of revelation, that there is an overall purposefulness to the world that one should accept on faith. An undue concern for physical survival, which can be no more than temporary in any event, can deflect one from the kind of understanding which is available to the truly pious man who submits himself completely to the divine will.

But all this is not to deny what is also apparent from the story of Jonah: there is available what we would call a natural understanding which suffices for much of human activity in this world and provides a useful guide to decent conduct. Most ships do sail successfully: most sailors know how to conduct themselves properly most of the time, just as most cities do promote morality. Yet extreme situations are bound to arise which make many wonder, if not even despair, about the overall sense and sensibleness of things.

VII.

Prophets such as Jonah, and perhaps even more those who choose to write about them, do seem to be helpful for reassuring mankind about the ultimate sense and sensibleness of things. This they do by proclaiming an “understanding” of a God who is omniscient, omnipotent, just and yet merciful, and radically inscrutable—in short, a God who is not truly to be understood but is to be obeyed and relied upon.173

The inscrutability of God is reflected even in the fact that someone such as Jonah should be His instrument, along with a storm, a fish, a gourd, and a worm (1:4, 17, 4:6-7). Why should Jonah happen to have had access to the critical (indeed precise) information he had—say, about the circumstances of the sailors and thereafter of the Ninevites? Why did not the Jonah who knew so much about things know even more than he apparently did about himself, about the limits of his power to avoid God’s demands, and about what would happen to him if he did embark on efforts of evasion and recrimination?174

All this reminds us of a question suggested by students of the Bible such as Maimonides, who insisted upon the moral character as well as the high level of intelligence required in the prophet.175 Must Jonah, despite his evasiveness and his recriminations, be considered, at heart, a good man, indeed even a very good man? This
may perhaps be seen in the prayer he is given to recite while still in the belly of the fish, a prayer which anticipates his deliverance (2:2-9). One may see in this expectation the confidence of the truly pious men?\textsuperscript{176}

Who should we say is the author of this book? Is it Jonah himself, or at least someone instructed as to critical details by a prophet such as Jonah if not by God Himself? Do even the evasiveness and recriminations of Jonah reflect a desire on his part to see the world as a coherent and predictable whole?\textsuperscript{177} But does he not come to recognize that God is always able to go one step further than even Jonah can anticipate? Is Jonah silenced, but not necessarily fully persuaded, by what is done and said to him at the end of the story?

Thus, that which had required a great storm earlier, and a great fish, can be taught again later in an unexpected way (even for Jonah?) by means of a gourd and a worm, especially if a story is made with such experiences (4:2-11). All this suggests that the great and the small, the past, the present, and the future—in short, the world—are bound together in ways that no man can know but that all can be taught is somehow so.

One can be reminded by this story of the difficulty of fathoming the depths of God’s understanding of things, a difficulty evident in any effort to grasp why it is that Jonah should be the one used as he is here. This reminds us, in turn, that other difficulties await us when these are solved, even more serious difficulties which point up the specialness of the truly pious man and the profound difference between him and any human being who relies upon the natural understanding alone.\textsuperscript{178}

VIII.

How was it that Jonah proved so effective with the Ninevites. I have suggested that there must have been a receptive element among them.\textsuperscript{179} What might have Jonah said to appeal to that receptive element among the Ninevites? It is difficult to see that a threat of impending destruction would suffice, with nothing more.

What more could Jonah have said to the them? Why not that which is so interesting to us, as to the millennia of readers—the story of the call that had come to Jonah from God, the efforts Jonah had made to run away from God, the storm, the sailors, and the fish, and finally Jonah’s submission to his unavoidable God? “All this has just happened to me,” he could well testify, “and I have been forced to warn you, even though I did not (and still do
not) want to do so." This kind of sermon could very well have had a salutary effect on the Ninevites. An audience would certainly be likely to notice this kind of message.

With these observations in mind we can begin to answer one of the questions we have been asking, Why was Jonah chosen as the prophet to the Ninevites? Perhaps he was chosen, at least in part, because he could be depended on to respond as he did—and all with a view to having, at the end, the story he can tell the Ninevites (and the even more subtle story, which includes Jonah’s experience with the gourd, that can be told to generations of readers of the Bible).

Jonah’s effectiveness in these circumstances—his usefulness both to the Ninevites and to us—may depend in part on his misconduct. Similarly, it can be said, the full force of Oedipus’ conduct, with respect to his father and his mother, depended on the vigorous efforts made by Oedipus (upon hearing the dreadful oracle) to avoid the fate that was said to await him.180

Do not these observations, in turn, reflect a view of the whole not altogether susceptible to the natural understanding? Do poets and prophets alike report on things that they do not themselves truly understand?

IX.

And yet, poets and prophets can be understood to support, by their inspired sayings, the conclusions arrived at otherwise by the natural understanding.

Among the things that the natural understanding is aware of is the importance in human affairs of a reliance upon divine providence. How else are we to explain the fact that each of the sailors on the ship has some divinity to pray to, or the fact that it is generally believed among them, as later among the Ninevites, that prayer and repentance can have a good effect,181 or the fact that human affairs are believed to be somehow keyed to the divine will? The captain on the troubled ship can even arouse the sleeping Jonah to add his prayers and divinity to the others (1:6).

Faith in the God of Israel is not required for many of the salutary effects that the natural understanding associates with various religious opinions. On the other hand, a genuine divinity would seem to be needed if there are to be miracles of the kind exhibited in the career of Jonah in this story.

Still, tales of miracles are not infrequent, and can be persuasive, even in circumstances where it is clear to others that no true divin-
ity is involved. Aside from all this there is the Maimonidean query as to whether even God ever acts through miracles as ordinarily understood.\(^{182}\)

Thus, the story of Jonah can have a salutary effect, even if it should not be "literally" true. Of course, our understanding might be served by probing into what "really happened" on that occasion. But this may be virtually impossible, perhaps absolutely impossible, to determine conclusively. This may be true with respect to any other highly unusual event in history. This may be another way of indicating that there is an unbridgeable gulf between reason and revelation, between (that is) one approach which makes much of general propositions about nature and another approach which makes much of dramatic particulars.

The Ninevites are moved to repentance by an Israelite prophet, more so it seems than Jonah himself is moved to repent. Indeed, Nineveh thus did something which is never said about Jerusalem in the Bible. The repentance of Nineveh was not permanent, however dramatic it was on this occasion. That is, was not Nineveh eventually destroyed by the Lord?\(^{183}\)

But, in another sense, Nineveh's repentance was permanent—in that it has been so graphically recorded as to provide a constant reminder to the people of Israel and to their successors (Jews, Christians, and Muslims across the centuries and in many lands)—a constant reminder of what the God of Israel is capable of and how limited, and yet somehow exalted, His people can be.

In this way, then, the enemies of Israel were permitted to be of service to the chosen people of God. That the God of Israel should thus make use, for the good of His people, of even their enemies is something well worth remembering on Yom Kippur, with its call to repentance. The people of Israel are thereby raised up, even as they humble themselves before their God.

Even those who can rely on no more than a natural grasp of these matters can see how this story contributes to an understanding of not only the nature of piety but also of the nature of nature and hence of the nature of understanding itself. Is it not fitting and proper that the Book of Jonah should end with a question?

4. OEDIPUS, CREON, AND ANTIGONE

4-A. Sophocles' Oedipus Tyrannus\(^{184}\)

I.

There is no hope either that one can add much to what has al-
ready been said many times about Sophocles' *Oedipus Tyrannus* or that one can exhaust this subject. Every talk on this play can reasonably hope to be no more than an introduction, which may be true as well of all talks on any great text. What one says about a great text can be less than an introduction—it may even obscure the text—if one (like Oedipus himself?) tries to do too much.¹⁸⁵

*Oedipus Tyrannus* is perhaps the greatest tragedy ever written, at least among the plays that we in the West have access to. Certainly, it is one of the most influential, serving as a wonders-filled reservoir for playwrights, theaergers, and critics for more than two thousand years. It is a play everyone knows something about, and not only because (as some would have it) it deals with psychic forces to be found in us all. It is also a play which bristles with puzzles, questions and problems, only a few of which we can touch upon here—but touch upon, it is hoped, in a way that is useful for one's understanding of the entire play.

The story of Oedipus is an old one. The first literary account we have is that found in Homer, where we hear Odysseus reporting what he saw during his visit to Hades:

I saw the mother of Oedipus, lovely Epicaste, who did an enormous deed in the ignorance of her mind and married her son. He slew his own father and married her. The gods soon made these things known to men. But he suffered pains in his much-beloved Thebes, and ruled the Cadmeians through the destructive plans of the gods; and she went to the place of the mighty gatekeeper Hades. She hung up a high noose from the lofty roofbeams, possessed by her grief. For him she left many pains behind her, the kind a mother's Furies bring to pass.¹⁸⁶

Odysseus' account put the emphasis on Epicaste (another name for Oedipus' mother; Jocasta is the name we are more familiar with). Nothing is said of Oedipus' fate in Odysseus' account except that it had "many pains." Nor does Homer say anything about Oedipus' presence in Thebes being a pollution upon the land or about Oedipus' blinding himself. These differences are touched upon in the *Encyclopedia Britannica* entry on Oedipus, which entry reports on the mythological as well as the Homeric accounts about the man:

*Oedipus*, in Greek mythology, the king of Thebes who unwittingly killed his father and married his mother. Homer related that Oedipus' mother hanged herself when the truth of their relationship became known, though Oedipus apparently continued to rule at Thebes until his death. In the post-Homeric tradition,
most familiar from Sophocles' *Oedipus Tyrannus* and *Oedipus Colonus*, there are notable differences in emphasis and detail. Traditionally, Laius, king of Thebes, was warned by an oracle that his son would slay him. Accordingly, when his wife, Jocasta (Iocaste; in Homer, Epicaste), bore a son, he exposed the baby on Mt. Cithaeron, first pinning his ankles together (hence the name Oedipus, meaning Swell-Foot). A shepherd took pity on the infant, who was adopted by King Polybus of Corinth and his wife and was brought up as their son. In early manhood Oedipus visited Delphi and, upon learning that he was fated to kill his father and marry his mother, he resolved never to return to Corinth. Travelling toward Thebes, he encountered Laius, who provoked a quarrel in which Oedipus killed him. Continuing on his way, Oedipus found Thebes plagued by the Sphinx, who put a riddle to all passerby and destroyed those who could not answer. Oedipus solved the riddle, and the Sphinx killed herself. In reward, he received the throne of Thebes and the hand of the widowed queen, his mother, Jocasta. They had four children: Eteocles, Polynice, Antigone, and Ismene. Later, when the truth became known, Jocasta committed suicide, and Oedipus (according to another version), after blinding himself, went into exile, accompanied by Antigone and Ismene, leaving his brother-in-law Creon as regent. Oedipus died at Colonus near Athens, where he was swallowed into the earth and became a guardian hero of the land. Although the Oedipus legend may have originally been based on a core of historical truth, it is impossible to isolate it from its folktale elements. Oedipus appears in the folk traditions of Albania, Finland, Cyprus, and Greece. The ancient story has intense dramatic appeal; through Seneca the theme was transmitted to a long succession of playwrights, including Pierre Corneille, John Dryden, and Voltaire. It has had a special attraction in the 20th Century, motivating Igor Stravinsky's secular oratorio *Oedipus Rex*, André Gide's *Oedipe*, and Jean Cocteau's *La Machine infernale*. Sigmund Freud chose the term *Oedipus complex* to designate a son's feeling of love toward his mother and jealousy and hate toward his father, although these were not emotions that motivated Oedipus' actions or determined his character in any ancient version of the story. 

It would be helpful, before turning to a discussion of some points in Sophocles' version of this story, to be reminded of what is in that version, which is in several respects different both from the Homeric account and from the general tradition of antiquity reported by the *Encyclopedia Britannica*:

Years ago, as [Sophocles'] audience already knew, Apollo through an oracle declared to Oedipus' parents, Laius and Jo-
casta, that a son born to them was destined to kill his father and marry his mother; it is not said that they were warned against having a child, although that is perhaps to be inferred. Thinking to circumvent the oracle, Laius and Jocasta had their new-born son abandoned at Mr. Cithaeron to die, its feet pinned together. The infant was rescued by a herdsman who took it back with him to Corinth. There the child grew to manhood, supposing himself to be the son of Polybus, King of Corinth, and his wife Merope, and called "Oedipus" because of the deformity to his feet. Taunted at a banquet with being no son of Polybus and Merope, he journeyed to [Delphi] to learn the truth of this; and the god gave him no answer to his question but stated that he was doomed to kill his father and marry his mother. Determined therefore never again to set foot in Corinth, Oedipus went onward and in a sudden quarrel at a cross-road killed an elderly man—his father—with all his retinue excepting one man who fled. He then came to Thebes and, on solving the riddle of the Sphinx, was hailed by that city as its deliverer from plague, and was made king; and the former king's wife—his mother—became his consort. When he learned the truth, he put out his own eyes.

In my discussion of the play on this occasion, I should like to see what happens primarily in the light of what the characters should have done. The characters I am particularly concerned about here are Laius, Jocasta and, of course, Oedipus himself. What should each of them have done at various stages of the careers indicated in this play?

II.

What should Laius and Jocasta have done when they learned of the oracle that their son would kill his father and marry his mother?

We cannot be sure from this Sophocles play, although it does seem to be indicated, that Laius and Jocasta may have been given their warning before the conception of Oedipus, if not even before they decided to marry. Were Laius and Jocasta, or at least Laius, overcome by passion, so much that they could not resist coming together? Is Jocasta discreet about this, perhaps because she is ashamed of her passion, just as she is about precisely how the infant was disposed of when it was born? Certainly, if they were warned in advance, and if they took the warning seriously enough to have the child killed, the conception of Oedipus should have been prevented. That, presumably, would have been the end of the story.
Suppose, however, that the warning came only after the child had been conceived, if not even born. There is no indication given us of a family curse, extending back to prior generations. We do learn that Laius has a temper, which is exhibited at the fatal crossroads when he meets Oedipus and where Oedipus exhibits his own temper in turn. Perhaps Laius’ temper reflects his passion, perhaps indeed the very passion which had made him unable to keep away from Jocasta. She, it might be added, is said by some—but not in this play—to have been irresistible as a very young woman. Evidently, she was still attractive as the middle-aged woman that Oedipus came to know and to marry.

Laius, we have noticed, has a remarkable temper. He, like Oedipus, seems to have been used to having his way. Is there not something presumptuous, or hubristic, in the effort made by Laius and Jocasta (as well as later, by Oedipus) to thwart the presumed will of the gods? We will return to these considerations later.

What, then, should Laius and Jocasta have done if they had in hand both a baby son and the ominous prophecy? Are we not taught by the play to notice that the first, and indispensable, step in such circumstances is to become as clear as one can possibly be about the meaning of the prophecy? Laius and Jocasta should have tried to understand the prophecy thoroughly. Or, put another way, in such matters it is generally desirable to be prudent.

Prudence should have instructed these royal parents about one simple fact on which everything depended and in the light of which their conduct should have been shaped both then and thereafter: the simple fact is that any baby they could kill should not, and need not, have been killed by them. Indeed, one could argue, the attempt to kill the baby only made matters worse, and not only because of its presumptuousness. In this case the attempt meant, among other things, that the parents would become estranged from their son and hence more vulnerable with respect to him.

I say that the simple fact is that any baby they could kill need not have been killed by them, since he obviously was not destined to kill his father and marry his mother. But my statement should be qualified, for it could also be said that a successful killing of the infant could mean that Laius and Jocasta had managed thereby to kill off Laius’ line, and hence Laius himself. And could it also be said that the thereafter childless Jocasta would have been as if married to her dead son, a sterile marriage?

We shall see, now that we turn to a consideration of what Oedi-
pus should have done in response to the oracle, that there are indeed various ways to understand the prophecy which so shook Laius, Jocasta and Oedipus.

III.

When Oedipus learned of the oracle—that he would kill his father and marry his mother—what should he have done?¹⁹²

Again it can be said that, the first, and indispensable, step was to become as clear as one could be about the meaning of the prophecy, including if possible an awareness of the cause of this fate. One recalls how Socrates responded to another oracular report from Delphi, to the effect that no man was wiser than Socrates: Socrates claimed that he spent much of his life thereafter trying to understand what the god had meant.¹⁹³ But, alas, Oedipus did not believe that there was anything he had to investigate, even though he had gone to consult Apollo originally because of the doubts aroused by a drunken man in Corinth about Oedipus' parentage (Oedipus Tyrannus ll. 775-82). (Was that drunken man exhibiting a different kind of “inspiration”?) Of course, Oedipus' supposed mother and father in Corinth, King Polybus and Queen Merope, had assured a troubled Oedipus about his parentage—but he had not been satisfied, and hence had gone to Delphi (ll. 783-98). What the Delphic oracle said about his future drove out of Oedipus' mind, it seems, the question he had had about his past—although his past and future were obviously connected—and so he did not do what he should have done in order to be clear about the meaning of the prophecy. (I notice, in passing, that the incident with the drunken man in Corinth seems to have been added by Sophocles—and, if so, it suggests that Sophocles wanted his more thoughtful readers, whatever may be said of the typical audience, to reflect upon what it meant that Oedipus did not make use of all the information he did have.)

What should a thorough, even a Socratic, investigation of the oracle have included? Should not Oedipus have gone back to the man he believed to be his father, Polybus, reporting what he had been told at Delphi and asking for advice? He could have added what he no doubt believed, “Obviously, I don’t want to kill you!” That is, an awareness by Oedipus of his limitations was in order. Instead, his efforts were immediately aimed at overcoming the oracle, as he immediately understood it—and he persisted in this attitude and response for more than a decade. It is generally true, I suppose, that children who refuse to discuss “personal matters”
with their parents make themselves even more vulnerable than they would naturally be.

Had Oedipus gone back to Polybus, he could have been reassured by him about blood ties. The obvious advice would then have been, "Stay here!" But, it seems, the prophecy received at Delphi was evidently too horrible for Oedipus to contemplate; the most he could do was to react to it—and that meant to run.

There are things to be usefully talked about in such cases: No matter how dark things look, it usually helps to discuss them with a sensible counsellor who has one's interest at heart. One may need help to spell out properly the implications of such a prophecy. To keep it to oneself may make it far more insidious in its consequences than it need be. But, it seems, Oedipus had never discussed the prophesy with anyone until the day of terrible revelations which we see unfold on the stage—and by then it was probably too late, although even then (as we shall see) there were better and worse ways of responding to the grim revelations.

As for the possible meanings of the oracle, in addition to the frightful (and likely?) meaning that Oedipus immediately assumed and reacted to, several others can be suggested. We are encouraged to conjure up such alternatives when we notice that Oedipus himself devised an alternative when he learned that his supposed father Polybus had died in Corinth: for Oedipus then suggested that perhaps the oracle was fulfilled in that Polybus had died pining for his absent son (I. 964-73). If that qualified as a sufficient fulfillment of the prophecy—and, it should be noticed, this too is a touch added by Sophocles, so far as we know—if death by pining qualified, in Oedipus' opinion, as an adequate (but not for him a troublesome) fulfillment of the prophecy that Oedipus would kill his father, then any one of the following half-dozen similarly equivocal accounts should have qualified as well.

Thus, Oedipus could have "killed Laius" by staying in Corinth and thereby cutting off Laius' known line (in Thebes); Oedipus could have killed his father (whoever he may have been) by not conforming to the model or guidance provided him by his father; Oedipus could have killed his father, in a more literal sense, by providing him, at his request, a mercy killing when he was old and in great pain; Oedipus could have killed his father by killing himself, cutting off the line in that way also; Oedipus could have killed his father, again in the more literal sense, in an accident; and Oedipus could have killed his father by not marrying at all, cutting off the line in still another way. Of course, one or more of these
might have been considered polluting, however innocent Oedipus’ intention. But this observation reminds us of still another response that Oedipus did not make to the oracle’s dire warning, and that is a determined recourse to prayers and sacrifices.

But what, someone might ask, could be considered an adequate fulfillment of the prophecy with respect to the incest, that incest which it is evident that Sophocles’ Oedipus dreaded even more than he did the patricides? Can the incest prophecy be similarly compiled with in a more or less innocent fashion? No doubt, plausible accounts can be conjured up here as well, such as the following: Oedipus could have married his mother in his imagination; or Oedipus could have married his mother in a play or game or mock-marriage, a play in which he acted as the groom and she as the bride; or (and this is quite common to this day) Oedipus could have married a woman very much like his mother; or Oedipus could have married his mother, so to speak, by always siding with her against his father in family differences; or Oedipus could have married his mother in a dream (as, indeed, Jocasta says to him that men often do). One might even argue that Oedipus, by declining to marry because of the fear of incest, could in effect be marrying his mother. But one need not go that far in order to show that what Oedipus required was to think long and carefully about what this prophecy too could mean and how best to deal with it.

Instead, Oedipus, like Jocasta and Laius before him, believed himself to know more than he could be sure of—and hence did not protect or conduct himself as well as he could have. By responding as he did to the oracle, he made it more likely that the prophecy would be fulfilled in perhaps the worst possible way.

Does Oedipus’ reaction to the original prophesy, as well as the reactions by Laius and by Jocasta, suggest that there is something deep in the soul which makes such prophecies plausible? Do we sense in ourselves tendencies in the directions prophesied? Otherwise, would we not laugh off such “threats”? Or is it that deeds of this character are so terrible, and so far from our desires, that we cannot even hear to them without shuddering? Besides, it can be argued, one should not simply ignore what the gods say, or seem to say.

Of course, one must wonder what kind of gods these are and whether they in any way arrange for or endorse what is prophesied? And if they do, what should be said and done about such gods? To ask such questions is to seek genuine understanding about the world on the basis of which to conduct one’s life—and
this seems something that Oedipus never disciplined himself to seek. Instead, as we have noticed, Oedipus resorted to immediate and direct action, as his parents had evidently done at the time of his birth: he must rule, wherever he is; he must prevail with whomever he is dealing, be it the old man at the crossroads, the Sphinx, a blind seer, old men who have information he wants, or (it can be said) even the gods.

But ruling is hardly the same as understanding—unless, of course, one is talking about genuine rule, which depends on true understanding.¹⁹⁹

IV.

All this raises the question whether oracles are of any use at all. This question is raised aside from the problem, evident in various remarks by Jocasta, as to whether any particular purported oracle is sound (ll. 707-25). It is aside, as well, from the problem I have already referred to: if the baby could be killed, if Oedipus’ parents could be fled by him, then the oracle in its convention interpretation could not have been sound.

As for the usefulness of oracles: it can be said that the oracle secured by Creon at Delphi, about the cause of the plague in Corinth, was useful, in that it presumably induced Oedipus to seek out the causes of the plague and to take the measures needed to lift it. But is this the only oracle dealt with in the play which we know to have been sought for, in its own terms, by men? That is, there is no indication that Laius and Jocasta sought the oracle they got (ll. 707-25). And we do know that Oedipus did not seek the oracle he got; rather, it was gratuitously given to him in place of the one he did seek (that is, about his parentage).²⁰⁰

Are unsought oracles of any use? What would the lives of these people have been like if they had never had any oracles to contend with or to be guided (or misguided) by? Would their lives have merely seemed senseless or perhaps only as ordinary? Do oracles help to make sense of things?

In any event, we should notice, the terrible things Oedipus feared most, and about which he received oracles—the patricide and the incest—were done before the play begins. Just as they were in his future once (and to be run away from), so they are in his past now (and to be run away from in still another way, by blinding himself). The terrible deeds he is most concerned about are never in his present: is this what comes from indulging in ora-
cles or taking them too seriously, that one never deals properly with the present?

It can even be said that the worst thing Oedipus did, his self-blinding, he was perhaps never *fated* to do (even though Tiresias predicted it) (ll. 370-77, 1265-79). Does this mutilation reflect a deep anger at himself and at things in general? Is this an act striking out against nature, against the gods, against the very order of things if not against being itself, as well as against learning and knowing?

It may well be, then, that fate does not exist, or have its effect, until men somehow know of it. Things are explained otherwise if fate is not made explicit: for a man to know of his fate may be critical to fully *suffering* that fate. On the other hand, to attempt to avoid one’s prophesied fate is to avoid the truth—and hence to make oneself more vulnerable than one might otherwise be. The more vigorous one’s efforts to avoid one’s fate, the more ignorant or impassioned one is apt to become—and that may be essential to the fulfillment of one’s fate in the worst possible way.

I have suggested that the personal characteristics of Laius, Jocasta and Oedipus made it likely that the prophecies would be fulfilled in the worst possible ways—and that is, in part because they did not properly address themselves to the question of the possible meanings of the oracles they received. One is not likely ever to be told or to know the future in any reliable detail, however sound one’s oracle may be. One needs, in such circumstances, to inquire, to think, and to respond carefully.

How one conducts oneself depends, in part, on what one considers the world and the gods to be like. For example, are the truly virtuous pursued by a malignant fate (whatever may be the effects of chance)? With or without an oracle, should not prudence and right conduct be one’s guide and one’s way?

Prudence is to be differentiated both from too much calculation and from not enough. Too much calculation may be seen in the *hubristic*, which is evident in one’s belief that one can circumvent a genuine prophecy (as may be seen in the attempted infanticide). Not enough calculation may be seen in panic, such panic as Oedipus exhibited when he was told at Delphi what he would do: he wanted to put more and more distance between himself and Corinth—but his flight led him immediately to his natural father (ll. 794-800).

We can also see in this play how one’s strengths can contribute to one’s undoing: thus, Oedipus’ ability to solve riddles first estab-
lished him (so much so that men called him “the great”) and then toppled him. And, it can be said, his exalted ability to uncover secrets is seen, in its most extreme form, in the dreaded incest. Not only that, but an improper response to what one is able to learn may mean that one’s very knowledge of a particular prophecy may itself contribute to one’s downfall.

V.

But enough, for now, of these more general observations. Let us return to the particulars of Oedipus and his parents.\textsuperscript{203}

We have considered what might have been thought and done by Laius and Jocasta and later by Oedipus in response to the oracles of patricide and incest they received. We should now consider what they should have done afterwards—that is, after they learned what they did about the dreadful outcome of their efforts. First, let us consider Laius and Jocasta in turn.

Laius, after having done what he believed he had done to his infant son, still goes to Delphi—and is killed on the way, by Oedipus. Why did he go? To seek advice, it seems, about the Sphinx, which was plaguing his city, Thebes (ll. 128-32). He did find an answer on the way to Delphi, but not the one he believed he was looking for. Should Laius have been a “believer” in Delphi or in oracles once he had, as he believed, needlessly killed his only son?

Why was the Sphinx plaguing Thebes? Perhaps because of what had been done to the infant Oedipus, a generation before, or because Laius and Jocasta had been pitiless, completely selfish and *hubristic*? Are we to understand that such afflictions as plagues often have moral causes?\textsuperscript{204} Again, we are asking, what kind of a world is it? The infection from the exposure of the infant Oedipus took a generation to fester into the affliction of the Sphinx; the infection from the parricide (or is it only the regicide?) took another generation to fester into the affliction of the plague. Was it appropriate, then, that the king who had thought he could circumvent an oracle (by the infanticide) should be killed on his way to take advantage of Apollo once again?

What about Jocasta? How should she have conducted herself upon learning of the parricide and incest? She, at least, had accepted, more than Laius had, the implications of the attempted infanticide: she no longer believed in oracles, or so she said (ll. 707-25). At least, she had not believed enough to wonder before marrying a younger second husband—someone young enough to be
her son, with scarred feet yet, and with the same build as her first husband (ll. 742-44).

How should Jocasta have responded to the dreadful revelation in this play about her second marriage? Was suicide by hanging called for? Should she have regarded Oedipus as her son? After all, the most intimate relations, as mother and child, had not existed between them, whatever blood ties they happened to have—and so the more serious moral blame and self-reckoning should not follow, it can be argued.

Besides, we have noticed, the oracle about the Theban plague had mentioned only the killer of Laius, not the incest at all. The gods themselves engage in incest; it can be acceptable to them. Besides, this Theban incest did produce so remarkable a child as the noble Antigone. Did not both Oedipus and Jocasta, as well as others, overreact to the revelation of incest in these circumstances? Was pride, even more than piety, offended here? Did their pain come as much from the recognition of their presumptuous self-confidence and ignorance as from anything else? They were exposed as not controlling what they had believed they controlled, as not understanding what they had been positive they understood.

VI.

Let us now consider Oedipus himself and how he should have responded to the unexpected revelations about the parricide and incest. To do this, let us first return to the problem of the Sphinx. Sophocles does not report the traditional riddle put by the Sphinx, which inquires as to what walked on four feet in the morning, two feet at noon and three feet in the evening. Is Sophocles silent about this because he did not want it—or because it was too well known to need repetition?

The traditional Sphinx' riddle does seem connected with Oedipus himself, the man whose very name refers to his feet. And, of course, the blinded Oedipus ends up with a cane, if he does not have one at the outset because of his feet. But then, he would never have walked on two feet. Thus, there are two great questions that Oedipus becomes occupied with. The first question, put by the Sphinx, is “What is the thing that walks, etc.?” The answer is “Man.” The second question, put by the anxious Oedipus, is “Who is this man?” This question has two related forms; “Who am I?” and “Who killed Laius?” The answer is that Oedipus is the man—the man who is not only the killer of Laius but the child of Laius and Jocasta as well.
Should not Oedipus have sensed that the Sphinx episode, in its bizarreness and in its subtle connection with his own name, was especially significant for him\textsuperscript{210} Was not he being thoughtless in not wondering how this could be connected with the prophecy he feared (and which he had just gotten at Delphi)? Certainly, the handling by him of the Sphinx looms large in his career: it is mentioned many times in the play.

We have seen that Oedipus is not really a man of reflection, but rather a man of action: he seems inclined to respond to every crisis with blows, either physical or verbal. Oedipus' gift, such as it was, lay in answering questions put to him in public circumstances, not in identifying and pursuing properly the questions of a somewhat private character he should have pursued.

Oedipus' responses to the two revelations that mattered most to him can now be assessed. When Oedipus discovers he has killed Laius, he seems more concerned about the penalty due him as the cause of pollution in the city (the exile he had ordered for the killer of Laius)—he seems more concerned about that, about the consequences for him, that is, than about patricide itself. And in the Oedipus at Colonus, the play which shows Oedipus as a very old man, much is made by him of having had to act in self-defense at the crossroads\textsuperscript{211} Certainly, he does not ever seem to take seriously the notion that he had killed his father, if only because he had never really known Laius.

Should not Oedipus have been bothered more by the killing of Laius and the others at the crossroads than by the incest? In that seemingly chance encounter, he forgot all considerations of humanity (ll. 801-13). To kill any other man, and certainly someone appreciably older than one is, is to try to kill one's father in one's self. But Oedipus is rather self-centered about these matters: thus, he had never wondered about his predecessor as king or as husband (just as Thebes had ignored the fate of Laius and invited the plague?). By the time Oedipus discovers who he is, he loses interest in the city, its fate or its needs\textsuperscript{212}

Much, much more is made by Oedipus of the incest—even though, as we have noticed, the oracle about the plague had ignored the incest and even though this mother and this child were attached, as such, by blood alone. What kept Oedipus from acting sensibly in response to the revelation about the incest was, at least in part, the fact that he had made all his inquiries in public, thus making the element of shame and of injured pride much greater. Creon had indicated, upon returning from Delphi, that he could
report to Oedipus in private. But Oedipus insisted he had "nothing to hide" (ll. 91-94). Is incest, too, a reflection of an insistence that there is nothing to hide? Does Oedipus have a natural inclination to uncover that which should remain hidden?

It is perhaps significant that, as we are told in *Oedipus at Colonus*, there is to be no monument over Oedipus' grave: he became a fully private man at his death (whatever may be the "magic" power of his presence at Colonus), with his body gone. Is this a counterpoint to his uncovering of his birthplace? The last thing said by Oedipus to his daughters in the *Colonus* play is, "You must not wish to see what is forbidden, or hear what may not be told." Oedipus' self-blinding may also be seen as a way of going private, of withdrawing from the world—of compensating, so to speak, for having not known what to look at and how?

In any event, one should be able to "walk away" from certain situations, when they have gotten distorted and there is no prospect of clearing them up—to walk away and thereby to allow other people to work out their lives as best they can. Certainly, it often does not do much good to publicize certain situations and thus intensify and worsen them, especially when family relations are involved.

A "way out" is provided to Oedipus in his disturbed situation: that is, fate, or the gods, who had "set up" Oedipus also provided him a graceful way out which he did not appreciate, the opportunity to go to Corinth and to rule. Corinth *does* expect him to come (ll. 1000-05). Should not Oedipus have long before recognized that everything about him was special and that, consequently, he should wonder about anything he took for granted, looking to see how things all fit together (especially if the gods are considered essentially, or eventually, just)? The remarkable string of coincidences here should have made him wonder. Thus, for example, he should have wondered why the Corinthian opportunity came when it did. True, the messenger's coming led to the unravelling of things, but this was necessarily harmful (I repeat) only because it was all done in public (ll. 91-94).

The Socrates we are familiar with from Plato's dialogues would have regarded all this as curious, to say the least. He certainly would not have blinded himself upon discovering what he had blundered into. This may have been, I have suggested, Oedipus' greatest offense, reflecting a blind, and blinding, rage. This is related, I have also suggested, to the delusion, now exposed, that he had been indeed in control. What would he have done to Jo-
casta in his rage if he had found her alive? Would he have added a
knowing matricide to his unknowing parricide (ll. 1254-63)? This
points up the foolishness of his immediate responses.216

Oedipus' best conduct may have been after he blinded himself.
Does he act then—in the closing scene of the Oedipus Tyrannus
and throughout much of the Oedipus at Colonus—better than he
had done while still able to see? The blinding, and his resulting
helplessness and suffering, may have been critical to his transfor-
mation into a daemonic power of sorts, which we see at the end of
the Colonus play.217

Did Oedipus have any reason to believe that blinding himself
was at all sensible in the circumstances. Was it an almost instinc-
tive reaction to having seen, in the incest, what he should not have
seen? Was it even a desire to become "wise" as the blind Tiresias
was? Had Tiresias, in effect, suggested this to Oedipus, in the form
of a prediction (ll. 372-74)? Once Oedipus is blinded, he becomes
somewhat more passive, less obviously in control—whatever the
daemonic power may be that he is aware of (or becomes aware of,
or remembers) as associated with the place of his death.

VII.

We should not conclude this introduction to Oedipus Tyrannus
without at least touching upon the question of whether it was good
for Oedipus that he learned the truth about himself:218 How one
responds to the bitter truth may suggest whether one truly grasps it
as the truth—as something which reveals the world and not merely
something which deals with oneself primarily and which one must
"personally" respond to and be pained by.

There is a presumption in favor of the truth, it has again and
again been noticed by thoughtful men. But we can all think of
instances in which a noble lie may be kind, prudent, or otherwise
useful.219 Would a Socratic counsellor, who alone learned the
truth about this family, have told either Jocasta or Oedipus what
had happened and how they were related? Does what a counsellor
should do depend, in large part, on whether it is likely that they
would be able to "handle" the truth sensibly? Certainly, he would
want to separate them physically—and the Corinthian summons is
convenient (even a godsend?) for that purpose. But what more
should he do? A Socratic counsellor would probably recognize
something that Oedipus was perhaps naturally incapable of grasp-
ing, that one cannot truly control things unless one truly under-
stands—and even then, there may be, because of chance and mortality, limits to one's effective control.\textsuperscript{220}

To talk about the \textit{Oedipus Tyrannus} as I have done on this occasion \textit{is} to step outside the character and hence the perspective of an Oedipus or of a Jocasta. To talk about the play thus may even seem monstrous to some, if only because it might seem to rob the story of some of the drama which appeals to playgoers. But even though I have not been talking about what most playgoers are apt to notice, the things I have noticed may help one see the text and what contributes to the power of the drama better than one otherwise would.

Perhaps the most telling criticism to be made of what I have said here is that I have failed to appreciate the horror aroused in the Greeks by parricide and incest. Even an innocent, or accidental, killing of a parent would have been considered deeply polluting. Still, I have suggested that Oedipus was not without choices in responding to the various crises he faced. If he had truly had no choice, this powerful story would be far less interesting than it is. That is, one must have choices, even though what happens may appear to be inevitable—or else the story cannot continue to challenge us. Even if one's critical acts were inevitable, one might still have choices in how one responds to them when they do come.

To suggest that a reader can be reasonable in identifying and discussing the passions and choices in this play is not to expect most people—whether as readers or as men of action—to be reasonable most of the time. Indeed, it is the mark of the truly reasonable human being to appreciate the limits of reason for most (if not for all) people. Thus, the prudent Odysseus once had himself tied to the mast of his ship, so he could listen safely to the dangerously beguiling music of the Sirens while his men, with wax in their ears, rowed him past that deadly but instructive place.\textsuperscript{221}

Such a man as Odysseus, who understood the risks as well as the enticements of discovery and who was almost always of the limits of human power, would never blind himself in a rage or in despair upon learning that the world is in important respects different from what he as a youth had believed. Rather, it was \textit{he}, the wily Odysseus, who blinded the bloodthirsty Cyclops and then devised a use of the four feet of a sheep so that he could escape from the Cyclops' cave to walk freely again on his own two feet and thus to return home to his father, wife and son.\textsuperscript{222}

That is, of course, another story for another occasion, a story which is a healthy and most welcome counterpart to the story of
Oedipus, that misconceived and misconceiving man who killed his father, took his mother as his wife and (to round out his perverse instincts with respect to family obligations) eventually cursed his own sons and thus left his most faithful daughter with a deadly legacy. But that, too, is still another story for another occasion.

4-B. *Sophocles’ Antigone*

I.

Sophocles’ *Antigone* opens with its heroine’s outburst to her sister (*Antigone* ll. 1-5):

My sister, my Ismene, do you know of any suffering from Oedipus sprung that Zeus does not achieve for us survivors? There’s nothing grievous, nothing free from doom, not shameful, not dishonored, I’ve not seen.

A translator has referred to these opening lines as made up of “confused and contradictory negative.”

A decided negativity is intended, something that is reflected in Antigone’s very name.

But what is it that induces such negativity, a negativity which takes on the proportions of nobility in its single-mindedness? The noble considers actions superior to explanations, deeds superior to words—but it may, in its own good time, attempt to explain itself. When Antigone is moved to do so, she uses an argument that seems to suffer from the confusion seen in her opening lines (ll. 903-13):

Polyneices knows the price I pay for doing final service to his corpse. And yet the wise will know my choice was right. Had I had children or their father dead, I’d let them moulder. I should not have chosen in such a case to cross the city’s decree. What is the law that lies behind these words? One husband gone, I might have found another, or a child from a new man in first child’s place, but with my parents hid away in death, no brother, ever, could spring up for me. Such was the law by which I honored you.

On the surface, this argument does seem irrational. Perhaps it was thus regarded by Creon and his entourage as well as by the typical Greek audience.

What does a closer examination of Antigone’s argument reveal? First, there is an implicit exclusion of concern for the corpses of anyone outside the family: dead fellow-citizens would not find Antigone defying the city’s decree on their behalf. (It is even implied that her defiance of the city would come only in the service of the dead, not of the living.) What she does applies to the family, the
dead of the family, if at all. The critical distinction is between a
dead husband or child, on the one hand, and a dead brother (or, at
least, a dead brother, with parents being dead), on the other hand.
What is the basis of such a distinction?

Antigone puts it in terms of irreplaceability. A husband or child
can always be replaced, but not a brother if their common parents
are dead. Why should such a distinction be decisive? Does not
the irreplaceability criterion point to another element, that of
whether one has any control over the relation? One has no control
over the initial existence of one's brother: it is one of the "givens"
of this world. Not so with the husband or child: one's own doing
helps determine their existence. Not only does one choose the sta-
tus of spouse or parent, but one chooses it (if one lives in a city)
pursuant to, or in conformity with, the laws of the city. The city
has, to some degree, taken a part in the making of one's spouse or
child.

Of course, the very same laws have played a similar role in the
determination of one's parents or brothers—but that is not evident
to the child. One's parents, and hence one's brothers, seem much
more by nature; they are among the natural, even inevitable, things
of the world that one finds oneself confronted by. Such relations
are natural, inevitable, even shrouded in awesome mystery. In the
relation with one's spouse or child, one looks up and out and to the
future; in the relation with one's parents or brother, one looks
down and inward and to the past—and it is appropriate that these
primitive, seemingly irrational, attachments should include invoca-
tions of the gods under the ground, the gods hidden away from
men's view, the gods of the distant past and of dark places (ll. 460-
62, 1068-77).

It is also appropriate that Antigone's argument—if it can be
called that—should appear to defy analysis, should appear to be
the outburst of hidden, inarticulate passion.

II.

Creon, on the other hand, invokes the gods of the city, the gods
of the heavens. Both Creon and Antigone recognize that Zeus is
Creon's ally, that it is Zeus to whom he looks. Antigone had spo-
ken in her opening words of the suffering that Zeus had achieved
for Oedipus' survivors (ll. 1-5). Indeed, Creon can argue that the
city (not the family) is fundamental to man's existence, that even
the family relies upon it for its effectiveness. It is on behalf of the
city, a particular city, that Creon had issued his decree forbidding
the burial of Polyneices, in order that citizens may learn to respect the city and not attempt to overthrow it (ll. 162-210). The city and all that it makes possible require that severe measures be taken to punish and thereby to deter treason.

But the claim for the city, for the political, cannot be as exclusive as Creon regards it. This is evident as he talks to his son (ll. 639f). He first appeals to his son as a father. That is, he wants to take advantage of the family tie which he had, in effect, disparaged in condemning Antigone's action. In this speech, the Zeus who had been theretofore regarded as the guardian of political life and associated with Creon's action is for the first time referred to as the "Zeus who guards the kindred" (ll. 658-59). Thus, not even the gods of the upper world are as single-minded as Creon has taken them to be: even those gods recognize the claims, and the role, of the family, which tends to look to the underworld. And, of course, it is through his family that Creon is struck down (ll. 1191f, 1279f).230

Before this happens, Creon is "converted" to Antigone's view. He is frightened by Tiresias. (ll. 1094f) He asks the Chorus what he should do. They respond (ll. 1100-01),

Go free the maiden from that rocky house. Bury the dead who lies in readiness.

It remains one of the mysteries of the play what would have happened if Creon had followed this advice. Instead of freeing the Antigone first, he turns to the burial of Polyneices. The messenger describes what they had done (ll. 1203-05):

[We] gave the final purifying bath, then burned the poor remains on new-cut boughs, and heaped a high mound of his native earth.

How long did all this take—to bathe the body, cut boughs, build a proper fire, burn flesh and bone, and then pile up a high mound? When the royal party finally gets to Antigone's tomb, they hear Haemon's outburst (ll. 1207f). How long had Antigone been dead? Could not the dead have waited a little longer—or, at least, could not two parties have been dispatched to perform the two tasks?

One is tempted to say that Creon moves from one extreme to the other—to the consequent destruction of his family and against the best interests of the city entrusted to his care. Had he remained dedicated primarily to the realm of the living—with his primary concern for life and with an openness to political advice from the living—things might have turned out differently. But then, he
would never been in the situation he was if he had not attempted to extend the jurisdiction of the city to include the realm of the dead.

III.

There is in Antigone, too, something of an unreflective mixture of elements from two disparate realms. Her opening speech, with its insistence on the negative, is followed almost immediately by the declaration, commenting on Creon's decree to the citizens about Polyneices' body (ll. 31-32),

Such orders they say the worthy Creon gives to you and me—
yes, yes, I say to me . . . .

Her concern is with the rights due to the gods of the world below; but her nobility—her style, so to speak—reminds of the heroes who look up to Olympus. It is no wonder that what she does is regarded as manly, and that Creon fears that he would be taken as womanish if he yields (ll. 484-85). Creon discovered too late that there is concealed even in a king the female element that underlies and thus sustains human existence.

Antigone's final act, her suicide, also reflects this nobility. She will insist upon some control over her fate—we remember that she consider herself obliged to safeguard the rights of relations (parents and brother) over which she has no control. She will not either try to survive in a prison-cave or wait upon nature to take its toll of her through starvation. She will, to the degree possible, be master of her fate—with the result that she not only forestalls the aid of a chastened city but also draws into the underworld with her anyone who may be immoderately attracted by her noble but deadly eminence.

Even Antigone's name suggests that her dedication to the family looks to the past, not to the future. We are again reminded that the heroic in her, unlike in the heroes dedicated to the gods of light and the upper world, is in the service ultimately of the dark, hidden and even primitive forces found in human beings.

4-C. Anouihl's Antigone

I.

Genuine tragedy recognize what can be said “for each side” in the most serious conflicts. It teaches us, among other things, that the moderating of extreme positions is necessary if there is to be both life and a humane life; it avoids both sensationalism and sentimentality in its effort to grasp fundamentals. Whether Jean Anouihl's Antigone is truly a tragedy is one of the questions to be
considered. It is said at one point (J. Anouihl, *Antigone* 23 (L. Galantiere trans. 1958)), by the Chorus, that in a tragedy "[t]he least little turn of the wrist will do the job. Anything will set it going . . ." Is this intended to suggest that trivial happenstance can be decisive? Does this do justice to the great, contending forces one associates with tragedy?

Or, to put all this another way, can tragedy concern itself as much as modern plays do with the personal and intimate? Does not this concern move us toward the legitimation of sentimentality as well as of sensationalism, with either paralysis or grotesqueness the ultimate result? Anouihl's play very much devotes itself to the private lives of Antigone, her family and even of the guards who deal with her.

II.

This play is to be seen against the backdrop of the great past of the story of Antigone, especially as we know that story in the timeless form provided it by Sophocles. The Sophoclean version is much shorter—it must have less than one-half the words of Anouihl's. But it is a version which demands much more from us, in that it is less dependent on its circumstances and more concerned with questions that are intrinsic to human life and to serious thought about that life.

I will return in a moment to the Sophoclean backdrop of the play. Also of significance for Anouihl's version, even though not for Sophocles', are the immediate circumstances of the play's initial production, the circumstances provided by the occupation of a decadent France by Nazi Germany during the Second World War. What are we to make of the fact, if fact it is, that the Creon of this play may have the better of the argument, an argument for law and order as well as for the futility of nobility? Was this a healthy argument for the French to have thrust before them at a time when collaboration with the Nazis was offered them? Should Antigone's position be reducible to the virtual willfulness, a kind of selfishness, that is depicted here? Consider, by comparison, the Declaration of Independence, with its insistence that there are by nature standards in the light of which the doings of governors and of regimes might be measured. Was not 1944 the wrong time—is it still so today?—to make so much of official power and so little of individual nobility, to say nothing of a vigorous piety? Whatever is wrong with the resistance offered by an Antigone, does it not pale into insignificance against the enormity of that parody of law and order
provided by the Nazis, no matter how Creon is presented? Put another way, must not a Creon who can make an argument for law and order in the immediate circumstances of this play be a man who is, whatever his pretensions to culture, a hollow man?

III.

It may be useful to recapitulate for you the Sophoclean version which cannot help but provide the backdrop of any Antigone written in our time.

(1) Sophocles' Antigone opens with Antigone informing her sister Ismene of Creon's impending decree forbidding the burial of their fallen brother, Polyneices. This is the first of a half-dozen major scenes in the play, scenes which are separated by extended choral statements. Antigone expresses her deep resentment, and Ismene her helplessness, in the face of Creon's decree (Sophocles, Antigone ll. 1-98). (2) We then hear from Creon himself his decree—a decree in the wake of a terrible civil war—and thereafter the report from a guard that the dishonored body has nevertheless had a ritual burial by an unknown party. Creon is furious and the guard is threatened (id. ll. 154-331). (3) The next scene shows Antigone brought in to Creon, apprehended when she returned to repeat the ritual burial which, she seems to have thought, had somehow been counteracted by the guards' removing the earlier dust. Antigone and Creon engage in an extended exchange, part of which Ismene joins, all of which assumes that Antigone will indeed be executed for her act of defiance (id. ll. 373-581). (4) After Antigone is taken away, Creon's only surviving son, Haemon, comes to plead with his father for his fiancee's life, but to no avail (id. ll. 628-780). (5) Thereafter, Antigone is brought back to Creon, for her final condemnation and her removal for execution (id. ll. 801-943). (6) Now, for the first time, we see blind old Tiresias who rebukes Creon for what he has done, who is then reviled by Creon, and who is turn shakes Creon with a terrible prophecy which moves Creon to rush out to bury Polyneices and to save Antigone (id. ll. 1088-1114). (7) The final scene shows a messenger returning with the tale of the prophesied catastrophes which have befallen Creon: not only is Antigone dead, but also Haemon and Creon's wife. Creon, at the end, is little more than a walking corpse himself (id. ll. 1152-1342).

IV.

Central to Sophocles' Antigone is the scene between Creon and
Haemon. It has been said, and I believe with some justice, that “Haemon does not know how to argue; he knows only how to be right.” One sees here the decisive responses, made somewhat in political terms, to the political argument Creon makes and stands for. Central to the Sophocles play as a whole are the lines, found in Creon’s speech here to Haemon, that civilization depends on discipline (id. ll. 660-80). The merits of this argument should be evident, whatever one may think of Creon’s distortion of them by his extremism.

This confrontation of father and son—a confrontation which has the son trying to bridge the gulf between his city-based father and his family-based fiancee—this confrontation is not central, however, to Anouihl’s Antigone. Central to Anouihl’s play is the early part of the extended conversation between Creon and Antigone. One can, by comparing Anouihl and Sophocles in their accounts of the father-son confrontation, notice a critical difference between the two plays. In Sophocles, Haemon reports that the (pious?) people of Thebes are deeply disturbed by the condemnation of Antigone; they see what she has done on behalf of her brother to be noble, worthy of praise, not of death. In Anouihl, the people, in the form of a mob, are seen as demanding Antigone’s death, with Creon trying to save her both from the mob and from herself. Anouihl’s Haemon is urged by his father to grow up, to put away his childish dependence on his fiancee. His Creon alone is presented as knowing that the things others yearn for, howl for, even die for—whether the others be Antigone, the mob, or his son—are childish things, not to be taken seriously. (One must wonder if this Creon is momentarily out of character when he desperately attempts to save his son’s life at the end.) Maturity, for Creon, seems to require considerable deceit and to presuppose, as well as produce, cynicism.

Thus, Anouihl’s Creon “has” to do what he does. His private inclinations are against what the others, particularly Antigone and the mob, force him to do. Somebody has to do the “dirty business” of governing. Why it is considered “dirty business” is never indicated with clarity. Anouihl’s Antigone seems to believe that every government is demeaning. That is not assumed in Sophocles’ version of the story, where Antigone is proud of her royal blood (id. ll. 38, 941). Perhaps all government is suspect wherever so much is made, as in our time and in Anouihl’s play, of private lives.
One consequence of (or reason for?) the emphasis upon, and interest in, private lives is the radically diminished role of the gods in the Anouihl version. The gods have very little to do with either side in this great conflict, virtually making the question of a proper burial pointless. In the Sophoclean version, on the other hand, the gods are invoked on both sides: the Zeus of kinship, with his underground allies, by Antigone, the Olympian and celestial Zeus by Creon. Antigone looked inward and to the primeval past associated with the family; Creon looked outward and to the future, and to a kind of happiness associated with the city. In Anouihl, also, kinship and politics provide the points of departure for the protagonists—but these are soon left behind as each is reduced to little more than self-expression (especially Antigone, since Creon is almost too cynical to take even himself seriously). Such self-centeredness leads to an emphasis upon self-consciousness, upon the sense that one is performing in a theatrical production—something which one notices again and again in the Anouihl play and (I believe) hardly at all in the Sophocles play.

VI.

Without the divine for the characters to draw upon, and to be illuminated by, we are left with hollow men on the stage. It is no accident, then, that Tiresias does not appear in the Anouihl play. The page who is introduced by Anouihl provides something of a substitute for Tiresias, perhaps, as well as a groping assurance of the future. The hollowness of Anouihl's men, at least of the more sophisticated men (such as his Creon, and to some extent his Chorus?), is revealed upon comparing the conclusions of the two plays. In Anouihl, Creon prepares to continue with the business of state; a Cabinet meeting is now on the agenda (J. Anouihl, supra, at 52). In Sophocles, Creon's last words are (Sophocles, supra, ll. 1340-42),

Take me away at once, the frantic man who killed my son,  
against my meaning. I cannot rest. My life is warped past cure.  
My fate has struck me down.

The response of Creon (whether Anouihl's Creon or Sophocles' Creon) is not that of the philosopher, of the truly thoughtful man. But certainly, the response of Sophocles' Creon is more "human," less "mechanical" or banal.

VII.

I have suggested that both sides in Sophocles' Antigone stand for
something vital to human existence, however distorted and hence distorting each side is in advancing its claims. But what about in Anouihl’s *Antigone*? *Does* either side there stand for anything? Two major figures in Anouihl’s play are “at their best” (if “best” it can be called) not in what they respectively stand for but in their devastating critiques of what “the other side” stands for.

That is, one must wonder whether modernity has perfected (if “perfected” it can be called) the destructive capacity of mankind, that dreadful power we have for negation. I trust, however, that what I have said on this occasion has not been simply negative: I have attempted to suggest the enduring greatness which Sophocles’ *Antigone* represents and which even Anouihl’s *Antigone*, properly viewed, can remind us of and perhaps reinforce in us.

5. **ABRAHAM AND KIERKEGAARD**

I.

We have been told, for thousands of years now, the following story in Chapter 22 of the *Book of Genesis* about the patriarch Abraham, the founder of a great people:

And it came to pass after these things, that God did test Abraham, and said unto him, Abraham; and he [Abraham] said, Behold, here I am.

And He [God] said, Please take thy son, thine only son, whom thou lovest, even Isaac, and get thee into the land of Moriah; and offer him there for a burnt offering upon one of the mountains which I will tell thee of.

And Abraham rose up early in the morning, and saddled his ass, and took two of his young men with him, and Isaac his son, and clave the wood for the burnt offering, and rose up, and went unto the place of which God had told him.

Then on the third day Abraham lifted up his eyes, and saw the place afar off.

And Abraham said unto his young men, sit yourselves down here with the ass; and I and the lad will go yonder and bow down and return to you.

And Abraham took the wood of the burnt offering, and laid it upon Isaac his son; and he took the fire in his hand, and a knife; and they went both of them together.

And Isaac spake unto Abraham his father, and said, My father: and [Abraham] said, Here am I, my son, and [Isaac] said, Behold the fire and wood: but where is the lamb for a burnt offering?
And Abraham said, My son, God will provide himself a lamb for a burnt offering: so they went both of them together.

And they came to the place which God had told him of; and Abraham built an altar there, and laid the wood in order, and bound Isaac his son, and laid him on the altar upon the wood.

And Abraham stretched forth his hand, and took the knife to slay his son.

And the angel of the Lord called unto him out of Heaven, and said, Abraham, Abraham, and he said, Here am I.

And [the angel] said, Lay not thine hand upon the lad, neither do thou anything unto him; for now I know that thou fearest God, seeing thou hast not withheld thy son, thine only son from Me.

And Abraham lifted up his eyes, and looked, and behold behind him a ram caught in a thicket by his horns: and Abraham went and took the ram, and offered him up for a burnt offering in the stead of his son.

And Abraham called the name of that place Jehovah-jireh: as it is said to this day, in the mount of the Lord it shall be seen.

And the angel of the Lord called unto Abraham out of Heaven the second time.

And said, By Myself have I sworn, saith the Lord, for because thou hast done this thing, and hast not withheld thy son, thine only son:

That in blessing I will bless thee, and in multiplying I will multiply thy seed as the stars of the heaven, and as the sand which is upon the sea shore; and thy seed shall possess the gate of his enemies;

And in thy seed shall all the nations of the earth be blessed; because thou hast obeyed my voice.

So Abraham returned unto the young men, and they rose up and went together to Beer-sheba; and Abraham dwelt at Beer-sheba.240

This story—the story of what is most tellingly referred to among the Jews as “The Binding”—has been retold (and in the way of retelling, commented upon) again and again. Consider, for example, what the twelfth-century Jewish scholar, Moses Maimonides, had to say about it:

As for the story of Abraham at the binding [of Isaac], it contains two great notions that are fundamental principles of the Law. One of these notions consists in our being informed of the limit of love for God, may He be exalted, and fear of Him—that is, up to what limit they must reach. For in this story he was ordered to do something that bears no comparison either with sacrifice of
property or with sacrifice of life. In truth it is the most extraordinary thing that could happen in the world, such a thing that one would not imagine that human nature was capable of it. Here there is a sterile man having an exceeding desire for a son, possessed of great property and commanding respect, and having the wish that his progeny should become a religious community. When a son comes to him after his having lost hope, how great will be his attachment to him and love for him! However, because of his fear of Him, who should be exalted, and because of his love to carry out His command, he holds this beloved son as little, gives up all his hopes regarding him, and hastens to slaughter him after a journey of days. For if he had chosen to do this immediately, as soon as the order came to him, it would have been an act of stupefaction and disturbance in the absence of exhaustive reflection. But his doing it days after the command had come to him shows that the act sprang from thought, correct understanding, consideration of the truth of His command, may He be exalted, love of Him, and fear of Him. No other circumstance should be put forward, nor should one opt for the notion that he was in a state of passion. For Abraham our Father did not hasten to slaughter Isaac because he was afraid that God would kill him or make him poor, but solely because of what is incumbent upon the Adamites—namely, to love Him and fear Him, may He be exalted—and not, as we have explained in several passages, for and hope of a reward or for fear of punishment. Accordingly the angel said to him: For now I know that thou fearest God: meaning that through the act because of which the term fearing God is applied to you, all the Adamites will know what the limits of the fear of the Lord are. Know that this notion is corroborated and explained in the Torah, in which it is mentioned that the find end of the whole of the Torah, including its commandments, prohibitions, promises, and narratives, is one thing only—namely, fear of Him, may He be exalted. This is referred to in its dictum: If thou wilt not take care to observe all the words of this Law that are written in this book, that thou mayest fear this glorious and awful Name, and so on. [Deut. 28:58] This is one of the two notions aimed at in the binding.

II.

Seven centuries after Maimonides a Danish writer published, from the Christian perspective, what has become a celebrated discussion of this story of Abraham and Isaac. That discussion has been described in these terms by a twentieth-century Jewish scholar:

Soren Kierkegaard wrote a book called Fear and Trembling. It is
the story of an old man who had spent many years thinking about the present chapter [Genesis 22]. He looks at it from many sides and his final thoughts were something like this: Abraham had been promised the seed, and that seed could only come through his chosen son, Isaac. On the other hand, God has commanded that the boy die. Abraham, in order to maintain his faith in God, must believe both that the promise would be kept and that the son would die. The old man reaches the conclusion that it is human reason itself which was placed on the altar that day so many years ago in the land of Moriah.242

Another contemporary of ours, a German scholar, has had this to say about Kierkegaard's book:

In Fear and Trembling faith is depicted as a major human passion, affecting daily life at every point, its content being the reality of the individual's existence. Faith is heroic and absurd, for it transcends the calculations of worldly wisdom. It implies an infinite resignation with respect to finite goods. Only after such resignation the religious experience lives again in the finite, but in virtue of an absolute relation to the Absolute or Eternal. The main theme, which stands for Kierkegaard's own act of renunciation, is Abraham's sacrifice of Isaac.243

Our German scholar, writing some thirty years ago, observed, [T]here is a distinct possibility for Kierkegaard's influence, for a recollection of the basic principle of Christianity. This will become apparent when we realize that the conventionally Christian habit of mind has suffered the corrosion of three centuries of liberalism, and that the final breakup of the Victorian age is inevitable. The language and outlook upon life, where to be a Christian was practically the same as to be a gentleman and to live in a civilized world, became a foreign tongue. In this atmosphere the radical distinction between Greek wisdom and Christian faith by men like Kierkegaard and Nietzsche may restore once more the original condition of Christianity to its true significance.244

Still another contemporary of ours, a Jewish scholar in this country, has written of Kierkegaard in this manner:

Under [his] influence, many contemporary thinkers have stressed the decisive importance of religious commitment, of self-engagement. They consider faith primarily a matter of will and decision. Reminiscent of Tertullian and Pascal, Kierkegaard maintained that what the individual did was conditioned by what he willed, not by what he understood.245

That Kierkegaard's influence extends beyond what may sometimes seem a limited circle of theologians may be seen in an observation by Leo Strauss, in his Natural Right and History, in the
course of his description of the importance attached in modernity to history and the philosophy of history:

By becoming the highest theme of philosophy, practice ceased to be practice proper, i.e., concern with agenda. The revolts against Hegelianism on the part of Kierkegaard and Nietzsche, in so far as they now exercise a strong influence on public opinion, thus appear as attempts to recover the possibility of practice, i.e., of a human life which has a significant and undetermined future. But these attempts increased the confusion, since they destroyed, as far as in them lay, the very possibility of theory. “Doctrinalism” and “existentialism” appear to us as the two faulty extremes. While being opposed to each other, they agree with each other in the decisive respect—they agree in ignoring prudence, “the god of this lower world.” [Edmund Burke, Works II, 28] Prudence and “this lower world” cannot be seen properly without some knowledge of “the higher world”—without genuine theoria.246

Consider the terms which stand out in the various passages I have quoted from thus far in providing the contemporary intellectual setting for our discussion of Kierkegaard and Abraham: individuality, resignation, commitment, absurdity, will, self-engagement, and now existentialism. Existentialism is the one likely, if not even natural, response to the sense of the absurdity of life which the modern individual has come to experience. It may well be, then, that Kierkegaard’s principal interest for us may come from what a study of him helps us see about the existentialist movement, a movement which can be traced from Kierkegaard (in reaction to Kant and to Hegel) to the more serious (and perhaps even more influential) developments in Nietzsche and Heidegger.247

The sense of the absurd, on which so much seems to depend for existentialism, is perhaps dealt with for someone such as Kierkegaard by the story of Abraham and Isaac. One sees in that story, Kierkegaard argues, the diametrically opposed positions one is led to take: everything depends on Isaac’s long life and yet everything depends as well on Isaac’s immediate death. This kind of argument may be anticipated in works such as a sixteenth-century commentary on Genesis by John Calvin:

For God, as if engaging in personal contest with [Abraham], requires the death of the boy, to whose person He himself had annexed the hope of eternal salvation. So that this latter command was, in a certain sense, the destruction of faith.

God, in a certain sense, assumes a double character [in his dealings here with Abraham], that, by the appearance of disagree-
ment and repugnance in which He presents Himself in his word, he may distract and wound the breast of the holy man. For the only method of cherishing constancy of faith, is to apply all our senses to the word of God. But so great was then the discrepancy of the word, that it would wound and lacerate the faith of Abraham. Wherefore, there is great emphasis [in the passage] on the word, "said," because God indeed made trial of Abraham's faith, not in the usual manner, but by drawing him into a contest with his own word.248

An editor of the Calvin text explains, at this point,

God's usual manner of trying the faith of his people is, by causing the dispensations of his providence apparently to contradict his word, and requiring them still to rely upon that word, notwithstanding the apparent inconsistency. But in Abraham's trial, He proposed a test far more severe. For His own command, or word, was in direct contradiction to what he had before spoken; His injunction respecting the slaying of Isaac could, by no human method of reasoning, be reconciled to his promises respecting the future destinies of Abraham's family, of the Church, and of the world.249

The stage had been set, then, for our discussion of Kierkegaard—and, whatever the failings may be of my own observations about him, you will at least have had, for your reflections hereafter, indications of what various scholars and commentators of note have had to say about Abraham and Isaac and about Abraham and Kierkegaard. One cannot reasonably expect in such matters to add much that is both original and valid.

III.

The Kierkegaard I presume to talk about on this occasion is, I must emphasize, a limited one. I am more concerned to examine certain problems, or rather to suggest how those problems might be considered, than to present a reliable account of Kierkegaard as a whole.

In order to understand Kierkegaard here, one must try to deal with the account in Genesis of The Binding of Isaac. Only if one begins to understand the account of The Binding may one learn something vital about Kierkegaard, how he reads a serious text which he takes seriously. One might also learn thereby what to expect from his reading of other texts, such as the Platonic dialogues.250 This would not be a critical point for one's efforts to understand an author who merely uses a text as an occasion or as a
point of departure—but it is stressed in *Fear and Trembling* that the *Genesis* story had been much thought about.

Our effort is complicated in this instance, as in dealing with a Platonic dialogue, because of the various interpreters of the story evident in the book: there is the old man who has pondered long about the story; there is the man under whose name (Johannes de Silentio) the account of the old man and of Abraham is issued; and there is, of course, Kierkegaard himself. A further complication is indicated by the name of the man to whom this book is assigned by Kierkegaard: what is left unsaid in the book may be more significant than, or at least as significant as, what is made explicit.

One must distinguish, however, between that which is deliberately left unsaid and that which is left unsaid because of ignorance or inadvertence. The first contemporary Jewish scholar from whom I quoted—the one who reported that “the old man reaches the conclusion that it is human reason itself which was placed on the altar that day”—added this comment to his summary of *Fear and Trembling*:

Kierkegaard, who considers himself a master of irony, at one point says, “If the old man had known Hebrew perhaps he would have understood the chapter better.” It is a pity for the modern world that Kierkegaard did not understand the true irony of that statement. If he had, he would have seen that the old man’s lack of Hebrew was indeed the cause of his misunderstanding of the text. The irony of the statement lies not in its falsity, as Kierkegaard thought, but rather in its truth.

Hebrew, I take it, includes not only the language, and hence how the text is to be read, but also (among other things) the opinions, expectations and practices of those writing and expected to read this text.

I can do no more than put you on notice about these things, for my knowledge of Hebrew (however understood) is virtually nonexistent. But the importance of such things can be suggested by two illustrations, one taken from the New Testament, the other from the Old. Consider, for example, the *Gospel of Matthew*, where there are recorded, as the last words of Jesus on the Cross, “My God, my God, why hast thou forsaken me?” Despair, a sense of abandonment, perhaps even a loss of faith are suggested by these words, standing alone. But, one must remember, *Matthew* is the most Jewish of the Gospels (in the way it is written, in the readers addressed); and, I am told, a Jewish reader would have recognized Jesus’ recourse to his last words as an instance of the pious
practice of invoking an entire psalm (in this case, the twenty-second) by proclaiming its opening line. The psalm in this case is one which moves from a cry of anguish to a song of praise of God, that is, to an enduring reliance upon Him.258

My Old Testament illustration, suggesting what knowledge of Hebrew can provide one, is taken from the twenty-second chapter of Genesis, from our story, where God says to Abraham, “Please take thy son, thine only son,” and so forth.259 Most translations into English do not notice the “please” here but rather say such things as, “Take your son, thine only son,” and so forth. A Jewish commentator has observed about this usage, “The Hebrew is peculiar: the imperative ‘take’ is followed by the Hebrew article . . . which means, ‘I pray thee’—God was speaking to Abraham ‘as friend to friend.’ ”260

Another commentator, the one who commented on Kierkegaard’s irony, in connection with this very passage, goes on to say (perhaps to begin to explain how the lack of Hebrew can mislead one),

The word please in Hebrew is a short word and is often ignored by translators, but when it appears in the words of God spoken to a human being it certainly cannot be overlooked. God uses the word in four other places, but in all of them it is used in the sense of inviting someone to accept a gift (Genesis 13:14, 15:5, 31:12). To no other person aside from Abraham does God say please in the whole of the Bible.

God and Abraham had made a Covenant. God would give Abraham a son and make his name great if Abraham were willing to devote that seed to the establishment of the New Way. He asked Abraham whether he would be willing to give up that seed and the Covenant. The question is whether Abraham would be willing to relinquish the seed while remaining perfect in the sense discussed in the beginning of Chapter Seventeen [of Genesis].

God’s request was dangerous on both sides. But suppose Abraham had refused? Killing Abraham would have been of little help, and yet how could the two of them ever face each other again? Could God have nullified the Covenant? Perhaps, but then God’s word would be meaningless, and what man could ever trust Him again?

So long as there was no command there was no contradiction, and Kierkegaard, in his sacrifice of reason [in his argument, that is, that a sacrifice of reason had been required of Abraham?], became more like the followers of Moloch than like Abraham.

The present chapter [chapter 22] appears in sharp contrast to God’s discussion with Abraham prior to the destruction of
Sodom and Gomorrah. In that case Abraham was willing to argue with God as any man might argue with another, but here he says nothing.

These two poles may not be so different as first appears. God may have the right to request that which He has no right to demand. If God had commanded the death of Isaac it is by no means clear that Abraham would have complied. The most that can be said is that Abraham is willing to argue with God in order to save the lives of men whom he does not know while he is willing to be silent when the destruction touches him personally. In the whole of the discussion about Sodom and Gomorrah, Lot's name was never mentioned. In a strange way the present passage speaks more about God's faith in Abraham than Abraham's faith in God. If Abraham had refused, God would still be forced to keep His promise, but the relationship between Him and Abraham would have become unbearable. As it is Abraham and God will never speak with each other again after the present chapter.261

Was Kierkegaard aware of such considerations? Was he equipped to become aware of them? Did he really read the Biblical (or Platonic) texts? Or did he merely use them?262 Let us consider further the story of The Binding and what Kierkegaard does with it. We can thus see what more can be said in support of the proposition that Abraham was not really faced by contradictory commands, that there was no sacrifice of reason required of him. Perhaps we can also see why Kierkegaard may have wanted to believe a sacrifice of reason is required from the man of faith (that is, the man of action)—and how all this bears upon, among other things, the psychic underpinnings of contemporary existentialism.

IV.

Should it not be understood that there is something fierce, even monstrous, about the attempted sacrifice of Isaac, and this is so independent of the promise associated with Abraham's seed through Isaac?

There may be, in the Old Testament stories, other deaths and other sacrifices (or attempted sacrifices) as troublesome as what is seen here. The destruction of Job's family comes to mind as does the sacrifice by Jephthah of his innocent daughter.263 But those people—the family and the daughter—do not become known as human beings to the reader. Of course, Isaac might not have become as known as he does to us if he had been sacrificed. But the desire by Abraham and Sarah for him is vivid and his birth is re-
To assess these matters thus is to work from the impression made upon us; it is to treat these matters somewhat as one would a play. But should not this be expected in thinking about accounts which were written to achieve certain effects, to put across certain teachings, in the community at large?

The fierceness, if not monstrousness, of what Abraham seems to have been asked to do is recognized, it would seem, by the author of the *Book of Genesis*. God Himself is shown as acknowledging this as the supreme test. Yet it is also shown as something Abraham should be willing to do, that it is almost "natural" that he should be willing to do it, however unnatural the deed might have been.

But, we notice, this episode, partly because of its fierceness, raises for us questions that are not explicitly addressed by the author of *Genesis*. How did Abraham learn that he should do this? How could he know that the request came from God? Abraham, it would seem, is a man who, by this time, has had well-established contacts with God. This particular message, it would also seem, came to him during the night, perhaps in a dream, for his is reported to have risen early in the morning and gone about complying with God's request. Maimonides had spoken of the story of Abraham and The Binding containing "two great notions that are fundamental principles of the Law.\(^6\)\(^6\) One of those notions, as we have seen, "consists in our being informed of the limit of love for God and fear of Him—that is, up to what limit they must reach.\(^6\)\(^7\) The other notion contained in the story of The Binding is one that bears on our immediate problem, that of how Abraham could have known that the fateful request came from God. Maimonides can say,

The second notion consists in making known to us the fact that the prophets consider as true that which comes to them from God in a prophetic revelation. For it should not be thought that what they hear or what appears to them in a parable is not certain or is commingled with illusion just because it comes about *in a dream and in a vision*, as we have made clear, and through the intermediary of the imaginative faculty. Accordingly [Scripture] wished to make it known to us that all that is seen by a prophet *in a vision of prophesy* is, in the opinion of the prophet, a certain truth, that the prophet has no doubts in any way concerning anything in it, and that in his opinion its status is the same as that of all existent things that are apprehended through the senses or through the intellect. A proof for this is the fact that [Abraham] hastened to slaughter, as he had been commanded, *his son, his*
only son, whom he loved, even though this command came to him in a dream or in a vision. For if a dream of prophecy had been obscure for the prophets, or if they had doubts or incertitude concerning what they apprehended in a vision of prophecy, they would not have hastened to do that which is repugnant to nature, and [Abraham's] soul would not have consented to accomplish an act of so great an importance if there had been a doubt about it.268

The primary consideration, it would seem, is not the form in which the "prophetic revelation" appears but rather "that the prophet has no doubts in any way concerning anything in it." This certainty, it would also seem, depends on one's overall relations with God. The intimate relation between prophetic insight and genuine poetic inspiration seems to be evident here. In a sense, then, the most reliable revelation consists of the best insight into the highest things—and the inspired man reflects this either in his words or in his deeds.269

The question remains, however, as to the immediate source of such insight. (I say immediate since everything, including the workings of what we call nature, can be thought by the believer to be ultimately derived from God.) Does not the absurdity that Kierkegaard insists upon depend on a certain view of the world and of the constant involvement of God in the things of this world? Does not his positing of absurdity somehow depend on interventions from time to time by God, interventions at least in the form of messages?

What is God like? Does He move, change or act? What can man know about God? If God does not change, the world may be such as to provide guidance to people even about God, if they but look and then think about what they see.

Dare one add that if God is indeed changeless—and does not this follow from perfection?—may not the place one has to look to understand what happened on the occasion of The Binding be not into the unfathomable mind of God but in the all-too-human soul of Abraham?270

V.

A critical question remains: What should Abraham have known about God? The answer to this question affects one's judgment as to whether this was a case of overwhelming absurdity and as to whether absurdity is really at the roots of seriousness, with "commitment" (which is essentially arbitrary, in appearance) the only way out.271
What should Abraham have known about God? A man, for example, who is told (as Socrates was) that a god had identified him as among the wisest of men would be wise to examine that identification for what it truly means. A man who is told, or asked, by God to undertake a questionable mission might well wonder whether he understands precisely what is to happen. Was there, on the occasion of The Binding, case of absurdity, with a leap of faith by Abraham across the dreadful abyss thereby revealed?

Does a miracle represent a kind of absurdity in the concrete, something which obliges us to accept contradictory propositions? But, one is again obliged to ask, does a perfect God act? Does he change? St. Augustine argues that the Biblical accounts of God’s anger do not mean that His changeless tranquillity had been, or can be, disturbed. He can say, in a passage which reminds one of how philosophy can regard poetry,

Now God’s anger is not an agitation of his mind; it is a judgment by which punishment is inflicted on sin. And his consideration and reconsideration are his unchanging plan applied to things subject to change. For God does not repent of any action of his, as man does, and his decision on any matter whatsoever is as fixed as his foreknowledge is sure. But if Scripture did not employ such words, it would not strike home so closely, as it were, to all mankind. For Scripture is concerned for man, and it uses such language to terrify the proud, to arouse the careless, to exercise the inquirer, and to nourish the intelligent; and it would not have this effect if it did not first bend down and, as we may say, descend to the level of those on the ground.

Perhaps another way of asking what Abraham should have known about God is to address the question, What should Abraham have expected to happen on this occasion? What should one, who perhaps knew as much as any living man can about what God is like, expect God to do or to allow—that is, to want or to call for? Should Abraham have known what even we know, that God would not permit Isaac to be killed? How do we know it? From the story, it will be said. How did the writer of the story know it? Abraham himself did not write the story. The writer had been moved to believe this story; it had somehow been told to him. Why did he believe this story, this version of the story, among the many versions that may have been available to him? Is it because it fit in with, or reflected, what he otherwise knew to be the truth about God and about His dealings with men?

In principle, then, did not the original writer of the story have to make the same decision we must make, or that Abraham had to
make, as to what God truly wants of man? Should one, without having to be told, be able to figure out, in the words of the psalmist, "All the paths of the Lord are mercy and truth"? Should not Abraham have sensed, therefore, that he would not have to go through with the sacrifice of his son if he was truly acting in accordance with the divine will?

It can be argued—and with this argument Kierkegaard's absurdity is further questioned—that Abraham was in fact somehow aware that he would not have to sacrifice Isaac. You will recall that Abraham did say to the servants accompanying him and his son, "Sit yourselves down here with the ass; and I and the lad will go yonder and bow down and return to you." The Rabbis [of old?] declare that at [this] moment the Spirit of Prophecy entered into him, and he spoke more truly than he knew.

Consider, also, Abraham's answer to the inquiring Isaac, "God will provide himself a lamb for a burnt offering." True, Abraham did draw his knife—but with what expectation? We would speak today of a conflict (or shall we say a difference of opinion?) between the conscious and unconscious parts of Abraham. One commentator has observed of the language, "and offer him there for a burnt offering," that this is literally, "‘lift him up’ (upon the altar)," adding, "God, in His command, did not use the word which signifies the slaying of the sacrificial victim. From the outset, therefore, there was no intention of accepting a human sacrifice, although Abraham was at first not aware of this." Or would it not be better to say, "Abraham was at first not fully aware of it"?

After all, it seems to me, far less is required to stop Abraham from completing the sacrifice than had happened up to this point to bring Isaac to the point of being sacrificed. What does happen now is something quite ordinary—and if not this ordinary thing, would not another have appeared and sufficed? I refer to the appearance of a ram caught by his horns in a thicket. Abraham sees a ram and sacrifices it instead of his son. He did not insist upon the lamb earlier anticipated (prophesied?) by him! What other compromises might he have made if properly directed?

To ask this question about proper direction is to remind ourselves that an angel also speaks to Abraham on this occasion. Does Isaac here this angel? We are not told. In what form does the angel appear to Abraham? Can this be understood as a second thought—perhaps as the culmination of the thinking he had been doing for three days? In a sense, then, there is nothing truly extraordinary about the intervention of such an angelic message.
Does it not make sense? Is Abraham's binding of Isaac as he did the only extraordinary thing which takes place in the entire episode?

If one considers this matter in this manner, the issue of absurdity need not arise. Nor did it arise, I should add, for many, perhaps most, Jewish as well as Christine believers over the centuries. Not that most of them would have spoken of all this as I just have. But neither would they have been reduced to Kierkegaard's mode of reasoning about the sacrifice. For example, Augustine writes (echoing his Jewish predecessors),

Abraham, we can be sure, could never have believed that God delights in human victims; and yet the thunder of a divine command must be obeyed without argument. However, Abraham is to be praised in that he believed, without hesitation, that his son would rise again when he had been sacrificed. . . . The devout father therefore clung . . . faithfully [to the promise] had to be fulfilled through the son whom God ordered to be slain, he did not doubt that a son who could be granted to him when he had ceased to hope [because of age] could also be restored to him after he had been sacrificed.

Augustine adds, "This is the interpretation we find in [St. Paul's] Epistle to the Hebrews. . . ." One is reminded of the (also fundamentally un-Jewish?) observation by John the Baptist that God could raise children out of stones to provide descendants for Abraham.

To say that the believer has not, over the centuries, usually conceived of himself as somehow accepting an absurdity is not to say that faith is not required. But faith has long been regarded as supplementing, not as contracting, the truths arrived at by natural reason. Some moderns, on the other hand, almost seem to welcome the appearance of absurdity: this seems to characterize for them the whole (or, perhaps we should say, the divergent wholes) they perceive. But before we turn to these moderns and their inclinations, we must notice something else about Abraham.

VI.

Another way of approaching all this is to ask, What was Abraham trying to do, to prove, to be, or to find out? Was Abraham's understanding of God faulty, perhaps too much influenced by the child-sacrifice practices of his neighbors? Was he somehow challenged by the extent of devotion evident among such idolators?

Is there reflected in this story Abraham's realization that he had made, or was in danger of making, too much of his son or of the
ambition to be realized through that son? All this, he seems to say, he is willing to put entirely in God's hands to dispose of as He wishes. But it is left to Abraham to listen for, and to respond to, the divine wish.

And so, like the dreamer or the poet, Abraham controls what happens—what he is inspired or moved to say or to do. It does not matter, for our purposes, whether control of events rests in Abraham or in the author of Genesis (who may have had, we have noticed, several accounts to choose among, accounts distilled over many years in the memory of the Jewish people).

The Rabbis speak of this as the tenth and the greatest of the trials to which Abraham was exposed. Exposed by whom or by what? If God does not move—does not intervene in particular cases—must not one's understanding of the divine will be decisive? That understanding may be faulty or limited, depending on one's training, one's capacities, and one's character and passions.

We thus return to our question, What is Abraham like? What did he truly want? Is it a sense of himself, or of what we might even call self-expression, rather than dedication to God that he is moved by? Something of this may be discerned in a somewhat romantic interpretation of The Binding that one Jewish scholar has provided us (adapting, it seems, ancient accounts to his tastes):

Abraham stood the test twice: first when he placed Isaac on the altar, then when he helped him down from it. The second trial exacted greater strength than the first. God Himself had told him to sacrifice his son. Then an angel came and called out, "Stop, don't touch him." How could he listen to an angel and disobey God? It took great self-control to miss such a marvelous opportunity to make a supreme sacrifice, and to yield to the angel.

Or is it that Abraham—or the author of Abraham—wanted to impress indelibly upon Isaac and his descendants what fidelity to this faith can mean, what it can look like? Is Abraham's deed a founding act, an act which defies the past and is not to be repeated (but "only" admired) in the future?

A Jewish colleague has told me that he remembers having been profoundly moved as a child by the story of The Binding—and that his own child (a girl even), upon first hearing the story as a ten-year old, simply turned white. What do children sense about this story, that it reflects the vulnerability which draws them to even as it makes them wary of their parents and of God?
VII.

My deliberations and conclusion seem, for the most part, alien to Kierkegaard's approach. He wants, or at least recognizes, man to be on his own. Not even reason is to be of much help, except to point up the aloneness and vulnerability of man. He seems to want absurdity, one might even suspect, so as to magnify the role of faith and the required leap. At any rate he surely wants to draw out the full implications of an absurd premiss and to show that that prem iss does not dissolve the mysteries which reason finds for or by itself.

The community, ecclesiastical as well as political, is systematically depreciated by him in his magnification of faith. In this respect—in his willingness to give up all to God—Abraham is for Kierkegaard the Old Testament model of the devout Christian. One must wonder, of course, whether it distorts the Abraham story to see it primarily as a model for, or in terms of, Christianity? One should remember that the story does teach that Judaism in itself offers something which is worth giving up everything one cherishes for.

But even to have this story—to be able to read it and to think about it and thereby to take it seriously—depends on a canon of sacred texts, upon language, and hence upon a community and tradition. It is to depend on those associations, of believers and of citizens, that Kierkegaard again and again disparages, those associations for whom prudence is indeed "the god of this lower world."293

To enter into an absolute relation with God would require, it would seem, that man be stripped of all these chance influences (the influences of family, political community, and church). Only thus, Kierkegaard seems to say, is man to be left as a willing self. Is this state of affairs, in which the roots of existentialism may be detected, somehow regarded as creative?294 For such self-assertion, passion, not reason, is critical—and requires to be deepened.295 Kierkegaard observes that dread lures forth the obscure libido (emotion).296 This, it would seem, permits one really to confront oneself, to live. And, Kierkegaard also suggests, when one delves into oneself, one first of all discovers the disposition to evil.297 Compare the ancient teaching that all actions and all pursuits naturally aim at the good.298

One might dismiss much that appeals to Kierkegaard as due merely to his own temperament. No doubt, problems in his personal life may have encouraged him to believe that the truly sensi-
tive person is torn by an overwhelming conflict of alternatives. Some of the stories in Fear and Trembling exhibit a sickly sentimentality—and may seem to some to suggest that there may be here instances of oddness which should be traced back to the artist's character.

But it will not do to dwell upon Kierkegaard's quirks. The considerable appeal, especially in intellectual circles, of Kierkegaard's opinions, especially the emphasis upon the role of the will, should be taken into account. Has Christianity discovered, invented or elevated the will, making of it what it never was in antiquity? Has this transformation of the will become particularly critical because of what has happened to the status of nature among us? Is this partly because of the somewhat successful effort to conquer nature? Has nature, that is, somehow been turned against nature?

VIII.

What is the status of nature? What is the relation between nature and the good? That is, can the good be discovered? Is it somehow rooted in nature? And does not this mean that one's bearings should be taken by universals which exist independent of our will and are knowable?

Kierkegaard's faith, on the other hand, rests on the opinion that the particular is higher than the universal. This would be seen by him in his acceptance of what he would consider the unreasonable (even absurd?) conclusion that Jesus could be both God and man. When one thus places the emphasis upon the particular, one must consider oneself as a witness, not as a teacher. Witnessing points to particulars; it does not rest, as teaching does, on a common good, on a community, or indeed on universals or the ideas.

Put another way, one can say that there is involved here the distinction, for the achievement of the best, between sacrifice and discipline. To emphasize sacrifice, as Kierkegaard does, is perhaps to make much of the will, at the expense of reason and of nature. On the other hand, to emphasize discipline is to assume there are standards to which one can aspire and from which freedom follows. This means, among other things, that prudence should be brought to bear upon human affairs. When prudence is at work, there is not the teleological suspension of the ethical of which Kierkegaard makes so much, but rather its proper interpretation of the ethical.

Kierkegaard sees the tragic hero as sacrificing everything for the universal; he is the beloved son of ethics. But is not this a mis-
understanding? Does not the tragic hero sacrifice the universal for the particular, the whole for a part? Prudence, on the other hand, permits one to see the whole properly. Kierkegaard’s insistence upon the ultimate primacy of the absurd, however, makes prudence a futile exercise.

The act of will, and hence of faith, is relied upon by him. One can know it is the will, it seems to be said, only if one has to resist desires. Pleasure is suspect. But from the perspective of the natural, it can be also said, one takes pleasure, if one is properly trained, in doing what one discerns to be truly good.

Nature is seen by us at bottom in the human awareness of, and inevitable reliance upon, the principle of contradiction. To talk meaningfully even about absurdity may be to assert a fundamental congruity between reason and the natural order. Do not Kierkegaard and his successors call into question the ground of the natural understanding? Do they question that which humans beings have always regarded as somehow immediately apparent to them, their natural awareness of certain things?

All this, it seems, is called into question to a radical extent by what can be called the existentialist movement. Of course, Kierkegaard himself happened to have something of a way out—in the form of a kind of Christianity. But his successors do not have this way out, especially since they may have sensed, better than did he, how much any body of religious opinions and practices depends on institutions and on other opinions (of an epistemological character) which have been undermined by rhetorical positions such as Kierkegaard’s.

All this may also represent a reaction against Hegel with his collectivization of thought. Kierkegaard wanted to make it clear, and for this he should be given credit, that the most important things cannot be collectivized. The culmination of the development advanced by Kierkegaard can be seen, perhaps, in Heidegger: God is gotten rid of altogether, leaving only Being—and, in Heidegger’s case, the crudest of particulars (a resurgent Germany!) to supply a body for his denatured universal. That bodies are needed it would not be prudent to deny, but surely we can do better than this.

So, we can again ask, what does nature teach? What is the status of nature? What can man, using his natural faculties, learn and know about divinity?
IX.

To raise these questions—to examine these matters as we have—is to approach these things from a perspective far older than that which Kierkegaard provides. It is from that older perspective that one is inclined, in thinking about Old Testament thinking, to make much of that passage in Deuteronomy which has Moses counseling his people,

Behold, I have taught you statutes and ordinances, even as the Lord my God commanded me, that you should do so in the midst of the land whither you go in to possess it. Observe therefore and do them; for this is your wisdom and your understanding in the sight of the peoples, that, when they hear all these statutes, shall say, "Surely this great nation is a wise and understanding people." 308

Should one make more of fear and trembling than of the questioning and perplexity which can lead to wisdom? "With fear and trembling," St. Paul wrote, "work out your own salvation." 309 It has been noticed that the good for Kierkegaard is not to compel a man to recognize his urgent need for knowledge, but his urgent need for a leap of faith. 310 Do fear and trembling encourage one to leap, that fear and trembling which philosophy was once thought to discourage? It is said of the old man in the Kierkegaard story that his enthusiasm for the Abraham story grew and grew as he understood it less and less. 311

Is too much made by the philosopher of reason? It is argued, in another work of Kierkegaard’s, that the Greeks failed to notice the will, the defiant will, as a determinant in determining what sin is. 312 He says there,

The Greek intellectualism was too happy, too naive, too aesthetic, too ironical, too witty . . . too sinful to be able to get it into its head that a person knowingly could fail to do the good, or knowingly, with knowledge of what was right, do what was wrong. The Greek spirit proposes an intellectual categorical imperative. 313

Does Kierkegaard say what he does because he fails to see the considerable role recognized among the Greeks, for example in the Platonic dialogues, for the passions—for irrepressible and ultimately ungovernable passions which make vulnerable any concrete manifestation of the works of the mind? Should not the emphasis be put not upon defiance as the cause of troubles but rather upon opinions and desires determined by chance rather than by understanding? 314

The critical role of understanding, even in the man of faith, may
be seen in Maimonides's warning against anyone who, even if by recourse to miracles, "issues a call to believe in impossible things." Does Kierkegaard's interpretation of the binding of Isaac amount to an illegitimate call "to believe in impossible things"?

Kierkegaard, like many before him, did recognize that it is in adversity that one may be obliged to recognize the deeper meaning of one's faith in God. Thus, the Talmud says, "When Nebuchadnezzar, the mighty King of Babylonia, wanted to sing praises to God, an angel came and slapped him in the face." A famous rabbi once asked, "Why did he deserve to be slapped, if his intention was to sing God's praises?" The rabbi answered himself, "You want to sing praises while you are wearing your crown? Let me hear how you praise me after having been slapped in the face."

To praise God properly in such circumstances, as well as to conceive of this story, to frame the appropriate question, and to develop a telling answer—in order to do all these things, and thereby make the act of faith both meaningful and salutary, is there not needed a sound awareness of the nature of things?

6. **SOCRATES OF ATHENS**

I.

A conversation between Socrates and a younger man by the name of Euthyphro takes place on the eve of Socrates' trial pursuant to an indictment which includes the charge (by still another young man) that Socrates does not acknowledge the gods that the city acknowledges.

I remind you of how this dialogue proceeds by drawing upon the introduction to the West translation of the dialogue (which is the most reliable translation available in English):

This dialogue . . . portrays [another] private conversation between Socrates and an acquaintance, in this case Euthyphro. They meet in the marketplace at a government building where each has court business. Each tells the other about his case. Socrates is being prosecuted for impiety, while Euthyphro is prosecuting his own father for an alleged murder that allegedly involves impiety. Then Socrates asks the self-confident Euthyphro to teach him what "the pious" is. Euthyphro's several attempts to do so are thwarted by Socrates' refutations, and Euthyphro finally puts an end to the discussion by claiming business elsewhere.

Readings today of this dialogue, and indeed of all the dialogues
related to the indictment, trial and execution of Socrates, la-

bor under one severe difficulty: we find it hard to appreciate the

concerns expressed by the Athenians about piety, concerns which

Socrates himself never considers improper in principle. Piety is not

likely to mean as much to modern readers, if only because we are

likely to insist that piety is not a legitimate public concern. If we

do respect piety it is apt to be in the form of the opinion that what

the Athenians did to Socrates was lamentable (and hence impious?).

We may be more inclined than the Athenians to recognize that

conventional judgments about piety and impiety do tend to de-

pend, in large part, on local opinion, something which modern an-

thropology makes us very much aware of. Still, we must

remember that the Athenians, too, were acquainted with ways

quite different from those of the Greeks. Besides, to have laws

ordaining acknowledgment of the gods of the city suggests that

other cities or peoples may "have" other gods.

II.

Socrates seems to raise questions about the piety of Euthyphro,

in that he indicates that Euthyphro, in his determination to be pi-

ous (or to avoid impiety), runs the risk of committing a gross impi-

ety himself in the way he treats his own father (Plato, Euthyphro

4a-e). The Athenians at large seem to consider Euthyphro's indict-

ment of his father for murder to be mad (pp. 6a, 8).

Euthyphro describes to Socrates what his father had done to

warrant his son's indictment (pp. 4c-d):

Now the man who died was a laborer of mine, and when we were

farming on Naxos [a colony of Athens], he was serving us there

for hire. So in a drunken fit he gets angry with one of the family

servants and cuts his throat. So my father, binding his feet and

hands together and throwing him into a ditch, sends a man [to

Athens] to ask the exegete what he should do. During this time

he paid little attention to the man he had bound and was careless

of him, on the ground that he was a murderer and it was no

matter even if he should die, which is just what happened to him.

For because of hunger and cold and the bonds, he dies before the

message returns from the exegete.

Euthyphro goes on to explain (pp. 4d-e):

This, then is just why my father and the rest of my family are

indignant: because on behalf of the murderer I am proceeding

against my father for murder, although he didn't kill him, as they

assert, and besides, even if he did kill him, since the man who
died was a murderer anyway, they say that one needn’t give any thought to someone of that sort—for it is impious for a son to proceed against his father for murder—they knowing badly, Socrates, how the divine is disposed concerning the pious and the impious.

Whatever may be thought about Euthyphro’s piety in prosecuting his father, no one would accuse Euthyphro of that impiety which takes the form of not acknowledging the gods of the city. Euthyphro can even be said to be virtually addicted to the gods of the city, in the sense that he readily accepts (he may eagerly collect) the many stories circulating among the Greeks about the gods. He is proud of his considerable store of such stories. We are not told where he gets the stories he loves to tell. But it does not seem to require much intelligence or a refined judgment to be well-versed in such stories. He can invoke the deeds of gods, holding them up as models for himself, when he is criticized about things he has done, especially the indictment of his own father. For example, Euthyphro makes much of the story that has Zeus binding his divine father, justifying thereby Euthyphro’s treatment of his own father (pp. 5d-6a).

Just as we suspect that Socrates, despite his reservations about the gods of the city, may exhibit a deeper piety than most men, so we suspect that Euthyphro, despite his absorption with stories about the gods, may reflect a deeper impiety, in that he does not respect the purposes, or spirit, of the piety generally cherished by mankind.

III.

The Athenians sense a serious problem in what Euthyphro has done, despite his reliance upon divine authorities for his actions. Euthyphro himself seems to believe that the invocation of divine authority should suffice to justify his action. We are familiar with such invocations: a Christian might invoke Jesus in performing acts of charity which impoverish his family; a Hindu might invoke Arjuna in performing duties which he finds personally abhorrent.

Still, one must wonder what led Euthyphro to act as he did in the first place? The divine models available are so varied, as Socrates goes on to show, that it must be difficult to know which one is to be regarded as authoritative. Must not something else than the models—something in Euthyphro’s temperament, if not chance—determine what precisely will be done by Euthyphro? Once he
does embark on a course of action, he can no doubt find precedents
enough among the many stories he knows about the gods.\textsuperscript{324}

Euthyphro seems to find it strange that people generally do not
consider such models sufficient to justify his conduct. He does not
see anything bizarre about treating his father the same way that he
would treat any other man.\textsuperscript{325}

IV.

Socrates, in not being convinced by the divine authorities
Euthyphro invokes, is probably like most other Athenians of his
time. He is different, of course, not only in how he argues against
such use of authority but even more in what he suggests about the
significance of the stories about the gods.

If one is to look to the gods for authority, one is obliged to won-
der which gods should be relied upon? Socrates can ask, Why rely
upon Zeus and not upon Kronos or Hera (the father and wife of
Zeus, respectively), both of whom Zeus had quarrelled with (pp.
8a-b) as to what is good or bad in various circumstances?

There are special problems when the gods are multiple. Does
such multiplicity reflect diverse strands in the human tempera-
ment, with each god (or each story about a god) appealing to a
particular kind of human being or a particular passion in human
beings generally?

A way out of this difficulty might seem to be offered by mono-
theism. Still, if the divine is authorized by the city—if there are to
be religious practices and opinions which are ordained by law—are
there not apt to be different aspects of the divine emphasized by
different factions within the city? For example, different orders of
priests or schools of theologians would contend with each other,
which would seem to follow “naturally” when the divine is “natu-
ralized” (that is to say politicized and taken over by the city).

V.

Socrates, by countering with other divinities than those that hap-
pen to be invoked by Euthyphro, is able to make arguments which
the typical citizen is not likely to make against Euthyphro. The
city, it seems, is not able to defend itself properly against apparent
abuses of its piety, as distinguished from what the city can do to
defend itself against apparent denials of the pious. And, as the
then-recent history of the Peloponnesian War showed, Athens
could be severely damaged by men who were bound by or who
exploited pious opinions held by the Athenians.\textsuperscript{326} Socrates, in the
restraints he seeks to place on Euthyphro's pious excesses, is displayed in this dialogue as a champion of the family and of common sense.

Athenians who learn someday of this conversation can be expected to appreciate that Socrates' reservations about the gods of the city (that is, about the stories attributed to the gods of the city) were reservations in the service of a civilized community. Similarly, just as Socrates the lawbreaker is displayed in the *Crito* as truly law-abiding (in refusing to flee the sentence imposed upon him), so Socrates the corrupter of youth is displayed in the *Euthyphro* as trying to protect a beleaguered father from his misguided son.

The Athenians, in regarding Euthyphro as mad in prosecuting his father in the name of Zeus, *sense* what Socrates is drawing upon in arguing against Euthyphro, even though they may not be able to develop the Socratic arguments. But, then, Socrates himself does not make his position altogether explicit in this dialogue. He does seem to be drawing upon nature as a guide, that very nature which someone of Euthyphro's temperament and inclinations may not be able to recognize as authoritative.

Is not nature implicitly drawn upon by the Athenians when they repudiate what Euthyphro has done? That is, nature may guide us in how to act, even when we are not able to recognize and describe what it is that does guide us. The Athenians do not appreciate the implications of their own rejection of Euthyphro's action. It is easier for us to do so, since we are not bound to acknowledge *their* gods.

Nature is reflected in common sense. But philosophy aims to make explicit what nature is. It devotes itself to a disciplined study of nature, with nature also providing a standard (that is, the truth, rationally arrived at) by which any inquiry may be judged. Thus Socrates, in challenging Euthyphro's prosecution of his own father, questions the stories upon which Euthyphro relies, including the vivid stories made so much of by the Athenians themselves in preparing the Robe for the Great Panathenean Festival referred to by Socrates (pp. 5e-6b). This means, in effect, that the Athenians can consider Euthyphro mad for taking most seriously the very stories about the gods that the Athenians can consider Socrates impious (and hence worthy of execution) for not believing as they (including Euthyphro) do. The Athenians, then, are like Euthyphro in this crucial respect: they do not understand what they are saying;
they contradict themselves; that is to say, they are not philosophical.\textsuperscript{328}

VI.

Immediately upon learning what Euthyphro has done, Socrates evidently understands why it is that he should do something so outlandish as indicting his own father for murder.

Socrates’ first oath thereupon (the first of the nine oaths in the dialogue) finds him invoking Heracles, a somewhat impulsive demigod (who eventually turned into an immortal) (p. 4a).\textsuperscript{329} Euthyphro responds with an oath by Zeus (p. 4b). In fact, he invokes only Zeus in his four oaths in the dialogue (pp. 4b, 5b, 13b, 13c). He acts as if Zeus were the only god that counts, never using the name of any other god. Euthyphro seems to sense that when he looks away from Zeus to the other gods for authority, he runs risks.\textsuperscript{330}

Socrates, too, swears explicitly by Zeus (three times) (pp. 4e, 5c, 13e). In his other two oaths, Zeus is implied. Thus, the oath by Heracles with which Socrates begins his swearings points not to “Zeus the son” (who “indicted” his father) but to “Zeus the father,” who had in Heracles (the most powerful of mortals) a dutiful son who would never even think of “indicting” his father (that is, Zeus himself).\textsuperscript{331} The other oath by Socrates in which Zeus is implied invokes “the god of friendship” (who is Zeus) (p. 6b). By doing this he reminds Euthyphro of a more benevolent side of Zeus than that drawn upon by the son who has presumed to indict his own father. We are again reminded that different strands in the human soul may make various people more receptive to one god (or to one facet of a god) than to another.\textsuperscript{332}

VII.

We can see in the way Socrates employs his oaths, as well as in his general urbanity, the restraint, if not even the aloofness, of the philosophical approach to these questions. We can also see not only Socrates’ guarded reservations about the gods recognized by the city but also how such official recognition (if not the gods themselves) should be questioned.\textsuperscript{333}

When philosophy is presented as it is in this dialogue, it can be seen as truly supportive of a decent civic life as well as of a healthy family life, both of which an unrestrained devotion to the gods of the city can sometimes (perhaps inadvertently) subvert.\textsuperscript{334} Euthyphro is so obviously monstrous in what he tries to do that
even the Athenians at large can recognize his piety as a problem. Other extreme forms of piety, as during the great war I have already referred to, had proved much more difficult for the Athenians to recognize and to counteract. And so great public decisions, unduly influenced by invocations of piety, had proved disastrous.

The *Euthyphro* can be seen, at least in part, as Plato’s quiet way of suggesting that Socrates had been of service to the city in questioning as he did the gods of the city. The caution with which Plato proceeds here reflects what he learned from the career, including the thought, of Socrates about the limitations that philosophy must respect if it is to survive in the city, especially when chance and other developments make philosophy even more vulnerable than it naturally is. It also reflects what Plato had learned about both the uses and the abuses of piety.

VIII.

What, indeed, is piety? If piety is put in terms of what is dear to, or chosen by, the gods (which is the way it is primarily put in this dialogue, perhaps because of Euthyphro’s interests and immediate circumstances), a vital question remains: Is a particular response pious because it is chosen by the gods or is it chosen by the gods because it is pious?

If what is critical is what the gods have chosen (that is, what the gods have done or said, often independently of human beings), then it becomes important to know the stories about the gods, so as to be able to see what it is that the gods have *made* to be pious. What is decisive then is the *will* (and perhaps the *love*) of god, not the thought or reasons of god. This approach is consistent with the opinion that the divine is incomprehensible to human beings. But is not some understanding of the divine implied in the human ability to identify some beings as gods and other as not-gods? One must wonder, furthermore, how one determines which stories about the gods are reliable. Such stories must be drawn upon if one is to look, as Socrates suggests Euthyphro should look, for those things which “all gods” believe (pp. 9a-b, 9c-d).

The incomprehensibility of the divine (for human beings) means that one reported action by a god may well contradict another reported action by a god (the same god or another god). This does make it difficult to model oneself safely upon what the gods do. It is far safer to try to do what the gods *say* human beings should do, provided of course that one can determine what in fact the gods mean human beings to do.
It is no wonder, then, that philosophy is looked to, at least by some, as a guide in sorting out the various stories and decrees attributed to divinity. (This is related to the perennial struggle between poetry and philosophy.) That the stories will be various, and quite varied, is inevitable, once diverse named gods are accepted: for there would be no point in naming them if they were not believed to act differently, if not to be different, from one another in critical respects. On the other hand, the gods of Socrates (and of Plato and of Aristotle?) are knowing gods rather than acting or loving or judging gods. Should it not be recognized that the knowing gods, insofar as they do know, are all the same and hence one? This, then, may be the ultimate philosophic resolution of the problems raised by the assumption that the pious is that which the gods have chosen.

IX.

An opportunity for philosophy may be seen also in the other answer suggested in this dialogue about the basis for piety. If what is critical to piety is not that it is pious because it is chosen by the gods but rather that it is chosen by the gods because it is pious, what then?

It would suggest, among other things, that piety (or rather the conduct dictated by piety) is something that philosophy could seek out on its own, without the help of any stories about the gods. Proper conduct would exist, in nature, like any other moral truth that is subject to being discovered. If all this is so, it suggests that the gods, if they know what they are up to, would all choose the same—and hence there should be no conflicts among the gods. (Otherwise, could not one usually find some god to justify the personal inclinations one happens to have?) And so, it can be said it is philosophy or the proper use of reason, not history or a canon of stories about the gods, which is needed to guide mankind aright.

What, then, would be properly called piety? Not simply a respect for the right order or for justice. Rather, piety would be that respect for the right order which is keyed to deference to (fear of, love of) the divine—that respect which is derived through, or reinforced by, one's beliefs about the divine. Thus, piety is something necessary, or at least often useful, for the many who do not have available the teachings of philosophy either directly, as philosophers themselves, or indirectly as citizens of a city shaped and ruled by philosophy.

All this may be related to why piety may not be, strictly speak-
The proper conduct in various circumstances would be governed by nature-based virtues, such as justice, temperance, courage, or wisdom. Is there, then, no piety, in the ordinary sense, exhibited by the philosopher? Certainly, he is not likely to have the awe or the dread (or the fear and trembling) popularly connected with piety (pp. 12a-c, 15d). The philosopher does perform most if not all of his actions in a way consistent with piety as commonly understood. He is guided by the virtues. But is he not too dispassionate and aloof for the many, who prefer to see love, anger and other passions at work, passions which seem to them to testify to one's humanity?

A kind of piety is exhibited by the philosopher in that he defers whenever possible to the religious practices of others. Thus, for the philosopher, piety may mean that he is respectful of the piety of others, even as he is aware of the excesses which such piety may promote, especially since it is not likely to be ultimately determined or tested by reason. Being respectful of the piety of others can include making use of others' piety in guiding them to do what they should.

In addition, the philosopher knows he was not born "from an oak or a rock" but rather from human beings living in a community which had nourished and protected him as a human being. He respects his own, not because it is necessarily right or the best but because it is his own. His own includes his family, of course, that very family whose welfare and integrity tend to be served by conventional piety (p. 14b). Does not this make Euthyphro's attack upon his father seem even odder?

The virtue most obviously connected with the philosopher is wisdom, and it is that which leads to something which resembles piety: a kind of reverence for the ruling principles of the universe. Is such a consequence of wisdom a form of piety without "god"? Does it see the divine in the purest form?

Still, the philosopher's reservations about the conventional dictates of piety do make others suspect him. Even someone as predisposed as Euthyphro is to defend Socrates can be put off by the questions that Socrates cannot "help" asking when he confronts error, intellectual or moral (p. 16a). But this dialogue shows that, however much the philosopher is suspected by the city, something like the understanding of philosophy must be depended on if the city is to be able to purge itself of the excesses, whether of piety or of impiety, to which it is inclined in some circumstances. The
understanding achieved by philosophy is what the community also naturally yearns for. The community indicates this in various ways, perhaps most so when it passionately turns against philosophy in the name of piety. The patriotic champion of piety, however misguided he may be, can be said to sense that there are things worthy of great sacrifices by human beings, not the least of which is a proper understanding of the universe and man's place in it.  

7. JESUS OF NAZARETH

7-A. The Gospel of Matthew

I.

I have found, in preparing for this talk, that many of my Jewish friends know little about the life, to say nothing of the trial of Jesus. When I have asked them what questions I should address here at Hillel House, they have said that they themselves would like to have, among other things, an elementary account of the career of Jesus. Few of them know anything about the trial itself except that Jesus was killed as one result of it. This is, in some ways, a curious phenomenon, for whatever Jesus' shortcomings in Jewish eyes he is certainly one of the most famous Jews of all times, perhaps the most famous. Thus, he is known of and highly regarded in many places where Abraham, Moses, and David, for example, are either hardly known or known only as figures in the background of the story of Jesus.

Abraham, Moses, and David, on the other hand, are known much more, I would guess, to Christians than Jesus is to Jews today. But then, one might say, Christians must accept as valid the Biblical accounts of those three men if they are to be Christians, whereas Jews in order to be Jews do not have to accept (perhaps "should not" accept) as valid the New Testament account of Jesus. My remarks thus far, however, have not been directed to "acceptance" but rather to "acquaintance"—to knowledge among Jews generally of the principal features of Jesus' life. Perhaps there is seen here, on the part of Jews, something of a defensive reaction: they would just as soon put out of mind Jesus and all he stands for, including the misery long associated, for Jews, with his worship. But safety, if not curiosity, should incline one to learn something reliable about one's adversary, if adversary he or his movement is.  

Perhaps, the skeptic might reply, there is nothing reliable to be known here: the story of Jesus is largely mythological, certainly
highly improbable. But it should be said that that story is no more improbable, in many respects less so, than many stories in the Hebrew Scriptures. The most dramatic events of Jesus' life, as recounted in the Gospels, are duplicated again and again in the Hebrew Scriptures. But what about the account of divinity assuming human form? One does not see that happen in the Gospels. Rather, someone who is shown as a man is said to be somehow divine. What he is shown to be doing (say, by walking on water or by healing) may be seen in the Hebrew Scriptures, if not in the same form, at least in comparable if not even more august forms. For example, nothing is portrayed on the part of Jesus or surrounding him comparable in grandeur to the plagues visited upon Egypt or the opening and then the most timely closing of the Red Sea, to say nothing of the Creation of the world which makes the resurrections of both the Old and the New Testaments pale by comparison.

One can add that the claim that divinity has assumed human form is, in principle, far more extreme than anything found in the Old Testament. One can find in the philosophers—for example, in the Republic of Plato—support for such a criticism. But that, I repeat, is not part of the action in the New Testament accounts before the reader but is rather an interpretation of the action. It is certainly conceivable that someone made such a claim or had it made about him. Whether such a claim was in fact made about a human being, and how it was understood if made by him or by his followers, would be of some value in assessing him as a leader.

When I referred to the prudence of learning something reliable about Jesus, I was not concerned primarily about the reliability of the New Testament accounts themselves but rather about the reliability of one's information about what is in those accounts. Truly to know such accounts would include a sound judgment about the reliability of such accounts—but short of that deeper knowledge is preliminary information about what someone else is saying.

II.

I turn now to Jesus, his life and his trial. I draw, at the outset of my account, on the Encyclopaedia Judaica for information about Jesus' life which can serve as the setting for what I in turn will have to say:

JESUS (d. 30 C.E.), whom Christianity sees as its founder and object of faith, was a Jew who lived toward the end of the Second Commonwealth period. The martyrdom of his brother James is
narrated by Josephus (Ant. 20:200-3), but the passage in the same work (18:63-64) speaking about the life and death of Jesus was either rewritten by a Christian or represents a Christian interpolation. The first Roman authors to mention Jesus are Tacitus and Seutonius. The historicity of Jesus is provided by the very nature of the records in the New Testament, especially the Four Gospels: Matthew, Mark, Luke, and John. The Gospels are records about the life of Jesus. . . . The picture of Jesus contained in [Matthew, Mark, and Luke] is not so much of a redeemer of mankind as of a Jewish miracle maker and preacher. The Jesus portrayed in these three Gospels is, therefore, the historical Jesus.

The Gospels. The precise day of the composition of the Gospels is not known, but all four were written before 100 C.E. and it is certain that Matthew, Mark, and Luke are interdependent. . . . It is generally accepted that the main substance of the Synoptic Gospels comes from two sources: an old account of the life of Jesus which is reproduced by Mark, and a collection of Jesus' sayings used in conjunction with the old account by Matthew and Luke. . . .

Both of the chief sources of the Synoptic Gospels, the old account, and the collection of Jesus' sayings, were produced in the primitive Christian congregation in Jerusalem, and were translated into the Greek from Aramaic or Hebrew. The present Gospels are redactions of these two sources, which were often changed as a result of ecclesiastical tendentiousness. This becomes especially clear in the description of Jesus' trial and crucifixion in which all Gospel writers to some degree exaggerate Jewish "guilt" and minimize Pilate's involvement. . . .

The Name, Birth, and Death Date of Jesus. Jesus is the common Greek form of the Hebrew name Joshua. Jesus' father, Joseph, his mother, Mary (in Heb., Miriam), and his brothers, James (in Heb., Jacob), Joses (Joseph), Judah, and Simon (Mark 6:3) likewise bore very popular Hebrew names. Jesus also had sisters, but their number and names are unknown. Jesus Christ means "Jesus the Messiah" and according to Jewish belief, the Messiah was to be a descendant of David. Both Matthew (1:2-16) and Luke (3:23-38) provide a genealogy leading back to David, but the two genealogies agree only from Abraham down to David. Thus, it is evident that both genealogies were constructed to show Jesus' Davidic descent, because the early Christian community believed that he was the Messiah. Matthew and Luke set Jesus' birth in Bethlehem, the city of David's birth. This motif is made comprehensible if it is assumed that many believed the Messiah would also be born in Bethlehem . . . .

. . . According to Luke's data, Jesus was baptized by John the
Baptist either in 27/28 or 28/29 C.E., when he was about the age of thirty. On the evidence of the first three Gospels, the period between his baptism and crucifixion comprised no more than one year; although according to John it ran to two or even three years. It seems that on the point of the duration of Jesus' public ministry, the Synoptic Gospels are to be trusted. Most probably, then, Jesus’ was baptized in 28/29 and died in the year 30 C.E.

Jesus’ Family and Circle. Jesus’ father, Joseph, was a carpenter in Nazareth and it is almost certain that he died before Jesus was baptized. All the Gospels state that there was a tension between Jesus and his family, although after Jesus’ death his family overcame their disbelief and took an honorable place in the young Jewish-Christian community. John the Baptist, who baptized Jesus in the river Jordan, was an important religious Jewish personality; he is recorded in Josephus (Ant. 18:116-9) as well as the New Testament. From Josephus it is seen that John’s baptismal theology was identical with that of the Essenes. From his closest disciples, [Jesus] appointed 12 apostles to be, at the Last Judgment, judges of the 12 tribes of Israel. After the death of Jesus the twelve apostles provided the leadership for the Jerusalem Church.

The Arrest of Jesus. Meanwhile, Herod Antipas, who had beheaded John the Baptist, also wanted to kill Jesus, whom he saw as the heir of the Baptist, but Jesus wanted to die in Jerusalem, which was reputed for “killing the prophets” (Luke 13:34). With Passover drawing near, Jesus decided to make a pilgrimage to the Temple at Jerusalem. There he openly predicted the future destruction of the Temple and the overthrow of the Temple hierarchy. According to the sources, he even tried to drive out the traders from the precincts of the Temple. These actions precipitated the catastrophe. The Sadducean priesthood, despised by everyone, found its one support in the Temple, and Jesus not only attacked them but even publicly predicted the destruction of their Temple.

After the festival meal, Jesus left the city together with his disciples and went to the nearby Mount of Olives, to the garden of Gethsemane. There, although he had foreseen the danger of his death, he prayed for his life (Luke 22:39-46). One of the 12 apostles, Judas Iscariot, had already betrayed him from unknown motives. The Temple guard, accompanied by Judas Iscariot, arrested Jesus and took him to the high priest.

The “Trial” and Crucifixion. The Gospels in their present form contain descriptions of the so-called “trial” of Jesus rewritten in a way making them improbable from the historical point of view. Nevertheless, a literary analysis of the sources is capable of revealing a closer approximation of the reality. Thus it seems
very probable that no session of the Sanhedrin took place in the house of the high priest where Jesus was in custody and that the "chief priests and elders and scribes" who assembled there were members of the Temple committee (see also Luke 20:1): the elders were apparently the elders of the Temple and the scribes were the Temple secretaries. The deliverance of Jesus into the hands of the Romans was, it seems, the work of the Sadducean "high priests," who are often mentioned alone in the story. A man suspected of being a messianic pretender could be delivered to the Romans without a verdict of the Jewish high court. In addition, the high priests were interested in getting rid of Jesus, who had spoken against them and had predicted the destruction of the Temple. The Roman governor Pontius Pilate ultimately had Jesus executed in the Roman way, by crucifixion. All the Gospels indicated that on the third day after the crucifixion Jesus' tomb was found empty. According to Mark, an angel announced that Jesus had risen, and the other Gospels state that Jesus appeared before his believers after his death.357

The author of this entry in the Encyclopaedia Judaica then turns to an assessment of the sayings and doings of Jesus which contributed to the tension between him and the Jewish authorities.358 But I must pass this by—some of you will want to read the entire article—and quote for you only two more brief passages from this useful article:

**Jesus as the Messiah.** The early Christian Church believed Jesus to be the expected Messiah of Israel, and he is described as such in the New Testament; but whether Jesus thought himself to be the Messiah is by no means clear. . . . [After examining various passages:] Thus Jesus' understanding of himself as the Messiah was probably inconsistent, or at first he was waiting for the Messiah, but at the end, he held the conviction that he himself was the Messiah.359

The author concludes his article, If, as Christians believe, the martyr was at the same time the Messiah, then his death has a cosmic importance. Through the teachings of Jesus, as well as through other channels, the Jewish moral message entered Christianity. Thus, the historical Jesus has served as a bridge between Judaism and Christianity, as well as one of the causes for their separation.360

I supplement this account with a few sentences from a Jewish lawyer, a Chicagoan active in civil liberty causes, who has written me in these terms about his understanding of Jesus:

The priests viewed him as one who threatened their hierarchy, but the Romans, whose rule must have been very repressive of all liberties of expression and association, wanted him tried by na-
tives and killed by Romans to avoid any threat to their exploita-
tion of the colony. His views, his preaching, and his fathering of
non-priestly apostles to form an organization guaranteed the fatal
reprisal. The Romans have plenty of modern successors.

III.

I venture to add some opinions of my own, not to contradict
what has been said by others but rather to suggest ways of begin-
ning to think about what is known about the trial of Jesus. Per-
haps, we can all thereby acquire what the Encyclopaedia Judaica
author called "a closer approximation of the reality."361

I draw, on this occasion, primarily on the Gospel of Matthew,
noting in passing that one written gospel may have been all that
many Christians ever had to go on in the early Church, if they had
that. Matthew is the most Jewish of the Gospels;362 it is tradition-
ally placed first in the compilation of the New Testament. The
Columbia Encyclopedia includes the following observations:

[T]here are more allusions to the Old Testament in [the Gospel of
Matthew] than in the others. . . . Its composition is assigned to
the latter half of the [first century]. The Gospel was written for
Jewish Christians; its purpose was to prove that Jesus was the
Messiah foretold in the Old Testament. The traditional ascrip-
tion to St. Matthew (doubted by many) dates from the [second
century].363

The Gospel, it seems to be agreed by scholars, was written by Jews
for Jews; it was probably passed on by and to Jewish-Christians in
an effort to settle what had become an intrafamily struggle. The
author of this Gospel does not say that he knew Jesus personally.
Nor does he say that he reports all he knows about him. But he
may well have believed that he told all that needed to be said.

The Jewishness of Christianity, not of Matthew alone, is reflected
in the reference by a distinguished Roman Catholic priest to his
faith as "the new order of salvation, whose roots were in Judaism
and not in Hellenism."364 This opinion goes back to the earliest
days of Christianity. Consider, for instance, the concern by the
Gentile craftsmen who made the offerings to be taken to the great
temple of Diana at Ephesus—the concern recorded in the Book of
Acts, about the teachings of Jewish (that is Christian) missionaries
about idols. We are told that a multitude, "when they knew that [a
missionary who was about to speak] was a Jew, all with one voice
cried about the space of two hours, 'Great is Diana of the
Ephesians.'"365

As for Matthew itself, it is filled with Jewish things: a dozen
prophecies of old (which are spelled out here and there) are said to be fulfilled, confirming thereby Jesus’ Messiahship; miracles abound among a people which regarded them as unusual but not as highly improbable events (and this includes miracles of resurrection). It is assumed throughout Matthew both that God is active in the affairs of men and that this is a time of wickedness and of divine intervention on a grand scale. Jesus turns against Judaism its own doctrines and presuppositions. He can even exploit a Jewish complaint against the authorities, to the effect that the prophets have always been persecuted, especially in Jerusalem (Matthew 5:12).

The text is so Jewish that it is difficult for the typical modern reader to understand much of it. It is obvious, for instance, that John the Baptist’s “Repent ye” (3:2) draws on Jewish doctrines and standards. But we are not told—the intended readers, it seems, did not have to be told—what those standards were. Similarly, Jesus is reported as speaking in Galilee’s synagogues, “preaching the gospel of the kingdom” (4:23). This, too, obviously meant something to the original readers.

The Jewishness of this gospel is anticipated by the way it opens with a genealogy which connects Jesus to King David. (Luke has its genealogy in its third chapter.) The opening verse of Matthew (1:1) reads, “The book of the generation of Jesus Christ, the son of David, the son of Abraham.” The series of “begats” is so arranged that it can be said, “So all the generations from Abraham to David are fourteen generations; and from David until the carrying away into Babylon are fourteen generations; and from the carrying away into Babylon unto Christ are fourteen generations (1:17). The history of the Jewish people is thereby so organized as to set up everything for Jesus: all that went before is to be seen as preparation for the coming of Jesus. Only three names seem to matter in this list: Abraham, David, and Jesus; only two names in the sequence have titles assigned to them: “David the king” and “Jesus, who is called Christ.” There had been, since the founding of the people by Abraham, the high point represented by the royal rule of David and then fourteen generations later the low point represented by the Babylonian captivity. Now a new high point—the very highest point—is to be reckoned with.

Abraham established the people; David established the royal line. Moses is not mentioned here: he does not matter for the immediate purpose of the genealogist. There is no need to go earlier than Abraham: it seems that Jesus comes primarily for the Jews.
Nor is there any need to have any lineage after Jesus. Not only is family life disregarded by Jesus, but we are to understand that with the coming of Jesus (as the Messiah) there is an end to significant Jewish (perhaps even human) history. This is anticipated in what is said by John the Baptist (3:9), in disparaging those who proudly invoked “Abraham as their father”: “God is able of these stones to raise up children unto Abraham.”

A further indication of Jewishness, if I may call it that, is the arrangement of the generations so as to have forty of them. In thirty-nine of the generations, *begat* is used; for Jesus a different formulation is used: “And Jacob begat Joseph the husband of Mary, of whom was born Jesus, who is called Christ” (1:16). (Later, the wise men who call on the infant seem to have their attention directed only to the child and its mother (2:11).) Of course, if Joseph is not the father, that might seem to cut the vital connection with David. But that is hardly an objection that someone who believes Mary was impregnated by the Holy Ghost would be concerned about. Besides, it can be said that not only is Joseph the putative father (as under the common law) but also that this is still another indication that blood ties are to be superseded.

Once *Matthew* is done, Jewishness can be forgotten as a vital source for the future development of Christianity. But within *Matthew*, the heritage of Judaism is exploited. The forty generations (13, 14, 13) are followed, in the fourth chapter of this Gospel, by an account of Jesus’ forty days in the wilderness and the resulting temptations by Satan. Is there not about all this symmetry, and the importance of certain numbers, something Jewish as well?

IV.

The trial of Jesus was, in a way, to be expected: it was the culmination of all that had gone before. What had gone before included fierce polemics, which seemed then to be generally taken for granted as the appropriate form of discourse! One must wonder, living in a tamer place (if not a tamer age), where the fervor came from for such polemics. One suspects that it must be related to the sense both of righteousness and vulnerability on all sides.

The language of the trial itself, however, is much milder than one finds elsewhere in the Gospel. I propose now to provide you an account of Jesus’ trial, from which I can proceed and on which our discussion can be based. In doing so I draw on the seventeenth-century King James translation, which is not as accurate as some English translations since then but which is unmatched in
beauty and in the sense it conveys of pious grandeur. We begin in the Garden of Gethsemane (26:45-47, 49-50, 57, 59-68, 27:1-2, 11-26):

Then cometh [Jesus] to his disciples, and saith unto them, Sleep on now, and take your rest: behold, the hour is at hand, and the Son of man is betrayed into the hands of sinners.

Rise, let us be going: behold, he is at hand that doth betray me. And while he yet spake, lo, Judas, one of the twelve, . . . came to Jesus, and said, Hail, Master; and kissed him.

And Jesus said unto him, Friend, wherefore art thou come? Then came they, and laid hands on Jesus, and took him.

And they that laid hold on Jesus led him away to Caiaphas the high priest, where the scribes and the elders were assembled. Now the chief priests, and elders, and all the council, sought false witness against Jesus, to put him to death;

But found none: yea, though many false witnesses came, yet found they none. At the last came two false witnesses.

And said, This fellow said, I am able to destroy the temple of God, and to build it in three days.

But Jesus held his peace. And the high priest answered and said unto him, Answerest thou nothing? What is it which these witness against thee?

But Jesus held his peace. And the high priest answered and said unto him, I adjure thee by the living God, that thou tell us whether thou be the Christ, the Son of God.

Jesus saith unto him, Thou hast said: nevertheless I say unto you, Hereafter shall ye see the Son of man sitting on the right hand of power, and coming in the clouds of heaven.

Then the high priest rent his clothes, saying, He hath spoken blasphemy; further need have we of witnesses? Behold, now ye have heard his blasphemy.

What think ye? They answered and said, He is guilty of death. Then did they spit in his face, and buffeted him; and others smote him with the palms of their hands,

Saying, Prophesy unto us, thou Christ, Who is he that smote thee? . . .

When the morning was come, all the chief priests and elders of the people took counsel against Jesus to put him to death:

And when they had bound him, they led him away, and delivered him to Pontius Pilate the governor. . . .

And Jesus stood before the governor: and the governor asked him, saying, Art thou the King of the Jews? And Jesus said unto him, Thou sayest.

And when he was accused of the chief priests and elders, he answered nothing.

Then said Pilate unto him, Hearest thou not how many things they witness against thee?
And he answered him to never a word; insomuch that the governor marveled greatly.
Now at that feast the governor was wont to release unto the people a prisoner, whom they would.
And they had then a notable prisoner, called Barabbas.
Therefore when they were gathered together, Pilate said unto them, Whom will ye that I release unto you? Barabbas, or Jesus which is called Christ?
For he knew that for envy they had delivered him.
When he was set down on the judgement seat, his wife sent unto him, saying, Have thou nothing to do with that just man: for I have suffered many things this day in a dream because of him.
But the chief priests and elders persuaded the multitude that they should ask Barabbas, and destroy Jesus.
The governor answered and said unto them, Whether of the twain will ye that I release unto you? They said, Barabbas.
Pilate saith unto them, What shall I do then with Jesus which is called Christ? They all say unto him, Let him be crucified.
And the governor said, Why, what evil hath he done? But they cried out more, saying, Let him be crucified.
When Pilate saw that he could prevail nothing, but that rather a tumult was made, he took water, and washed his hands before the multitude, saying, I am innocent of the blood of this just person: see ye to it.
Then answered all the people, and said, His blood be on us, and on our children.
Then released he Barabbas unto them: and when he had scourged Jesus, he delivered him to be crucified.

One can regret that more detail is not provided about the trial itself. But the slimmness of the record can be understood. Few trials of the time would have been recorded. There were, we gather, a lot of trials around. Indeed, two other men were crucified with Jesus—and nothing at all is said about their trials. It happens that this particular trial is the one which has come to matter—but we have to be satisfied with what is almost a stylized rendering of it.

It should be noticed that there is nothing that is reported to have happened at this trial which does not happen every day. Nothing miraculous, or remarkably unusual, is offered up to us. Pontius Pilate's equivocal attitude is all too familiar. This is not to say, however, that whatever is plausible must have happened. Jewish scholarship today seems to be agreed that the account of the trial, insofar as it touches on Jewish legal procedures and standards, is either fragmentary or distorted. But if God was involved (as, for example, in the story of the sacrifice of Isaac), then things could
have been done for the first, perhaps only, time this way. I myself do not know enough about how things were then done to know whether this trial departed from standard procedure and hence was unjust in this respect also.\textsuperscript{377}

The case, as presented in the \textit{Matthew} account, may not be of much interest in itself without consideration of the significance of the claim of divinity associated with Jesus. Can one pass on all this without passing judgment first on the claim of divinity? Does \textit{that} rest, in turn, on the issue of the Resurrection? Certainly, the belief of the author in the Resurrection very much shapes the account he presents. We can see, here as elsewhere, that "facts" and "values" cannot be separated. Truly to describe—that is, fully to understand—the career of Jesus, one has to pass on the soundness of the claims made on his behalf as well as on the soundness of the presuppositions upon which such claims may be based.\textsuperscript{378}

V.

But, as I have indicated, our efforts on this occasion will be much more modest: the truly serious questions we must leave to others. Even so, we can say something more about the career of Jesus.

\textit{Matthew}, alone of the gospels, has the Herod problem at the outset of its account (after the genealogies). Herod the King (maintained in power by the Romans, it seems) seeks to destroy the infant Jesus when he learns, from the "wise men from the east," that someone had been born in Bethlehem who would be "King of the Jews" (2:1-20). From his very birth, therefore, Jesus "confronts" political authority, in the form of a king who is apprehensive about his temporal power. At his death, Jesus confronts political authority, in the form of a governor who is apprehensive that his temporal power may be compromised by disturbances due to the religious beliefs of his restless subjects. That is, the final (and perhaps decisive) phase of Jesus' trial—that before Pilate—concerns explicitly only his supposed kingship (27:11). This is seen, also, when he is given up to be crucified, in the mockery of him as a king by the soldiers and in the inscription placed over his head on the cross, "\textit{THIS IS JESUS THE KING OF THE JEWS}" (27:37). The Jewish authorities, when they had mocked him the night before, had addressed him as a prophet (26:68).

What we may call the spiritual mission of Jesus is framed in \textit{Matthew} by the political challenges he faced: at birth from Herod, at death from Pilate. The challenge at birth can remind the reader
of similarities in the infancy of Moses. Both infants were unusually
vulnerable at birth; they both came to the attention of the local
ruler; both survived while many other babies were killed; and spe-
cial efforts had to be made to save them by removing them from
where they would otherwise have been.

No doubt, some would regard Jesus as a Jew with what could be
called a Moses complex—just as Sigmund Freud seems to have
seen Moses and Judaism in Christian terms, with decisive emphasis
upon a sacrificed leader. But whereas Moses was very much
concerned with a law which would govern one’s temporal (includ-
ing family) affairs, Jesus can be said to have been un-Jewish both in
his relative lack of concern about his physical survival and in his
casualness about family ties.

But, it should be added, Jesus’ principal accusers may not have
been concerned ultimately about physical survival either, but
rather about the body (and the community which is made up of
and serves bodies) primarily as means for the proper development
of spiritual life. Certainly, Jesus and his accusers seem to have
agreed that his spiritual manifestations were more important than
his political manifestations. Or, put another way, both Jesus and
his Jewish enemies would have agreed that what happened to the
soul was far more important than what either Herod or Pilate
could do to anyone’s body.

How souls should be ministered to is implied, in Matthew, by the
account of the genealogy which precedes the Herod story and by
the account of the Resurrection which follows the Pilate story.
Critical to the trial of Jesus was conduct by him in the last three
years of his life that could be associated by some with blasphemy.

VI.

Blasphemy has been taken to include, at least in Anglo-Ameri-
can law, the denial to God of something that belongs to Him. And, it would seem, to arrogate to oneself a divine attribute is to
deny God something that may be exclusively His. But, scholars
say, a claim to Messiahship was not blasphemous; but “invocation
of the divine name” was. Insofar as blasphemy consists also of offending the religious sens-
bilities of the community, then Jesus can certainly be considered
to have raised doubts about the propriety of what he was doing.
(This is not to say that the sensibilities of a particular community
may not themselves be questionable.) Consider the following illus-
trations drawn from Matthew of how troublesome Jesus could be.
Wonder is aroused early in his recorded ministry (7:29): “For he taught them as one having authority, and not as the scribes [do].” Certain of the scribes, upon observing how Jesus healed, believed him to have blasphemed when he said (9:2-3), “Son, be of good cheer; thy sins be forgiven thee.” That is, he conducted himself as if he had the power to forgive sins. Less serious questions were raised about Jesus’ eating with publicans and sinners (9:11). More serious, of course, was his healing on the Sabbath of a man with a withered hand (12:10-13). It is at this point that Matthew notes, “Then the Pharisees went out, and held a council against him, how they might destroy him” (12:14). His hungry disciples (but not Jesus himself, it should be noticed) had troubled them by plucking corn on the Sabbath (12:2). Before and after this the Pharisees had concluded, “This fellow doth not cast out devils, but by Beelzebub the prince of the devils” (9:34, 12:24). Finally, in this array of a half-dozen illustrations of what bothered Jesus’ critics, there is the query (15:2), “Why do thy disciples transgress the tradition of the elders, for they wash not their hands when they eat bread?” His critics were concerned about his repeated defiance of Jewish law, that law which reflected and protected the core of the revelation made available to their people.

All of these episodes are outside Jerusalem. By the time Jesus got to the great city, packed with visitors and excited by the impending Passover, he had established himself as incorrigible in the eyes of some of the authorities. His reception in the city as a prophet, his conduct in the temple, and his preaching disturbed his critics. They returned to the questions he had encountered at the outset of his career: “By what authority doest thou these things? and who gave thee this authority?” This is what “the chief priests and the elders of the people” asked of him “as he was teaching” (21:23). Jesus avoided an answer by exploiting the equivocal status among them of John the Baptist (21:24-27). He then spoke scathingly, but in parables, about questioners who were astute enough to perceive that he referred to them. But we are further told, “When they sought to lay hands on him, they feared the multitude, because they took him for a prophet” (21:46).

VII.

Both sides to this controversy conformed to the spirit of the declaration that Jesus had considered himself obliged to make (10:34): “Think not that I am come to send peace on earth: I came not to
send peace, but a sword.” That is, they considered themselves at war.

Jesus and his critics talked at, but not to, each other. Their vigorous exchanges (with “generation of viper” a mild epithet, it sometimes seems) cannot be considered rational discourse (3:7). Such exchanges do remind us both of the seriousness of the pursuit of truth for man and the folly to which one’s passions can lead one. Something of the imprudence of the times may be seen in Jesus’ promise (or is it a threat?) after a series of parables, “I will utter things which have been kept secret from the foundation of the world” (13:35).

Who is most at fault here? (I set aside for the moment the question of which side, if either, expressed the divine will.) In such “confrontations,” which display features of a civil war, he is most at fault who should have been superior. The superior, in such circumstances, should be able to step back, assess what is happening, and resolve the difference, or at least avoid adding to the friction. Certainly, each of the parties should have made allowances for the shortcomings of the other. There is little indication in this account that such allowances were made. Certainly, also, both parties, assessed in human terms, suffered mightily from allowing this conflict to proceed to its bitter conclusion.

A good man, we are taught by Socrates, prefers to be harmed than to harm another. We are taught in another Platonic dialogue that complete virtue is a condition for immunity from harm as well as an inhibition upon doing harm to another. That is to say, the truly good man can take care of himself in the proper fashion. His courage, for example, discourages many would-be attackers; his prudence anticipates others. Thus, moral virtue is seen as productive of good; suffering is not seen as a desirable means to happiness.

Consider, in this connection, the story of the young man who had kept all commandments since his youth. He was then told by Jesus, “If thou wilt be perfect, go and sell that thou hast, and give to the poor, and thou shalt have treasure in heaven: and come and follow me” (19:16-21). At this the young man went away sorrowful, for he had great possessions (19:22). The old way, it seems, was no longer sufficient, nor perhaps yet the new.

VIII.

We return to our immediate concern, the trial of Jesus, and the charge of blasphemy. The fatal statement, made in response to the
high priest’s insistence, seems to have been (26:64), “Hereafter shall ye see the Son of man sitting on the right hand of power, and coming in the clouds of heaven.”

This evident claim by Jesus of divine powers for himself seems to have been considered an obvious blasphemy by everyone else present. Their response indicates that Jesus was not regarded as simply mad. Should what he said have been taken in the way that, or as seriously as, they did take it?

Most of us, I dare say, cannot appreciate the seriousness of this matter. It can seem to us that the crime here consists of a mere difference of opinion. (This is aside from the political consequences which might have been anticipated from Jesus’ ministry—but then, could he not have been isolated for awhile, so as not to provoke the Romans during the Passover season?) Our inability to appreciate all this, if only as an excuse for disposing of Jesus, again suggests our distance from such things. Neither can we understand the competition among the disciples when they vie for privileged positions in Heaven or when some try to say who Jesus really is: John the Baptist, Elijah, and Jeremiah are conjured up (16:13). Even someone as sophisticated as Herod, we are told, could be moved by a prophecy that a threat to his rule would be born in Bethlehem (2:46).

Most of us, I have said, do not feel this way. We must wonder whether we are liberated and thus enriched? Or are we poorer for our sophistication? It is evident that the responses to Jesus’ claims—the responses of enemies and enthusiasts alike—suggest that he was addressing, in his own way, a vital issue, perhaps even a profound need in human nature.

IX.

It is interesting to notice in Matthew how each side to the controversy accounts for the other side’s doings and sayings. The chief priests and pharisees are shown saying to Pilate (27:63), “Sir, we remember that that deceiver said, while he was yet alive, ‘After three days I will rise again.’” They suggest that precautions be taken lest Jesus’ disciples steal the body and claim he has risen. This accounts for a guard being at the tomb (27:64-66). Later, the Jewish authorities say that the body was stolen and the Christians say that the authorities bribed the guards to conceal the Resurrection (28:11-15). Thus, each side has its explanation for the other’s account of the evidently missing body.

The alertness of the Jewish leaders, we are in effect told, is supe-
rior to that of the disciples, for the disciples never seemed to hear, or to take account of, Jesus' indication on more than one occasion that he would rise again. In a curious way, Jesus and his principal adversaries understood and respected each other more than either of them respected most of their own followers. Did "the better men" in the community tend to be among the authorities, rather than among the followers of Jesus, and did they continue thus until Christianity became established? 388

Of course, one might wonder why, in the Gospel account, the chief priests did not become Christians if they knew what really happened. 389 This is a complicated problem, and not only because it must have been difficult in those trying days to find out what had "really happened," including what the authorities learned and believed.

X.

The Gospel itself recognizes the problem of establishing the believability of anything. One of the twelve disciples, despite intimate contact with Jesus, is said to have betrayed him (26:47-50). The betrayer evidently did not believe what he had heard from Jesus himself. After the Resurrection, most of the remaining eleven worshipped Jesus when they met in Galilee, "but some doubted" (28:17). Earlier, Jesus had complained about certain cities "wherein most of his mighty works were done, because they repented not" (11:20). Consider, also, Herod: he is willing to believe, almost matter-of-factly, that Jesus is John resurrected—and yet Herod continues to conduct himself as he has (14:2). Consider, as well, the Jews in the desert who repudiated Moses' teaching not long after having witnessed the great miracles of the Exodus. 390 Is there not, in such accounts, an honest recognition that not all who see do believe, just as many who do not see may come to believe. In short, the eyes may be informed, or misled, by the mind or by the will. 391

The last that is seen of Jesus in Matthew—the very end of the Gospel, in fact—consists of Jesus commissioning his disciples to go out and teach all nations. He promises he will be with them "even unto the end of the world," a long way and time from the quite particular genealogy (in quite particular times and places) with which the Matthew account opens and on which all that follows seems to depend (1:1-18, 28:16-20).
XI.

How successful was Jesus in what he did? Does this bear on the validity of that which he claimed? What was he truly after? Was there something wrong among the Jews (or, at least, among the Romans and Jews in their collaboration) on which Jesus worked? Was he somehow correct, for instance, in what he had to say, in his fatal blasphemy, about his coming glory—for how many have had such elevation as he has been accorded for almost two thousand years now?

Did Jesus, in what he said, broadcast to the world the old Jewish teaching? Was such eventual worldwide dissemination intended from the outset by the founder(s) of that teaching? Is the form this dissemination took a distortion of Judaism, a dilution of it? Or is it a salutary transformation of it? Was that teaching, before transformation, dependent on a people, preferably a people in its own land, a relatively small people?

The Gospels replace genealogy: affirmations of the word replace ties of blood. Such a proposed replacement could well have been taken as the end of Jews as Jews—and so naturally they resisted. In the same way, love can pose a threat to law, as may be seen in routine recourse to healing on the Sabbath.

Both Jesus and his adversaries, one can say, sensed that Roman power was empty at its core, that it was bound to be replaced by a vital faith. The new Jewish teaching, somewhat modified by Greek thought, was not that of a community but that of individuals.

XII.

What determines who happens to be moved by what faith? Is it due to chance—whether in one's circumstances or one's passions or one's capacities? What is the status in these matters of reasonableness?

There are, throughout the Gospel of Matthew, displays of remarkable intelligence: apt responses, shrewd evasions, and extended sermons drawing on a sensitive grasp of human nature. But, it can sometimes seem to the modern reader, there is not much emphasis upon rationality itself. I can recall only two instances where someone persuades another (not silences him, not parries him, but persuades him). In both instances, the one persuaded is Jesus himself; in neither instance is the persuader a Jew.

The first instance is found in 8:5-10, 13:
And when Jesus was entered into Capernaum, there came unto him a centurion, beseeching him,
And saying, Lord, my servant lieth at home sick of the palsy, grievously tormented.
And Jesus saith unto him, I will come and heal him.
The centurion answered and said, Lord, I am not worthy that thou shouldest come under my roof: but speak the word only, and my servant shall be healed.
For I am a man under authority, having soldiers under me: and I say to this man, Go, and he goeth: and to another, Come, and he cometh; and to my servant, Do this, and he doeth it.
When Jesus heard it, he marvelled, and said to them that followed, Verily I say unto you, I have not found so great faith, no, not in Israel.
And Jesus said unto the centurion, Go thy way; and as thou hast believed, so be it done unto thee. And his servant was healed in the selfsame hour.
The second instance is in 15:22-28:
And, behold, a woman of Canaan came out of the same coasts, and cried unto him, saying, Have mercy on me, O Lord, thou Son of David; my daughter is grievously vexed with a devil.
But he answered her not a word. And his disciples came and besought him, saying, Send her away; for she crieth after us.
But he answered and said, I am not sent but unto the lost sheep of the house of Israel.
Then came she and worshipped him, saying, Lord, help me. But he answered and said, It is not meet to take the children's bread, and to cast it to dogs.
And she said, Truth, Lord: yet the dogs eat of the crumbs which fall from their masters' table. Then Jesus answered and said unto her, O woman, great is thy faith: be it unto thee even as thou wilt. And her daughter was made whole from that very hour.
That an outsider should be involved in each case suggests (and I realize this may be rather fanciful) that the Jews of that time may not have been able really to talk to one another, especially when critical differences were involved. But notice also—I believe this is less likely to be fanciful—that Jesus speaks of the great faith evident on both of these occasions. No doubt, faith is involved, but may not what makes these two exchanges so effective be what I have called their rationality, rationality which is expressed (in each case) in a kind of metaphor?396

XIII.

Jews and Christians, despite their millennia-old differences, have
much more in common than either group has with most of the rest of the world. I have suggested that the struggle between them, especially in the early centuries of their common era, was like a civil war, with the special bitterness of which such a war is capable. Since one’s brother is likely to know where one’s weaknesses lie, one is particularly threatened. One is also disturbed at having to strike out at part of oneself. Does not each faction continue to remind the other of their common origins, failings, and aspirations?

The Socratic dialogues, it should be evident from what I have said, are clearer (in one sense) than a gospel addressed to one’s faith, perhaps in part because such dialogues are devoted more to questions than to answers. We must not forget, however, the role in Greek life of the Eleusinian mysteries, the rituals of an old faith which had matured and become responsible as well as satisfying. What is there in the human being, or in most human beings, that cannot otherwise be reliably ministered to in a civilized way?

7-B. The Gospel of Mark

I.

I do not believe it would be prudent for either you or me to expect anything truly new to be said on this occasion about the life, trial or death of Jesus. When as much has been written about any subject as there has been about Jesus, it would be folly to expect anyone to be able to say anything new. On the other hand, when this much has been written about any subject, it is as if nothing has been written—and so one can presume to share one’s impressions with others.

It is no doubt significant that there has been the worldwide response there has been to the story of Jesus. His story seems, at the very least, to satisfy—perhaps to develop and to satisfy—a natural need in man. That which is natural is something which can be examined afresh again and again, or at least observed for what it is. One’s understanding of divine, as well as of human, things may be thereby enhanced.

I do believe that something useful can be said on this occasion, not necessarily about the life of Jesus but about how one might go about thinking about matters related to that life. Thus, one can make suggestions about how to read a text, even a sacred text, if only in a preliminary fashion, and how to deal with it once it is read—how to begin to think about what one reads and how to
speak responsibly about what one might learn. At the very least one can, as a student of these matters, suggest questions, perhaps clarified questions, to be answered by partisans who are more confident than the genuine student can be about the answers to certain other, perhaps even prior, questions.\footnote{228}

II.

When there has been as much partisan effort as there has been with respect to Jesus, the inquiring mind is driven back to the original texts—and, in this case, to the Gospel accounts in the form that they have come down to us. That form is itself open to question—but we must have a point from which to begin on this occasion here at Rosary College.

Once one turns to the Gospels, one must start from the fact that their hero is a Jew. Jesus of Nazareth was born a Jew; he lived a Jew; he died a Jew. One cannot begin to understand him without taking into account the fact of his pervasive Jewishness. One cannot otherwise understand him, his disciples, his multitude of followers, his enemies, or his fate.\footnote{230} We today—and this includes most contemporary Jews—necessarily come to Jesus and his story from a Gentile view of things. Even so, someone who is truly a Christian today is in large part Jewish, in some ways perhaps even more Jewish in his devoutness than the occasional Jew who has become thoroughly secularized.

The Jewishness of Jesus is a massive fact which the sensitive reader of the Gospels cannot help but notice.\footnote{209} Much of what Jesus says would not be sensible otherwise. His teaching, standing alone—that is, independent of its Jewish context and expectations—is hardly coherent. Allusions are made by him to a long, and evidently well-known, tradition. Virtually everyone with whom Jesus deals (at least among his Jewish countrymen) is what we today would call a believer. Intense struggles were waged among his countrymen, it seems, not about whether the God of Abraham, Isaac and Jacob existed and was entitled to single-minded devotion but rather about what form that devotion should take and what in turn could be expected from God for the people of Israel.

The speaker on the Gospels today addresses an audience vastly different from that originally confronting the authors of the Gospels. One must, in what one says today, accommodate oneself to believers and unbelievers alike, to the doctrines of one sect and the sensibilities of the other. Unbelievers themselves are quite varied
in their opinions, as varied as believers and as much shaped as they by the "faith" of their fathers. Temperament and chance do seem to play a considerable role in these matters, as some insist upon their freedom while others upon their salvation—and all, one way or another, very much want and need the truth, so that they may truly be saved, so that they may truly be free.

III.

It is convenient to settle for our discussion on this occasion primarily upon one of the Gospels. The Gospel of Mark is the shortest of the four Gospels. It is often said to be the oldest of the Gospels, even though John has in it details about the trial of Jesus which are not found in Mark or in the other two synoptic Gospels. Those gospels, Matthew and Luke, are close to Mark in their descriptions of the trial of Jesus. Mark seems not only the oldest but also the simplest and most naive of the four accounts. (It is also the one in which the Resurrection barely figures.) Mark is said to have been written a half-century or so after the death of Jesus, which death was about 40 A.D.

Most early Christians, it seems to me, probably knew only one written Gospel, if they knew any at all. One might wonder whether there has ever been a time when what most people learned about Jesus was exclusively, or even primarily, from written Gospels. Still, I will assume knowledge here of the Gospel stories, at least in outline, stories which have been retold in so many different ways.

Believers and unbelievers alike can be brought together in a joint effort to think through the implications of the Gospel accounts of the trial of Jesus. There is nothing miraculous on the face of the standard account of that trial, as it appears in Mark. This is not to say that there is nothing that would not be questioned by some. Some scholars, for example, question the emphasis placed upon the role of the Jewish council in the effort to move Pilate to pronounce a sentence of death for Jesus. But the reader is not asked to take anything on what is called faith. Men, in the natural order of things, could have acted as the participants in the trial are reported to have acted.

IV.

It is remarkable that there should be, in a Gospel, so many pages as there are in the account of the trial without a miracle in it. Is this because of the nature of legal proceedings? That is, things are
done more or less in the open during a trial, with official witnesses and, often, official reporters. In addition, the circumstances tend to be controlled and routine—and so things tend to get “down to earth” and hence prosaic, even when life-and-death matters are at stake. Besides, there are what we can call theological reasons why there should have been no miracles during this trial, no extraordinary deliverance of Jesus from the fate in store for him. Thus, between the Last Supper (14:12) and the Crucifixion (15:24) there are no miracles recorded in the Gospel of Mark. Before the Last Supper there were numerous healings; after the Crucifixion there is, of course, the Resurrection.

This absence of miracles at the time of Jesus’ arrest, trial and execution is not characteristic of the Gospel of Mark alone: the same can be said of the other three Gospels, except for the incident which has Jesus healing (restoring?) the ear of one of the men who had come to seize him, the ear cut by the sword of one of Jesus’ companions. This healing is found only in Luke and little is made of it there.

Spectacular healing, or other miracles of note, might have deterred the enemies of Jesus from proceeding against him as they did. There is no important miracle which takes place in Jerusalem during Jesus’ fatal visit there prior to the Resurrection, which can be thought of as the miracle of miracles. Why this should be so—why miracles are reserved for the more credulous countryside rather than for sophisticated Jerusalem—may be left as something of a mystery. In any event, the distribution of miracles in the Gospels may be worthy of note.

The story of the trial is, I have suggested, plausible enough as a human story. Whatever doubts scholars may have about it (based on what they know about Jewish and Roman history, law and practices), there is nothing in that story which is difficult to believe, humanly speaking. One’s questions need be only as to human passions and motivations. We all know that such things as are reported in the Gospel accounts of Jesus’ trial can and do happen, that there is nothing miraculous or extraordinary about them. No one has to be persuaded that an innocent man can be convicted and punished. So routine, from a Christian point of view, is what happens to Jesus that it shows what is wrong with the world and how someone such as Jesus fits in as a radically redemptive element. What is wrong with the world can have the human Jesus both somehow guilty and yet clearly innocent: man is fallen and yet worthy and capable of being saved.
It has been suggested by some scholars that the Passion story—the story of the arrest, trial, and execution of Jesus—may have been the first part of the Christian tradition set in a continuous narrative.\textsuperscript{410} Jesus \textit{does} first come to view to the Gentile world (in a sense, to “us”; certainly, to the Romans) as a defendant in a trial. Whatever happened to him before he thus comes to view is uncertain: whatever happened theretofore happened among the Jews. He is very much rooted, it seems, in his time, people and place—and those roots may always have been very difficult for Gentiles to make out. Jesus does seem to have had a meteoric rise among the Jews—and something about his preaching and his doctrine among them doomed him, if the Gospel story is to be believed.

Thus, for us as Gentiles, it is through Pilate that we make “our” first substantial contact with Jesus. The accounts of his trial in the synoptic Gospels are more consistent, however different they may be in critical details than, say, the birth or the Resurrection accounts in those same Gospels. But it should be emphasized, it is not the truth or the comprehensiveness of any trial account which is critical for us on this occasion. Rather, our concern is more with the implications for us of a career which somehow is most critically determined by the facts and effects of a prosecution.

What \textit{have} been the effects of a long-accepted story which is built around what is taken to be a radically unjust condemnation? May not one effect, if not moderated by venerable religious institutions, be that of calling into question among us the laws of men and the administration of justice, even calling into question all political authority, lawful or otherwise? The tension between the way of Jesus and the way of authority is prefigured from the earliest days of his life, as may be seen in the story in \textit{Matthew} of the slaying by Herod of all infants under the age of two, slayings said to have been ordered in the hope of killing one particularly threatening infant.\textsuperscript{411} Jesus is shown, again and again during his life, as challenging constituted authority, as questioning established interpretations and practices of the law. Much of what he stands for—and here his trial and condemnation are the culmination of his lifetime encounters with authority—is seen in vital opposition to the rule of law, perhaps even to the life and the people of the law. Thus, how one thinks about the \textit{trial} of Jesus may well affect much of what one thinks about the \textit{life} of Jesus and of the authority from which he rebelled.

What does it mean that an unjust trial should be as critical as it
On Trial

is to the West? What does it say about, or do to, the status of community and of politics among us? What does it do to legitimate among us whatever natural inclination there may be to self-development, to self-fulfillment, even to a kind of selfishness? The overriding concern for personal salvation—which, in temporal terms, easily takes the form of physical self-preservation—is something to be reckoned with. One must wonder whether a fear of death and a concern for self permeate the Gospels, legitimated and reinforced as they may be by the individuality of salvation, and all this in defiance of, or at least apart from, the community.

VI.

I have been speaking thus far of the trial of Jesus as reported in Mark. But, it can be said, there were two trials, the one before the Jewish council (the Sanhedrin) in which Jesus was found guilty of blasphemy, the other before the Roman governor (Pontius Pilate) in which Jesus was found guilty of, or at least condemned for, sedition (Mark 14:53-65, 15:1-15). The accounts of both trials are fragmentary, perhaps even grossly distorted, partly because of the lack of legal skills on the part of the narrator, partly because of the immediate polemical interests of the narrator and of his associates. But let us consider the accounts as we find them.

The two trials, if two there be, seem to be intimately related to one another. The Jewish authorities do not have the last word: they must go to Pilate for his decision (15:1). Crucifixion was a peculiarly Roman form of punishment, not one to which the Jews on their own ever had recourse. It is clear from the account in Mark, as that account is apt to be read and as it is likely that it was intended to be read, that the principal drive for the condemnation of Jesus came from the Jewish authorities (15:10-11).

We are given to understand by this account (and, for that matter, by the other three Gospel accounts as well) that the Romans really did not care much, one way or another, about Jesus. He was not known to them, it would seem; Pilate had not had soldiers out looking for him; perhaps, even, Pilate had never heard of Jesus before he was brought in by his Jewish enemies. Nor is this Pilate sympathetic toward Jesus, at least not so sympathetic towards someone he says is an innocent man that he can resist executing him at the insistence of his enemies. Pilate can even be seen to be mocking the Jewish authorities, obliging them to take what may have been the unusual position of pressing a Roman governor to be
harsher than he was inclined to be toward one of their coreligionists.

VII.

It is the animosity of the local authorities to which, we are told, Pilate is pressed to defer (15:10-11). What are we to understand to have been the cause of that animosity on the part of Jesus' accusers? It can be argued that his persistent criticism of established practices and his condemnation of the hypocrisy of established practitioners was resented. The language he used in berating his opponents was not designed to endear him to them. In fact, one is startled to notice how much harsher Jesus' language is than that of his opponents, reflecting perhaps the ardor of youthful righteousness.

But Mark is somewhat more precise than this in singling out the causes of a deadly animosity toward Jesus on the part of the Jewish authorities. There are, I believe, only two occasions in Mark on which it is said that Jesus' enemies took counsel among themselves "how they might destroy him." The first may be found following his insistence upon healing on the Sabbath; the second may be found following his assault in the temple (in Jerusalem) upon the money-changers and other businessmen (3:6, 11:18). Concerns were expressed by scribes and pharisees on other occasions, but the two responses I have singled out seem to be particularly strong. How can these two responses be understood? One cannot discount altogether the role of envy and of the desire men may have to retain their privileged positions. But to make too much of these elements, important as they may have been, is to fail to appreciate what is special about the two "overt acts" which are singled out by the Gospel narrator, however he himself understood them.

The healing episode was preceded by the concern expressed by the pharisees about the plucking of grain on the Sabbath by Jesus' followers (2:23-24). Jesus stoutly defends what his followers have done, citing a precedent (but not a Sabbath-day precedent?) from David, and observing that "the Sabbath was made for man, not man for the Sabbath" (2:25-28). He then heals a man who had a withered hand (3:1-5). The plucking of the grain, and the way that was justified, had alerted the pharisees here to see whether he would heal the withered hand, so "that they might accuse him" (3:2). Jesus, before healing the hand, asks, "Is it lawful to do good on the sabbath days, or to do evil? To save life, or to kill?" "But," we are told, "they held their peace." Jesus, we are further told,
“looked round on them with anger, being grieved for the hardness of their hearts,” and then healed the man (3:4-5). It should be noticed that any criticism of a man for healing on the Sabbath does concede the healing. Jesus’ enemies are prepared to concede that, just as they are evidently prepared to believe that others can heal as well.

Is the narrator correct in attributing anger to Jesus and grief at “the hardness of their hearts” (3:5)? Were the Pharisees hard of heart? What is to be made of the Sabbath prohibition? It was a prohibition which did allow exceptions for emergencies. Thus, it had long been recognized that one could pull one’s ox out of a ditch on the Sabbath, lest it perish while one waited for the first day of the week to come. But what emergency is there for a man born with a withered hand? Cannot he wait one more day? Should not compassion take due account of the law which is seen, in its outward and routine manifestation, in the respect of the community for the Sabbath? The deep respect for the Sabbath may even be reflected in the evident suspension of the efforts to anoint Jesus’s body when he was removed from the cross. It seems to be indicated in Luke that the women had to postpone, until after the Sabbath, their preparation of the body for burial. It was when they went to the tomb to finish the work they had begun that they learned of the Resurrection.

A religion, to be effective, must be to some degree simple-minded, if not even ruthless. The prerogative generously exercised by Jesus in healing on the Sabbath may have threatened Israel no less than did those in the desert who selfishly worshipped the Golden Calf. So it might have seemed to the more thoughtful of those numbered among the critics of Jesus: they saw their people, and the community which shaped that people, very much dependent on a law which at times inevitably appeared inflexible and even callous. Jesus rarely acknowledges the usefulness of temporal authority, and then it is a grudging acknowledgment designed, it would seem, to avoid immediate serious consequences. He does seem aware of his vulnerability, and takes precautions, lest he be killed before his time.

Jesus’ apparent casualness about authority is evident throughout Mark. Thus, he is never portrayed as consulting with men in authority in an effort to modify their behavior. The Gospel narrators do not think it necessary to show Jesus trying to correct things by normal means. Rather, he is again and again shown to be acting on his own authority, sure of his prerogatives and determined to
have his way. At least, that is the way it must have seemed to the authorities, to men who were very much concerned lest outbreaks of rebellion bring down upon the entire community the ferocious wrath of the Romans. At no time does Jesus seem to be concerned about this threat to the community. The Jewish authorities probably saw him in uncertain control of a number of followers, and so as someone who could be dangerous. The more farsighted among them might have anticipated the destruction brought down upon Jerusalem and the temple a generation later, in 70 A.D., when the Romans decided once and for all to try to rid themselves of troublesome subjects. There must have been for several decades some desperate men among the Jewish authorities in Jerusalem.

On the other hand, some of Jesus' followers must have considered the spiritual life of Israel so deteriorated that radical measures had to be taken. Perhaps the very presence of the Roman occupiers could be taken by the more sensitive Jews as a sign of deep-rooted sinfulness on the part of their people. How bad were things at the time of Jesus? Were the Jews particularly sinful? Were things too far gone to permit the constituted community to proceed as it had for generations—to permit the normal processes of grievances and reform, such as they were, to operate? From one perspective, Jesus' actions in cleansing the temple could be seen as out-and-out usurpation by an impulsive zealot, unused to city ways, who did not appreciate the accommodations men must make in order to live with one another, especially when they are vulnerable to outside forces (11:15-17).

The temple authorities would have seized Jesus after his single-handed cleansing of the temple, we are told, except that the multitudes around him in effect protected him (12:1-12). It is evident that those multitudes expected more of Jesus than he, with his pacifist inclinations, was prepared to deliver. They would continue to support and hence protect him so long as it seemed to them that he, as the Messiah, did not need to be protected. The concerns of the Jewish authorities are easy to minimize, but we should remember that there have always been far more false prophets than true ones and, so far as the authorities could see, there was nothing special about this one. Christian charity, to say nothing of political science, should lead us to appreciate the concern that responsible leaders might have. Thus, we find in John the sound of desperate men (whatever the narrator himself believed to be the case), when certain Jews are recorded to have said, "If we let him thus alone, all men will believe on him; and the Romans shall come
and take away both our [holy] place and nation.”⁴²⁰ To this the high priest is recorded as adding that it is expedient “that one man should die for the people, and that the whole nation perish not.”⁴²¹

VIII.

Since the Jewish authorities could not get to Jesus—since they themselves could neither dissuade him nor seize him—, they tried to make use of Roman power. They attempted, therefore, to trap him with their question about whether taxes should be paid to Caesar. If Jesus answered that taxes should be paid, he would lose some of the popular support which made him dangerous and which protected him; if he answered that taxes should not be paid, he would commit a criminal offense of which Rome could be induced to take notice. Jesus escaped the trap set for him by calling for a coin, noting thereon Caesar’s inscription, and saying that one should render unto Caesar the things that are Caesar’s, and unto God the things that are God’s (12:13-17). This kind of evasiveness obliged the Jewish authorities to seize Jesus by night—and, we are told, they were able to do so by making use (with Judas Iscariot) of some of the very coin about which Jesus had spoken so equivocally (14:10-11).

The concerns and motives of the Jewish authorities had to be transformed into formal charges in the course of the two trials referred to. When Jesus was taken before the authorities, there was false testimony brought against him, but the witnesses did not agree (14:55-59). Does not this suggest, by the way, that the case against him may not have been simply a deliberate fabrication? Had the case been well-organized, would there have been the confusion which seems evident here? The testimony brought against Jesus, which failed to hold up, seems to have been with respect to what he might have said (as if somehow divine?) about destroying and rebuilding the temple. Throughout this part of the proceedings, Jesus stood silent (14:57-61). He was then asked by the high priest (14:61), “Art thou the Christ, the Son of the Blessed?” He is said to have answered (14:62), “I am: and ye shall see the Son of man sitting at the right hand of power, and coming in the clouds of heaven.” This is then said to have been identified by the high priest as blasphemy—“[a]nd they all condemned him to be guilty of death” (14:63-64).

Scholars differ as to whether this was indeed blasphemy under Jewish law.⁴²² I am not able to assess the validity of this charge. Nor am I sure that the Gentile (?) narrator of this Gospel was in a
position to assess it either. But I suspect that that narrator was prepared to concede that if what Jesus said was not true, then it was blasphemy—and it is this that readers of the Gospel were probably intended to concede as well. That is to say, Jesus is evidently shown to have claimed for himself divine powers even though the synoptic Gospels never have him claiming to be other than human. It is not made clear how those who heard him were supposed to know that the powers and status he claimed were indeed his. Certainly, those who heard him on trial did not know about him the many things that the reader of the Gospel has been told by the time the trials come. On the other hand, readers of the Gospel outside Palestine were hardly likely to be as aware as the Jewish authorities might have been about the dangerous prevalence of false prophets and of false but plausible messiahs and about the criteria to be taken account of in judging the claims that were presumptuously, if not insanely, made from time to time.

The Christ (or Messiah) charge is transformed, when Jesus is brought before Pilate, into a form intended to be of concern to the Romans. Pilate evidently understood the Messiah to be a Jewish king, and so he greeted Jesus with the question (15:2), “Art thou the King of the Jews?” This is the only Roman question about which we are told by Mark, even though the chief priests are said to have accused Jesus of many things (15:3). Although Jesus is evidently taken to concede his claim of kingship, Pilate is not shown to have taken this charge and admission seriously (15:14). Even so, the formal justification for the Crucifixion, on the basis of this Gospel account, must have been that Jesus claimed royal power. This sedition on his part is recognized in the announcement placed by the Romans on his cross. It is said in Mark that “the superscription of his accusation” on the cross read, “The King of the Jews” (15:26).

IX.

The mockery Jesus received at the hands of the Jews and Romans respectively reflected the two sets of charges, or the two sets of interests being guarded, which I have mentioned. Thus, after Jesus had been condemned as a blasphemer, we are told (14:65), “some began to spit on him, and to cover his face [that is, to blindfold him], and to buffet him, and to say unto him, ‘Prophesy’ [that is, ‘although he cannot see, a prophet should be able to identify who strikes him’].” And when he is on the cross, “they who passed by railed on him, wagging their heads, and saying (15:29-
30), ‘Ah, thou that destroyest the temple, and buildest it in three
days, save thyself, and come down from the cross.’” This is the
“Jewish” response. The Roman soldiers, on the other hand (15:17-
19), “clothed him with purple, and platted a crown of thorns, and
put it about his head. And they began to salute him, ‘Hail, King of
the Jews!’ And they smote him on the head with a reed, and did
spit upon him, and bowing their knees worshipped him.”
The two sets of charges to which Jesus was subjected suggest
that the people involved did have divergent interests, which are
reflected in the two kinds of mockeries to which he was subjected.
The Roman soldiers saw Jesus as a political usurper; the Jewish
people, those few who joined in the mockery, saw him as a reli-
gious imposter. Pontius Pilate, as presented here, can be said not
to have been seriously concerned about Jesus in either capacity.
The Jewish authorities, on the other hand, can be seen to have been
concerned about the political consequences of Jesus’ religious
pretensions, which consequences could in turn very much affect
the spiritual life of their people, a people which they conceived to
depend very much on a land of their own. A blending of Jewish
and Roman concerns may be heard in what the mocking chief
priests said among themselves with the scribes (15:31-32), “He
saved others; himself he cannot save. Let Christ the King of Israel
descend now from the cross, that we may see and believe.” Thus,
in their private conversation, and there alone, “the Christ” of the
first trial (or arraignment) and the “King of Israel” of the second
trial can be said to have been brought together.
These two realms—that which we call political and that which
we call religious—had never been separated, at least not for the
Jewish authorities. Neither was it separated for the narrator of this
Gospel or for Jesus himself. There may be, in various circum-
stances, practical reasons for separating the two realms—but that
can be done in a sensible, and hence flexible, manner only by those
who appreciate how intermingled the concerns of the two realms
may naturally be.424

X.
The relations between the realms of politics and religion are sug-
gested by a brief consideration here of the Gospel of Matthew. That
Gospel has essentially the same account of the trial of Jesus as does
Mark.425 But Matthew has also an extended account of Jesus’
temptations in the wilderness, whereas Mark does no more than
note that episode (1:12-13). The parallels in Matthew between the
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temptations account and the trials account are striking and hence instructive. There were, for Jesus in the wilderness, three temptations: the first, to turn stones into bread; the second, to dare hurl himself off the pinnacle of the Temple; the third, to become ruler of all the kingdoms of the earth shown him from a high mountain. Notice the order of the latter two temptations: one has to do with the Temple as the point of departure, so to speak; the other, with the kingdoms of the earth. This order, religious and political, is the same as that in the trials of Jesus, first before the Jewish authorities, then before the Roman authorities. When one considers the temptations parallel, one realizes there can be said to have been three trials as well. Comparable to the first temptation (the temptation for a man who has fasted forty days, of turning stones into bread) is the agony for Jesus, prior to his arrest, as he prays in Gethsemane.

Consider also the circumstances of and sequels to these two sets of challenges. The temptations are preceded by forty days of fasting; the trials are preceded by a feast, evidently the Passover (what we now know as the Last Supper). In the former, Jesus is alone; in the latter, Jesus is with many. This contrast may be seen in the respective sequels as well: the temptations are followed by angels ministering to Jesus; the trials are followed by the Crucifixion. But then, of course, there is the Resurrection to be taken account of: it is that which breaks the pattern, providing the basis, it can be said, for a new ordering of things.

The temptations in the wilderness (at the outset of the account in Matthew of Jesus' ministry) and the trial and condemnation of Jesus (at the end of that ministry) bracket the story of his career. Are we to understand thereby that Jesus always, and necessarily, confronted the challenges of the temptations story. He must always wrestle with himself; he must wrestle with spiritual traditions; he must wrestle with political ambitions. These concerns exist together for him: the devil (or perhaps God) brings the three together. It takes self-confidence, with a self tempered by the first temptation, by the first trial, if one is to be able effectively to challenge constituted authority, whether spiritual or political. Do not we see here, again, that the trials are somehow primary, that everything else in Jesus' life is seen and explained as anticipating that final set of challenges?

We can also see that Jesus could have given in to the final set of challenges in Jerusalem and thereby "saved" himself, just as he could have, at the peril of his mission as it is here presented, given
in to the first set of challenges in the wilderness. He could have, in Gethsemane, decided to flee to Galilee, where he would have been relatively safe; he could, thereafter, have come to terms with the Jewish authorities or thrown himself upon the mercy of the Roman governor. Finally we see, upon examining these two sets of three challenges, that the spiritual concern is central to each: that which we call spiritual helps shape the human being, on the one hand, and helps guide the community, on the other.

The most critical difference between Jesus and the Jewish authorities may have come down to the question of the extent to which enduring spiritual power depends on a political community with its discipline and ritual. Certainly, we once again see the importance of moderation in human matters. This seems to depend on understanding.

We began by speaking of the trial of Jesus. We moved to a consideration of his two trials. The parallels to the Matthew temptations in the wilderness moved us to notice in turn that there could be said to have been not one, not two, but six trials. And all of these point to a seventh trial, an overarching trial, so to speak—that trial, or challenge, which comes to us in the form of a question, How should a man live?

Saint Augustine observes in his passionate Confessions, “Is not the life of man upon earth all trial?” Elsewhere in that book he observes that Jesus had done nothing worthy of death, and yet he was killed. This awareness of the deep injustice among unredeemed men is not to be found, he suggests, in the Platonic (that is, philosophic) scheme of things. Does not this call somewhat into question the parallels often drawn between Socrates and Jesus? It should be evident from what I have said on this occasion that the differences between these two influential teachers are perhaps more striking than their similarities. Jesus’ death is presented as a necessary one: the very nature of things demands his death. This is not so with Socrates: he lived twice the age of Jesus—and had he died, naturally, a few years before he was brought to trial, he still would have lived a full life. If the Peloponnesian War had come out differently or lasted a little longer, Socrates probably would never have been indicted at all. The Platonic Socrates, as is evident from the Republic, had an extensive political teaching; Jesus evidently did not. Whatever the natural tension between philosophy and the city, it is neither necessary not inevitable that the philosopher be killed by the city.
XI.

It is difficult to garner from the Gospels precisely what Jesus' character or teachings are, spiritual as well as political. He does seem to question the established order and, in a sense, life itself. But what does he stand for? Consider, by contrast, not only the detailed arguments in the Platonic dialogues but also the detailed prescriptions and, in effect, arguments in the Old Testament. Jesus sees man in critical need of redemption and capable of it with God's help. It is far from clear that Socrates does. Certainly, Socrates does not consider his teaching to be designed for the many. Jesus' offer, on the other hand, is held out to all: everyone is asked to have faith, to believe in him.

Thus, a Gospel—the good news of salvation—is primarily an account of deeds, capped by the miracle of the Resurrection. It is less than is a Platonic dialogue an account of teachings which make sense on their own. The slimness of the appendage to the Old Testament that the New Testament represents testifies that it is a message to be preached to all nations (13:10). Jesus warns his disciples that there will be false Christs and false prophets—but there is, so far as I can tell, no reliable indication given of what constitutes genuineness in prophecy.

An emphasis is placed in the Gospels upon watchfulness: a state of constant anxiety seems to be called for (13:21-37). The serenity of a Socrates, apparently unconcerned about mistreatment or death, is in marked contrast. From the Christian point of view, such serenity is unwarranted prior to finding oneself in the resurrected Christ.

We return to the story in Mark of the rich young man: it is not enough, he was told, to obey scrupulously the various commandments, the old teaching; he was also told to sell all his goods, give his wealth to the poor, and follow Jesus (10:17-22). What does following Jesus consist of? A life of poverty is indicated and the abandonment of other attachments, even those family and communal attachments which have always meant so much to Jews. It is not for nothing that the Old Testament divinity is seen as the God of Abraham, Issac and Jacob: God is, in some critical respect, the God of a family.

To have faith in Jesus means, ultimately, that there must be a decisive act of will, not a sustained activity of the reason. Compare, on the other hand, the passage in Deuteronomy which has Moses anticipating that other peoples will come, evidently on the basis of reason alone, to recognize the wisdom of the statutes
taught to the people of Israel. All this is not to say that there are no teachings emanating from Jesus: one is enjoined to love God and man; the elevated are to be humbled; the lowly and afflicted are to be shown compassion. Beyond that, one might say, religious institutions will provide guidance which includes, perhaps because of the emphasis upon will, rigorous curtailment of the passions. Man is to be kept in his place.

The Christian emphasis upon the will confirms the critical role of the trials of Jesus that we have seen in the Gospels. The test of a man is whether he will stand firm, whether he will resist the temptation to succumb. His faith, not his understanding, is what is ultimately appealed to. "All things are possible to him who believes," it is said (9:23). One result of an approach which makes so little of the ways of this world and so much of death as something to be conquered and surpassed is that when its otherworldly expectations begin to fade, men are apt to be left in far deeper despair than they would have been in if they had had to rely all along "merely" upon a natural understanding of things.

XII.

When so much depends on the testing of man, of which the trial of Jesus is taken to be the great example, one is obliged to consider where the responsibility lies for the outcome of that testing. Who, indeed, is responsible for the miscarriage of justice which the outcome of Jesus' trial is generally taken to be?

For many years—for many centuries now—the primary responsibility has been assigned to the Jews, to the leaders of the Jews at least, if not to the Jewish people as a whole. Jesus is regarded as entirely blameless, which is understandable, considering the divine status traditionally accorded him. But Pilate's guilt, too, has been curiously minimized: he is shown, in one Gospel after another, as making repeated efforts to release a man whom he found to be in-
necent. It is sometimes said by scholars that the Gospels present him thus so as to make the story of Jesus acceptable to the Gentile world. It was not rhetorically useful to picture Jesus as a man condemned for rebellion against Roman authority. But the narrators' motives must be distinguished here from their effects—and one effect of the Gospels certainly is that of presenting a Roman governor who did not want to do what he was somehow forced by the Jews to do.

But should it not be said that of the three parties involved—Jesus, the Jews, and Pilate—, the Jews had by far the most difficult task and the most serious duty? The Jewish authorities had a quite vulnerable community to look out for. Their lack of faith in Jesus, someone whom they did not truly know but who seemed to pose a serious threat to the community, was in the circumstances not surprising. In a sense, they were far more realistic about him than were his immediate disciples, for those disciples seem to have expected him to be able to protect himself from execution. It is difficult to see that Jesus did or said anything in the presence of the Jewish authorities in Jerusalem that entitled them to believe that he was an extraordinary prophet, that they need not continue to remain vigilant in defense of the old way. The devout Christian is fortunate, in judging the Jewish authorities in Jerusalem, to have the advantage of hindsight, including his critical faith in Jesus' Resurrection.

We have assumed throughout our discussion that the Gospels are intact and that they are substantially accurate in recording the sentiments and activities of the men of that time. Even so, is it not salutary for us to regard Pontius Pilate as far more contemptible in his conduct than the Gospel writers seem to regard him? Pilate should have known that if the Jewish authorities had really believed that Jesus was a genuine threat to Roman political power in Palestine, they would have been delighted. Instead, we are in effect told, Pilate killed an innocent man accused of sedition in order to keep that man's enemies from themselves becoming seditious.

The principles of natural right would seem to question the justice of the conviction of Jesus. But, it can be said, natural right was overcome, in the case of the more zealous Jewish enemies of Jesus, by their faith. But no such influence excuses Pilate. At the very least he should have acquitted Jesus, if not out of compassion, at least out of a desire not to be personally tainted by an injustice, whatever Jesus himself may have "wanted." An inspired judge
could perhaps have acquitted a helpless Jesus in such a way as to diminish his political influence and hence danger.

What Jesus himself truly wanted is difficult to determine. It is far from clear, even from the Gospel accounts, that Jesus was important in Israel at the time of his execution. We have noticed that no popular effort was made to interfere with his public execution. Had he been important, rather than merely troublesome and potentially dangerous, it is likely that his trial would have been longer and more carefully recorded than it was. Jesus can be said to be responsible for the verdict in the case, at least in the sense of having knowingly provoked a certain response to his conduct. Do not the faithful regard the charges against Jesus as essentially true? That is, what does innocence mean here? Who is really responsible for what happened? May there not be, in the life of Jesus, the curious phenomenon of the form but not the substance of an unfair trial? Suppose he had been acquitted, what then? Would still another challenge by him, still another provocation, have been necessary, until at last the necessary redemptive sacrifice could be made?

How much should we assume Jesus to have foreseen and to have ordained? Is it not more charitable to assume that he did not, that he could not, anticipate the dreadful persecutions visited upon Jews for some two thousand years in large part because of their supposed responsibility for the execution of the Christian God?

I do not mean to suggest that Jews and Judaism were not at all responsible for what happened to Jesus. They were deeply responsible—responsible for the life and thought of Jesus much more than for his death. One might even add that Jews and Judaism were responsible for the very best in Jesus, for whatever in him has made him properly attractive to this day and across many lands. The gross misconduct of Jesus' trial—whether by Gentiles or Jews, whether by the accusers or the accused or the governor—can be understood by recourse to what we know of human nature. Insofar as Judaism was at fault—with its determined righteousness and its provocative self-assurance—, it was a fault it has generously shared for two millennia now with Jesus and millions of his followers. On the other hand, that Pilate should have had such a good press, that millions of innocent Jews should have suffered as they have, and that Israel should remain as vulnerable as it is today does suggest that there indeed may be something deeply wrong with the world of affairs. That, I am afraid, is nothing new but rather something one has to learn to live with. One should not,
however, make matters worse than they need be by expecting too much.

I leave to you to consider what light, if any, this analysis of the trial of Jesus and its aftermath casts on the enduring question of the truth of the miracles recorded in the Gospels, especially that critical miracle of the Resurrection.

XIII.

I conclude by addressing further a question which I have touched upon in the course of this talk: What should have been done with Jesus? It should not require an argument to establish that good men should not be killed. Certainly, Jesus should have been talked to—again and again and again. It is far from clear that Jesus himself was receptive to serious discussion with skeptics and the unrepentant: his vigorous responses to what he considered hypocritical questions were not such as to encourage patient inquiry on the part of others. Still, more efforts should have been made by all of the parties involved. Delay was on the side of justice, if only because mellowing usually does come with age and experience. Even a few years might have made a considerable difference in Jesus and in the responses of others to him. A few days delay, until the passions of the Passover season had cooled and Jerusalem could return to its normal life, might have helped restore a sense of proportion to all the parties involved. (Whether a redemptive sacrifice was needed or inevitable I do not presume to discuss on this occasion.)

To ask what should have been done about Jesus is to ask, in effect, what we should do. The desire to pay homage to such a man as Jesus is taken to be is natural enough. But one cannot pay homage to Jesus without paying homage as well, whether or not one recognizes it, to the people who made him possible and to whom he will always belong. One appropriate form of such homage today, I venture to suggest, is that we here in this country take care not to play the demoralizing part of Pontius Pilate. We should take care, as a nation under the pressures now mounting, not to permit a misguided world opinion, and mundane considerations of security and petroleum, to crucify a beleaguered Israel, however difficult that country may appear to be at times.

What should one do in moments of sustained crisis? Perhaps the most prudent thing one can do in such circumstances as the Jewish authorities, Pontius Pilate, and Jesus found themselves, circumstances not altogether unlike those in which we find ourselves from
time to time, is to remind the partisans involved in such deadly controversies of the highest aspirations in their heritage. Old-fashionedness, rather than innovation, is very much to be preferred in such matters.

We in the West are the privileged heirs to both the Romans and the Jews of antiquity. For the Roman in us, there is the matter-of-fact dedication to the rule of law evident in the report by a Roman officer to his superior on the disposition of the Apostle Paul. This report may be found in the Book of Acts:

Claudius Lysias to his Excellency the governor Felix, greeting. This man was seized by the Jews, and was about to be killed by them, when I came upon them with the soldiers and rescued him, having learned that he was a Roman citizen. And desiring to know the charge on which they accused him, I brought him down to their council. I found that he was accused about questions of their law, but charged with nothing deserving death or imprisonment. And when it was disclosed to me that there would be a plot against the man, I sent him to you at once, ordering his accusers also to state before you what they have against him.449

For the Jew in everyone of us, there is the ageless prescription recorded in the Book of Micah and transmitted to us all, in effect, by the ministry of Jesus:

And what doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God?450

Thus, we need Socratic prudence—or, if it should happen to be available, divine wisdom—to teach us how to weave together, in practical affairs, these two worthy strands from our complex heritage, the mundane requirements of the rule of law, the eternal demands of the call to purity. Neither the usefulness nor the vulnerability of our necessarily imperfect and yet necessary institutions, both civil and spiritual, should be underestimated by those among us who happen to yearn for the very best and are nobly determined to get it at all costs.

8. JOAN OF ARC451

I.

I can do no more on this occasion than to suggest how we can begin to think about and pass responsible judgment on claims and events which seem to touch upon the supernatural—and to do this only with whatever aid is provided us by the light of natural reason and by the guidance of common experience. Those among us who
are blessed with more than human wisdom should be looked up to—and it is in the interest of us all, the blessed and the ordinary alike, that systematic efforts be made to use what talents we have to identify and cherish those who may be divinely inspired.

Our case in point, for this occasion, is that Medieval treasure, Joan of Arc (Jeanne d’Arc). I anticipate much of what I can say about her and, even more important, about the enduring questions about inspiration that her case can help us examine, by referring you to two instructive stories and by telling you a third. The first story, recorded in the Book of Jeremiah, has to do with a struggle between two prophets. The second instructive story, recorded in Shakespeare’s Henry VI, Part 2, has to do with how a sensible man comes to terms with the miraculous. These are the two stories to which I refer you, bearing as they do on what I will be saying on this occasion. The third instructive story, which Joan of Arc herself (in the lighter moments of which she was capable) would probably have enjoyed as a particularly apt commentary upon her circumstances, goes something like this:

A man who liked to hike across all kinds of terrain fell over a cliff one day but managed to grab a strong branch. Although his arm and shoulder pained him fiercely, he held on desperately. He looked down hundreds of feet and up fifty feet. There was no help in either direction. There was nothing to do but yell and hope someone would hear.

“Is anyone up there?” he shouted.
“Yes, I am here,” a voice replied.
“Who are you?” the hiker asked.
“I am the Lord, the voice replied again. Do you need help?”
“I need it badly and at once.”
“Do you have faith?”
“I have all the faith in the world.”
“Then let go of the branch.”

There was a long pause. Then the hiker called out, “Is there anyone else up there?”

Let us turn now to the trial of Joan of Arc, but by way of still another story, a story provided us by a Greek playwright surpassingly alert to the workings of human passions.

II.

Odysseus is shown at the outset of Sophocles’ Ajax in a kind of conversation with the goddess Athena. It is “a kind of conversation” in that Athena does not appear to him visually; rather, he can (he says) clearly catch her words. That is, he is a man who,
insofar as he thinks and is crafty, effectively turns to and relies upon Athena. In a manner of speaking, then, the hardheaded Odysseus hears divine voices, voices which are critical to his plans and activities as a most practical man.

In this respect, it would seem, he is a forerunner by some two millennia, of Joan of Arc, the teenaged girl who heard voices which directed her from a village in the east of France to the court of a king, to glorious exploits both military and political, and thereafter to the stake as a heretic. Joan's perceptions of her angels and saints were not limited to voices, however. She could see her visitors, as well, and on occasion touch them and smell them. But it is as voices that they most significantly affected her—and in that respect, she does resemble the wily Odysseus.

But the Odysseus of Sophocles (or, for that matter, the Odysseus of Homer) is not a visionary, either in his temperament or in his effect upon others. The recognized visionary tends to have an unsettling effect upon others as well as, at the outset, upon himself. The oddness of what is happening to him, of what he discerns or describes to be happening, can be intimidating. Sophocles' play opens with an instance of such intimidation: Ajax, furious with the leaders of the Greeks (including Odysseus), has that very night gleefully slaughtered many animals, believing them to have been the Greek leaders. He had been subjected to this delusion by Athena, protectress of Odysseus and his colleagues. She had, she reports, thrown before his eyes "obsessive notions, thoughts of insane joy." We can understand how someone of Ajax's fierce temperament, thwarted in his efforts to secure revenge for an affront he has suffered, should have "taken it out" on the animals available to him. We can also understand that Odysseus can regard what Ajax has done as "an act of staggering horror."

Passionate oddness, to use a neutral term, can be intimidating, whether found in a saint, in the insane, or in the diabolically possessed. Consider the following exchange between Athena and Odysseus, when the goddess proposes to show him the afflicted Ajax:

Athena: Get a grip on your nerves and wait. It's no disaster to see the man. I'll turn his glance away. He'll never see you or know your face. . . .

Odysseus: Athena, what can you be thinking of? Don't call him out!

Athena: Quiet, now! No cowardice!
Odysseus:
No, no, for heaven's sake! I'd very much rather he stayed inside.
Athena:
What are you afraid of? He was only a man before.
Odysseus:
Yes, but he was my enemy and still is.
Athena:
But to laugh at your enemies—what sweeter laughter can there be than that?
Odysseus:
It's enough for me if he stays just where he is.
Athena:
You're afraid, then, to see a madman face to face?
Odysseus:
Certainly if he were sane, I should never shrink from him. 460

This is no idle boast on Odysseus' part: he had always been competent and confident enough to deal with the sane, however powerful, Ajax. But the insane have always aroused in men a "reverential awe." 461 There is about them something unnatural, otherworldly, radically irrational. Such people can be more sensitive, more perceptive, as well as far less inhibited in what they say and do. The heightened powers of such people make others feel more vulnerable. One's soul may even feel unnaturally exposed. One senses that whatever malice there may be in such people is undiluted and thus more likely to be effective, especially because they tend to be oblivious to pain and threats. They can be unsettling even when one recognizes them to be exhibiting a standard mental aberration, such as certain hallucinations. Not only can they not be counted upon to be restrained by prudential considerations and by the typical concern for self-preservation, but they undermine our reliance upon the possibility of communicating with one another, thereby subverting our reliance upon rationality.

To be possessed is to be like an inspired poet—except that in a poet, this sort of thing is held in check, if only barely in some instances. But poetic or otherwise, this kind of manifestation can be beguiling as well as intimidating, depending on the circumstances and perhaps depending also on whether it can be harnessed by those who know what they are doing—by those who are aware of the limits of human knowledge of, and control over, events, and by those who are aware as well of the power and limitations of public opinion.

To be possessed is to exhibit a single-mindedness, or to be moved by a mindlessness, which can be wholeheartedly devoted to cosmic
purposes. There can be something exhilarating as well as eerie about this, perhaps not least because of the risks being run. The career of the visionary can be quite precarious, if only because the visionary stands alone, unable to rely upon anyone else when circumstances change.

III.

An inspired singlemindedness may be seen in the character and career of Joan of Arc. A useful recapitulation of that career is provided us by the short entry devoted to her in the *New Catholic Encyclopedia*:

Jeanne la Pucelle, national patroness of France; b. Domremy in Lorraine (Department, Meuse), Jan. 6, 1412; d. Rouen, May 30, 1431 (feast, May 30).

Except for her piety, nothing in 'Jeannette's' early years distinguished her from other children of the countryside. When she was about thirteen, her 'voices,' which she kept a secret for almost five years, revealed her mission, the deliverance of the French kingdom from English control. The treaty of Troyes (May 20, 1420) had made the English king, Henry V, king of France, setting aside the legitimate heir, the future Charles VII. The madness of Charles VI, French military reverses, and the alliance between England and Burgundy had prepared for this shattering event. After the successive deaths of Henry V and Charles VI, the Duke of Bedford, regent of France for his nephew, Henry VI, undertook to complete the conquest of the kingdom by tracking down the Dauphin (Charles VII), who had taken refuge beyond the Loire, and by putting Orleans under siege.

Joan secretly left her home in January of 1429, succeeded in obtaining an escort from the captain of Vaucouleurs, who had remained faithful to the king of France, and was presented to Charles VII at Chinon (Feb. 25, 1429). Having had Joan examined by theologians at Poitiers, Charles consented to follow her advice and reassembled his army. With Joan in command they marched on Orleans and in eight days (May 8, 1429) ended the siege that had lasted eight months. After the brilliant victory of Patay (June 18), she opened the road to Reims, where Charles was crowned in the cathedral on July 17.

The coronation rallied the people of France, who until then had been hesitant in their support of Charles; it marked the end of English victories. But unfortunately the apathetic and ill-advised King opposed Joan's further plans. When at length she again went into action, hoping to relieve Compiegne, besieged by the Burgundians, Joan was taken prisoner (May 23, 1430). She was
sold to the English, who, in placing her on trial for heresy, sought at once to remove a formidable adversary and to discredit the King who owed her his crown. The trial was held in Rouen, presided over by the bishop of Beauvais, Pierre Cauchon, the former rector of the University of Paris and a staunch champion of the English. After months of interrogation (Feb. 21-May 24, 1431) and artifice, in which Cauchon tricked Joan into an admission of guilt, the judge sentenced her to death as a relapsed heretic. On May 30, she was excommunicated, turned over to the secular arm, and burned at the stake. Engulfed by flames, Joan protested her innocence and the holiness of her mission.

Even during her lifetime, Joan was hailed as a saint because of both the preternatural character of her deeds and the purity of her life. She was solemnly rehabilitated by the Church after a seven-year trial (1449-56), during which 115 witnesses were heard; she was beatified on April 18, 1909, and canonized on May 9, 1920.462

Several immediate qualifications, if not corrections, of this account are called for. There were two judges on this occasion (as seems usually to have been the case in such trials), the Bishop of Beauvais (Pierre Cauchon) and the deputy inquisitor for France (the chief inquisitor himself being occupied elsewhere in another trial).463 The two judges were advised by dozens of assessors, who commented on the law and the evidence from time to time, and (perhaps more important on this occasion) by the theological faculty of the University of Paris, a body with a European reputation and considerable influence.464 These proceedings, which extended over several months, were anything but perfunctory.465 It is, despite what the New Catholic Encyclopedia entry says, not useful to consider Joan "tricked . . . into an admission of guilt."466 Rather, it appears that the fundamental issues were fairly clear by the time the trial ended; it was also fairly clear what each side stood for and required of the other. It is not insignificant that more than a year elapsed between the capture of Joan and her execution. (This was about as long as her military career prior to her capture.) Thus, there was no rush to judgment, but rather an extended (sometimes tortured) struggle between troubled churchmen and a troubling, if not troubled, youngster.

Joan seems, in her last days, to have been much disturbed by the prospect of death at the stake.467 In this she exhibited a normal concern for self-preservation, just as she had been concerned earlier that she not be subjected to the torture often resorted to in the interrogation of defendants in heresy and witchcraft trials.468 It may well be that she did not fully realize, until almost the very end,
that she faced immediate execution upon conviction—and when she did realize this, as the final judgment was being pronounced, she renounced her claims about the divine origins of her voices and formally accepted the authority of the Church.  

But, it turned out, this was a submission that she could not really live with. Within a few days, she had repudiated her submission, and thereby invited her condemnation and immediate execution as a relapsed heretic. Her relapse turned around her revival of claims about the voices by which she had been, and continued to be, guided. Thus, her submission in the face of death gained her only a few more days of life. But it might well have contributed immeasurably to her reputation with subsequent generations in that it did reveal her as someone with a healthy desire to live, something which must be naturally wondered about when enthusiasts, especially youthful enthusiasts, are encountered. That is to say, Joan's life-preserving retreat suggests that, however unsettling and distorting her voices might have been, she probably had some notion of what she was letting herself in for when she returned to her original position.

Of course, there can be no assurance that her relapse was other than a resurgence of a psychopathic state from which the immediate prospect of death had momentarily shaken her, like a kind of shock treatment. But that is not how this timely assertion and then renunciation by her of the self-preserving instinct strike most people. Such a desperate exhibition of weakness, if weakness it is, appeals to mankind at large. Certainly, she has an extensive appeal. Thus, fifty years ago, an American writer said of her, "It is just five hundred years since Joan of Arc lived her brief life. Her story has been told many times, and will be told oftener in the years to come, for she was, she is, the most interesting human being the world has ever known." And only last year she was voted the "most admired" public figure by the millions of people who visit Madame Tussaud's Wax Museum in London, a tribute particularly touching considering that it was the English who executed her after she had been excommunicated by a tribunal of French churchmen. It is not without interest to notice that she was followed in this poll by Winston Churchill and thereafter by Jesus, John F. Kennedy and Lord Nelson. Her career resembles in some respects that of Jesus himself. The careers of four of these five favorites are marked by, and perhaps are attractive because of, untimely deaths. The exception, of course, is Churchill, whose "glamour" comes not from a "romantic" death, which seems to
have some appeal today, but from his reputation as the savior of Great Britain against the threat posed by Adolf Hitler, who is awarded recognition (in the same poll) as “the most-hated public figure.”

It is Churchill himself who has written in his history of the English-speaking peoples one of the most eloquent (and, in a sense, authoritative) appreciations of the girl whose trial we are considering. He opens and closes his account of the leader he considers the decisive enemy of England during the Hundred Years War with these celebrations of her:

There now appeared upon the ravaged scene an Angel of Deliverance, the noblest patriot of France, the most splendid of her heroes, the most beloved of her saints, the most inspiring of all her memories, the peasant Maid, the ever-shining, ever-glorious Joan of Arc...

Joan was a being so uplifted from the ordinary run of mankind that she finds no equal in a thousand years. The records of her trial present us with facts alive to-day through all the mists of time. Out of her own mouth she can be judged in each generation. She embodied the natural goodness and valour of the human race in unexampled perfection. Unconquerable courage, infinite compassion, the virtue of the simple, the wisdom of the just, shone forth in her. She glorifies as she freed the soil from which she sprang. All soldiers should read her story and ponder on the words and deeds of the true warrior, who in one single year, though untaught in technical arts, reveals in every situation the key of victory.

IV.

We speak of the trial of Joan of Arc, but it may be more instructive to consider her to have been subjected to three different trials. The first was the examination to which she was assigned upon offering her services to Charles VII; the second was the inquisition undergone upon her capture; the third was the trial for relapse following immediately upon her conviction, abjuration and sentence to life imprisonment by the Inquisition. Let us consider each of these trials in turn.

The examination, by churchmen loyal to Charles VII, lasted three weeks. A young girl had appeared before the king, reporting strange experiences and making extraordinary demands. How was she to be understood? The inquiries to which Joan was repeatedly subjected recognized that it is rare to have observable angels and saints visit human beings. This is not to suggest that a vision-
ary may not be sincere in what she reports but rather that alternative explanations must be routinely considered. If Joan's claims had not been outlandish, there would have been no need to examine her; but then, if they had not been outlandish, she would not have been (upon establishing herself) as influential as she was, nor would we have come to learn of, and be interested in, her. She was able to persuade her initial examiners that her voices were genuine—or, at least, that there was no spiritual risk in allowing her to advise the king.\footnote{There does not seem to be a record available of that first examination (although, it seems, some record was made). One must wonder whether Joan was more accommodating in what she said about her voices in that initial effort, upon which everything else depended, than she was later on in her trial at Rouen, by which time she had accomplished much of what she had set out to do.}

The trial at Rouen, the second of our three trials, consisted of several stages.\footnote{There were a preliminary examination, a formal trial on charges drawn from the preliminary examination, consultations with the appropriate advisors (such as the theologians the University of Paris), and the final confrontation which led to her conviction, abjuration and sentence. This extended examination, by French churchmen loyal to the English king, Henry VI, was probably concerned with many of the issues to which the earlier French churchmen loyal to Charles VII had directed their attention. Of this examination, at Rouen, there is an official transcript available. There are indications, however, that this transcript is not complete; some suggest that it is not strictly fair to Joan, that it may even have been doctored somewhat. But this may not matter for our purposes: enough seems to be there, and in a plausible form, to suggest to us what the issues were, and what standards were applied, in judging Joan.}

No doubt, her judges began with prejudice against her. After all, she was a captured enemy leader, \textit{and a woman at that}, who was generally believed to have performed wonders. In such proceedings, it may be virtually impossible to have participants who are without prejudice.\footnote{Joan, it should be emphasized, was executed not so much because of what she and her court differed on as because of what she and they agreed about. It was crucial that they agreed that both the divine and the diabolical can manifest themselves in appearances among human beings. Of secondary importance was the determination of how claims of particular manifestations are to be regarded and tested. The attitude of her
judges could be characterized as that of men who were highly skeptical without being skeptics. They believed, among other things, that her voices were, at best, questionable (reflecting perhaps a “dialogue” within her own disturbed soul), and that in such circumstances she should defer to the judgment of the constituted Church authorities with respect both to the character of her visions and to how she should respond to them. The typical modern observer would no doubt share much of their skepticism about her voices.

Joan’s recantation leaves one no better off than one would otherwise be in determining the character of her voices. She was quite practical about her recantation, waiting until the final judgment was actually being read. If they really proposed to kill her because of what she reported, she can be understood to have thought, then she would formally unsay what she had said, just as earlier she had warned them that if they tortured her she would say whatever they wanted her to say and then repudiate it afterwards as having been said because of torture. The required recantation, she can also be understood to have thought, would be put by her in a form which was sufficient for her judges, even as it allowed intelligent people to figure out why she had spoken as she had. Thus, she said repeatedly “that inasmuch as the clergy had pronounced that her revelations and apparitions were not to be upheld or believed, she would not maintain them, but would defer in all things to her judges and our Holy Mother Church.” This seems to be the heart of her abjuration, an essentially hypothetical statement which recognizes (“repeatedly”) that she is saying this because it is what they evidently want said. There is a longer, even more formal abjuration which follows, but that is not in her style. Nowhere else in the hundreds of pages of record is there so long a statement on her part, I believe, as in this more explicit abjuration. Are we not counted on to recognize that that detailed statement is some churchman’s doing, not Joan’s?

Joan evidently learned in short order, however, that her abjuration would not save her from the terribly oppressive conditions in which she was held. She had already had months of that, which provided her a sample of what the life sentence she now received could mean. Once the immediate threat of death was removed, she could assess properly the alternative, imprisonment for life. Perhaps she also came to realize that she had once led men into battle and to their deaths by instilling in them belief in voices which she had just now been intimidated into repudiating.

*Did* it hurt to deny voices that others could not hear or believe
in? What did those voices “want” to happen, and why? Why did they not appear to her judges and tell them to let her alone? Did her voices care what happened to her? If we moderns dismiss the voices, as most of us are disposed to do, do we want her to have insisted on a delusion (or a deception) at the cost of her life? If we believe in the voices, but voices we have not been privileged to have heard ourselves, are we in a position to second-guess her relations with those voices? What she conceived those relations to be is poignantly suggested by the following exchanges during her short trial for relapse:

As we her judges had heard from certain people that she had not yet cut herself off from her illusions and pretended revelations, which she had previously renounced, we asked her whether she had not since Thursday [May 24] heard the voices of St. Catherine and St. Margaret. She answered yes.

Asked what they told her, she answered that they told her God had sent her word through St. Catherine and St. Margaret of the great pity of this treason by which she consented to abjure and recant in order to save her life; that she had damned herself to save her life. She said that before Thursday they told her what to do and say then, which she did. . . . She said that if she [now] declared God had not sent her she would damn herself, for in truth she was sent from God. She said that her voices had since told her that she had done a great evil in declaring that what she had done was wrong. She said that what she had declared and recanted on Thursday was done only for fear of the fire.

Asked if she believed her voices to be St. Catherine and St. Margaret, she answered, “Yes, and they came from God.\(^4\)\(^8\)

V.

Is it not highly likely, in the circumstances, that Joan was sincere in stating her belief that the voices were those of St. Catherine and St. Margaret?\(^4\)\(^89\) But the duty of the court was not limited to determinations of sincerity: rather, it had to decide what the origins and character of the voices in fact were. I do not presume to pass judgment on Joan’s voices, only (as I have indicated) to suggest how one might go about thinking about them. It is important to see that such matters can be systematically examined and assessed, however inconclusive one’s assessment might have to be in some circumstances.

In assessing such matters, it is important to separate the critical issues from the secondary. Secondary were such matters as the male clothing Joan wore, the way she conducted herself as a mili-
tary leader, her uses of incantations, magic, and divination, and
even her attitude toward the property of others.⁴⁹⁰ Such matters as
this may have been important, but mostly as clues to or reflections
of deeper problems. The deeper problems in her case were the visi-
tations she claimed and, ultimately, the question of who should
assess those visitations.

The key to heresy is, it seems, a stubborn, inflexible will.⁴⁹¹ The
question of submission to a Church which had seen a lot of things,
including the limits of enthusiasm, became critical.⁴⁹² Should not
long-established institutions be given the benefit of the doubt, at
least in circumstances where a member is claiming revelations that
others simply do not have? Is not the Church entitled, in such
circumstances, to generally observable confirmations, lest cata-
strophic delusions and deceptions be let loose upon the world?

Joan’s recalcitrance was condemned as superba (the word from
which we derive superb).⁴⁹³ The superb has its obvious attractions:
a kind of gallantry is suggested, among other things. But willful-
ness may also be suggested, a willfulness which could be said in
this instance to have put religion in the service of politics.⁴⁹⁴ Joan’s
judges can be understood to have believed that she cared more for
France than she did for God and for God’s Church. In this respect
the Maid of Orleans can be seen to have been the forerunner of that
much-married English King, Henry VIII.⁴⁹⁵

VI.

This is not to suggest, however, that Joan of Arc was either a
crude nationalist or an early Protestant. Her case was more com-
plicated than that, which is reflected in the claims made upon Joan
to this day in France by contending clerical and anticlerical fac-
tions alike. There are two dates on which she is “officially”
remembered in her country. Some prefer to celebrate her on the
second Sunday in May, ordered by Proclamation of the Republic
in 1920, to commemorate her relief of Orleans;⁴⁹⁶ others prefer to
celebrate on her Feast Day as a saint, May 30, the date of her
death.

I have suggested that Joan’s considerable piety was somehow
put in the service of her country. This identification of herself with
her country may even be seen in her use of the word pity. She had
reported that her saints had told her, at the very outset of her ca-
reer, of the pity that was in the kingdom of France as a result of
the English occupation; and she reported that her saints had told
her, at the end of her career, that the treason of her abjuration had been a great pity.497

The Church’s view of these matters had to be that politics should be in the service of religion, or at least, that religion and politics should be separated, not that religion should be subordinated to politics as Joan somehow seemed to do. The subordination of politics to religion had, aside from its spiritual benefits, several temporal advantages as well: nationalism was subdued; international order was encouraged, with a consequent moderation of war; and natural right was more apt to be generally appealing, as were certain salutary opinions about God and the good. Such an international order in both society and opinion can be more rational, less expressive of partisan local interests, and hence more civilized.498

Patriotism, on the other hand, can become single-minded, less thoughtful and yet more ingenious, in that all is organized for the national effort. The desire for personal salvation can also be single-minded, but not when it is organized as it is apt to be by a long-established church with worldwide responsibilities. Such an organization, one might argue, is more apt to be mistaken about particulars than about general principles—and even in its errors about particulars it will affirm general principles by which its own shortcomings can eventually be gauged and corrected.499

VII.

The question remains for us, How does one begin to assess such claims as Joan made?

There is first the problem of determining what she did claim. Misrepresentation, or misreporting, of her claims has to be guarded against. Let us assume, for purposes of illustration, that the claims here are as to the manifestation before her (and external to her) of angels and saints—of talking bodies as apparent to her as I am to you and you are to me.

How are her claims to be understood? Several possibilities suggest themselves to account for the things she claims to have seen:

1) that these were visions sent by God;
2) that these were visions sent by the devil;
3) that they were hallucinations, reflecting either a pathological mental state or powerful passions (such as patriotic passions);
4) that these claims were the result of deliberate deceptions by her or by some other human beings;
5) that what she experienced were optical illusions or were due merely to some other such misunderstanding.500
How does one determine which of the possibilities (whether these or still others) makes the most sense in the circumstances? There is first the problem of determining whether there can be any visions at all from God, or from any other supernatural source. (I use vision throughout here even though Joan also reported hearing, touching, and smelling the manifestations she dealt with.) Some might argue, for instance, that God does not move, does not change, and hence does not intervene in the affairs of men. But this, I take it, has always been a minority view among men—and so means have had to be devised (along with standard pathological checks) to help communities pass judgment, without the aid of direct divine guidance, on the kind of private revelation that the visionary claims.

Several tests suggest themselves (aside from the question of whether a purported manifestation conforms to earlier known revelations, sacred texts, etc.):

1) the predictions conveyed by the visionary can be compared to subsequent events;
2) the miracles, and especially cures, induced by the visionary or her visions can be assessed;
3) the overall effects, especially the moral stance and the psychological state, of the visionary and her program can be evaluated;
4) the personal aggrandizement attendant upon the vision can be taken note of;
5) the logical consistency and common sense of the visionary’s report can be taken account of.

Various of these tests can be used to eliminate claims. None of them can be used to establish any particular claim definitely and unquestionably. Thus, the Roman Catholic Church does not guarantee private revelation, at least not after that found in the Old and New Testaments. The most that the Church can certify is, I understand, that particular private revelations are not contrary to faith or morals.

An established insincerity on the part of the visionary can call her claims into question. Private aggrandizement, for example, can indicate insincerity, as when the transmitter of a message calling for sacrifice and penance accumulates or spends a personal fortune from the contributions of believers. On the other hand, it should be evident from what has been said that sincerity, even when it is obvious, cannot suffice to validate a claim.

That Joan was sincere it would be presumptuous of us to question. Consider various of the other tests: It is difficult to establish that the predictions she made were particularly remarkable,
that significant miracles have followed upon her career, or that the overall effects and success of her career cannot be explained in political terms (or as the result of fleeting chance). The remaining test, that of the logical consistency and sensibleness of her reports, should take into account certain difficulties in what she stood for, especially in her resistance to Church authority. She did not proclaim general principles arrived at independent of, or in opposition to, the Church; rather, she simply selected a part of what the Church had taught her and made that primary. There is about this something naive and touching—and there is no doubt that it touched a responsive chord in troubled France, just as has, say, national Marxism in many Third World countries in the Twentieth Century. If Joan had lived in a different village, one suspects, her personal allegiances might well have been different. In addition, and perhaps more important for purposes of assessment, one can notice that chance seems to have affected the form of the visions she had: she saw the saints which had been dramatized in her part of the country through the medium of churches and church statues. Consider as well the significance of the fact, if fact it is, that one of the principal saints upon which Joan relied never existed.

Such are the considerations that one might well take into account in judging such things, especially if one has a duty to judge them for the sake of the community entrusted to one's care. It is not enough to say—as many of us today would be inclined to say—that such determinations are matters of faith, of taste, and of opinion and hence beyond the competence of any community to decide. To say this is to deny that we can understand what does happen in such cases. Anyone who would truly or fully understand these things must determine as best he can whether such voices can ever come from God.

VIII.

No doubt, Joan seemed quite presumptuous. Perhaps she was. But, also, she was quite young—and mature men should have been able to make some of the assessments we have, to have recognized what she was drawing on and what she was influenced by, and to have acknowledged at least her gallantry and their own limitations. But those in authority were burning witches right and left, even in circumstances where pathetic hallucinations must have been suspected.

Joan's judges were prisoners of their fears and their expectations as well as of their immediate temporal interests. They should have
known that enthusiastic aberrations from the teachings, including
the rituals and art, of the Church should be expected periodically.
Impressionable girls of little education, but of considerable passion
and spirit, have especially to be watched out for.

To say all this is to suggest that Joan's judges should have been
prudent: after all, they were rulers. Her insistence upon God's
will, as it was revealed to her, in preference to Church decrees
might well have entitled them to recognize her as partially in-
dependent of, if not separated from, them. But should they have
resorted to explicit excommunication in circumstances where they
could foresee the immediate cruel consequences of such a ruling?

What, then, should they have done? The truly decent thing to
have done would have been to continue to hold her as a prisoner of
war, perhaps shipping her to England. The authorities should
have recognized well before the time Joan was executed that they
had in their hands a young woman who was not able to effect her
physical release by supernatural means. This powerlessness,
properly publicized, would have gone far to have dissipated the
adverse political as well as spiritual influence they feared.

It may well be that Joan had "peaked" in her political effective-
ness months before she was captured. This may even have contrib-
uted to her fall. Charles and his advisors must have sensed how
vulnerable she could be if captured; but they seem to have aban-
doned her to her fate, as well as permitted her to expose herself to
the risk of capture, perhaps because they did not consider her any
longer useful to them. Had her failure to continue to move them
prompted her to take chances by trying things she should not have
tried?

It may not have been in Joan's enduring interest to have escaped
execution. One can even argue that a favor was done her, that she
might otherwise have deteriorated as her powerlessness became ev-
dent, especially if her visions reflected deep psychic disturbances
which she had been temporarily able to put to good use. Did her
deliberate relapse represent an unconscious recognition of her in-
ability to live in ordinary circumstances with the psychic turmoil
that war and adventure had mobilized and thereby sublimated?

But, one must immediately add, one cannot kill another as a
form of therapy—or to head off anticipated psychic anguish.
There was nothing wrong with Joan that burning could cure. The
perhaps accidental glorification of Joan which resulted from the
conduct of her judges is no excuse for that conduct, conduct which
was rooted in what they were so imprudent as to believe.
judges acted as they did in her case more because of their passionate ignorance than because of deliberate reasons of state. And, I presume to add, the things they should not have been ignorant of were not divine things but rather human things, including the pitfalls that human beings are likely to encounter when dealing with divine things.

IX.

I have argued, on this occasion, that even such private and perhaps divine phenomena as visions can properly be subjected to dispassionate judgment, a judgment which assumes a moral as well as a physical coherence in the universe.\textsuperscript{510} I have also argued that those officials, ecclesiastical or secular, who undertake to render such judgments can and should be subjected to dispassionate judgment as well.

The decisive critique to be made of the treatment of Joan of Arc by her judges at Rouen is a critique that can be made as well of such recent conduct as the unhappy American role in the Vietnam War and our sometimes excessive responses to the Watergate revelations.\textsuperscript{511} I remind you of a salutary maxim for such situations: one should not do evil that good may come. One must take care, that is, lest "a certain and positive evil be produced for the purpose of effecting an uncertain, remote, and very doubtful good."\textsuperscript{512}

I return, as I close, to the Odysseus of Sophocles' \textit{Ajax}. Odysseus is, in some respects, superior to Athena herself. Certainly, he seems to instruct that goddess in compassion, drawing on the humanity that she is not privileged to share.\textsuperscript{513} It is Odysseus who persuades his vindictive fellow kings that honorable burial should be permitted the body of Ajax.\textsuperscript{514} And it is Odysseus who can say of the insanely murderous Ajax, even while he is still alive,

\begin{quote}
Yet I pity his wretchedness, though he is my enemy, for the terrible yoke of blindness that is on him. I think of him, yet also of myself; for I see the true state of all of us that live—we are dim shapes, no more, and weightless shadows.\textsuperscript{515}
\end{quote}

Perhaps it takes such manly compassion, grounded in an awareness of human limitations, if men of power are to be purged of self-righteousness and those other shortcomings which stand in the way both of thoughtfulness and of decent conduct.

9. SHYLOCK AND SHAKESPEARE\textsuperscript{516}

I.

The ugliest play written by William Shakespeare may well be
The Merchant of Venice. It is a play in which considerable hate and little generosity is exhibited, although there is in it much talk of love and mercy. Even some of the sacrifices made in the name of love, of which sacrifices one also hears much in the play, seem to be due at least in part to a hatred of one's life, if not of life itself. This may be seen in the career of Antonio, the merchant who ventures his life in securing the money needed by his friend Bassanio in order to court the wealthy Portia (W. Shakespeare, *The Merchant of Venice* act I, sc. i, ll. 1-7, 77-92; *id.* sc. iii, ll. 139-55; *id.* act II, sc. ix, l. 90; *id.* act IV, sc. i, ll. 111-18).

There are, no doubt, other plays by Shakespeare which have ugly features, plays such as *Macbeth*, *Measure for Measure*, *King Lear*, *The Winter's Tale*, and *Troilus and Cressida*. But such plays usually have redeeming characters or features about them which lighten the overall effect. Portia may be intended as such a character in *The Merchant of Venice* and the wholesale indulgence in love at her estate (Belmont) as such a feature (V:i:1f). But, I confess, these effects are largely lost on me. There is hardly anyone in the play whom I can like. Bassanio may be an exception; but he is a spendthrift, and it is silly for him, in the circumstances, to allow his friend Antonio to risk his life as he does in order to secure ready cash for Bassanio (I:i:126-34).

I have long found the play troubling and troublesome. At the root of the trouble may be the fact that the kind of conflict presented here, especially when grounded in religion, is likely to degrade everyone involved. Making matters even more troublesome is one's perhaps naive expectation that poetry should be a thing of beauty instead of the ugly exhibition that this play is. Especially ugly is how Jews—not just Shylock but all Jews who remain Jews—are meant to be portrayed in this play. I have been deeply puzzled for some forty years about the passions that permitted, and even moved, the Germans to exterminate the Jews as they did during the Second World War—and the passions that have contributed to other such large-scale persecutions of the Jews over the centuries. One can see in this play something of these passions, which permitted Jews to be regarded almost as a species apart. Shakespeare helps us see these things, perhaps in part because he himself may have shared (or at least remembered having shared) certain of the sentiments, or passions, at the root of the animus against Jews in Christendom.

Still, it should at once be added, people do like the play, including various Jewish friends of mine whom I have consulted about it.
(I will consider later some of their reasons.) One or two of Shylock's speeches do appeal to people generally, as does the celebrated "quality of mercy" speech by Portia (III:i:51f, IV:i:182f). One must wonder, of course, whether Shakespeare intended at least these speeches to be remembered and to have a salutary effect, if anything of the play survived. Even so, I continue to find the play grating on the soul, even atrocious in some respects.

I remind you that this play is about a Jew-baiting merchant who, for the sake of his friend's courtship of Portia, borrows money from a wealthy Jew who hates him in turn and who requires of him the notorious "pound of flesh" bond (I:iii:145-46). This bond turns out to be something the lender, one Shylock, can foreclose on when the payment is not made in time, with the borrower being saved, at the last minute, only by the ingenuity of Portia disguised as a judge (IV:i:164f). I return to the ugliness of the play by also reminding you of various of its features:

1) the original bond, its terms and the terrible passions concealed in it (I:iii:37f);
2) the hardhearted way in which Shylock insists upon the execution of its monstrous forfeiture provision (III:i:44f);
3) the callous way in which Jessica betrays her father Shylock, who, so far as we know, had always cared for her (II:iii:1f);
4) the cynical way in which Portia sets aside the deadly bond, deliberately destroying Shylock in the process, when there were commonsensical ways available for nullifying the unconscionable contract in a more humane manner (IV:i:319f);
5) the thoughtless way in which the unfaithful daughter of Shylock is received by Portia, Bassanio, and others, and her further betrayal of her father in their company (III:ii:284f);
6) the unrelenting character of the way Shylock is humiliated, including his forced conversion to "Christianity" (IV:i:331f)
7) Shylock's own hatred of Christians, especially of Antonio, and the hostility of others which provoked or at least fueled his hatred (I:iii:37f).

It seems to be assumed in the play that Jews will be, perhaps even should be, hostilely treated by others so long as they remain Jews (I:iii:45-48). This is so even in a commercial society such as Venice, where Jews were regarded as useful for the financial life of the city. In fact, Jews may be even more vulnerable in a place such as Venice, because there is much about that kind of community which encourages Jews to relax their vigilance and which permits citizens the liberty of expressing themselves. Consider the significance of the title to this play, The Merchant of Venice. Can the kind of problem investigated here, depending on both the status
and the presumptuousness of the outsider, arise only in a community where largely impersonal commercial relations rule? A Jew such as Shylock would never have had either the opportunity or the effrontery to attempt in ancient Rome (that is, in ancient Italy) what he tries to do in Venice (in modern Italy). It is revealing that deliverance for Antonio comes from someone with a Roman name (I:i:165-66): there can be seen here a reassertion of the prerogatives of the political community and of a prudence of sorts.520

Thus, it can be said, the ugliness of the play comes, in part, from its laying bare the bones and sinews of a commercial society. One feature of such a society is suggested by the observation by a colleague of mine who has pointed out, “It is certainty in the enforcement of contracts that permits calculations of risk upon which commerce depends and thrives.”521 And he adds, “Antonio does default, and Shylock insists upon the forfeiture. This conflict is resolved by a judicial decision that not only saves Antonio’s life, but also preserves inviolate the principles of the law of contract and the practice of certainty in their enforcement.”522 Something of this old-fashioned attitude, about the vital importance of “certainty in the enforcement of contracts,” may be seen in a recent New York Times article describing the continuance in Hong Kong of imprisonment for debt. The article opens, “Not many places still put people in prison for owing money, but then not many places take money as seriously as does this outpost of unbridled capitalism.”523

We must now consider how Jews are presented by Shakespeare and perhaps why, including the instructive insights he does have about the worldly shrewdness of Jews. Questionable features of the Jewish character as well as of the Christian character, as presented by Shakespeare, will be touched upon. Also to be touched upon are the limitations in Shakespeare himself that his treatment of Jews may expose to view. Before venturing upon these delicate matters, it is well to remind ourselves of something that even the great Shakespeare himself seems not to have been properly aware of, the deep sense of humanity to be found in Judaism. For this purpose I draw upon a story told in materials I picked up at a Yom Kippur service I looked in on a fortnight ago:

It was late in the afternoon on Yom Kippur. Rabbi Levi Yitzhak had been praying in the Berditchev synagogue all day. For a moment, he closed his tired eyes. Suddenly, he was before the Judgment Seat of God. The fate of humanity was being weighed in the great scales. Alas, the sins were heavy; the prospects for humanity were bleak.
Rabbi Levi Yitzhak pleaded with God: “If you wanted us to be angels, You should have let us remain in the Garden of Eden. But You sent us out into the world! And the daily struggles often put us into the hands of sin.”

The Lord was moved and motioned the rabbi to a chair at His side. The rabbi continued. His appeal was sincere and convincing. The scales began to tilt in humanity’s favor.

Suddenly, the rabbi heard a piteous cry. He looked down to earth, into the tiny Berditchev synagogue. Haim, the washerman, fasting on this holiest day, had fainted from hunger. Levi Yitzhak rose to leave, to hurry back to earth to conclude the service—so that Haim could break his fast.

A voice called after him: “Levi Yitzhak! Where are you going? You were on the verge of saving the world.” Replied Levi Yitzhak: “Where is it written that the price of salvation must be the life of Haim, the washerman?”

And he left. As he hurried on his way, a great chorus of angels sang: “Levi Yitzhak, you are saving the world!”

II.

However all this may be, Shylock is no Rabbi Levi Yitzhak, exquisitely sensitive to the claims of humanity. The thing which Shylock proposes to do—deliberately to take a fatal pound of flesh from Antonio—is surely monstrous not only to do but even to seriously want to do. And, it sometimes seems to me, Shakespeare would have us understand that Shylock’s monstrousness is intimately related to his Judaism. It is not accidental that he should be the one who wants to do this; it is not just the doing of one peculiarly demented Jew, but rather of a respected member of his community. We are shown the conversation between him and another Jew, who never counsels Shylock against what he proposes to do (III:i:109-12). It does seem that Shakespeare believes that the Jewish community in a city such as Venice might tolerate this kind of conduct by one of its members.

True, Shylock had been grievously provoked by Antonio’s abuse of him (I:iii:44-47). He is angered as well by Antonio’s insistence upon lending money without charge, which keeps interest down (I:iii:39-40, III:i:112-13). It is a much-reviled, much-put-upon man who strikes back as Shylock does. But whatever Antonio may have done, either by his calumnies or by his competition, he surely was not guilty of a capital offense.

It should be noticed as well that there is also something monstrous in Antonio’s desire for martyrdom (IV:i:262-79). After all,
there were, as I have suggested, commonsensical responses nullifying the contract that Shylock was attempting to enforce. The very fact that a contract provision was entered into for “merry sport,” as Shylock originally put his proposed forfeiture arrangement (I:iii:141), could easily provide the basis for finding the forfeiture provision void as not having been truly agreed upon. It should have been enough for Antonio to say, “Man, you know that my witnesses and I never took this seriously, whatever you may have wanted or believed in your heart of hearts!” On the other hand, if the forfeiture provision was indeed valid, then Portia’s “drop of blood” exception (IV:i:308) would not make sense, since a valid contract implies the likely means necessary for its execution.527

Aside from the question of whether there had been enough evidence of an agreement to warrant the finding that a “pound of flesh” contract had truly been entered into here, there is also the question of whether such an unjust and destructive arrangement is one that the law can countenance at all (IV:i:345-54).528

The monstrousness of Christianity in this play may be evident not only in the appetite for martyrdom in Antonio (a Christlike figure) but perhaps also in the very monstrousness of Shylock. He is, in critical respects, a “reaction” to the Christianity of his time and place.529 That there is something critically wrong with Judaism and Christianity alike in Venice may be suggested in what Jessica can do—both in that she does to her trusting father what she does and in that she is received as she is by the Christians who know what she has done.530

Various commentators have argued that Shakespeare “humanizes” Shylock, making him far less of a stock villain, much more a man of sensibilities, etc., than other playwrights of the era did with Jewish characters on stage.531 But may it not make matters worse for Shylock to be as “human” as he is and still be monstrous?532 True, there may be something noble in Shylock’s preferring revenge to his money, even a threefold amount of money, but it is a peculiarly perverted nobility. He is shown reverting to a baser level, once the elation due to his desire for revenge is dissipated, when he asks for his money back after Portia pounces (IV:i:207-28).533

To say that Shakespeare humanizes Shylock is to say that he knew better than his contemporary playwrights how to begin to think about Jews. But is it not also to say that he should have known better than to leave matters as he did in this play, that he should have, as a thinker, been more astute and hence more just
and responsible in his presentation of a much-reviled and perennially persecuted minority?

III.

The unsurpassed skill of Shakespeare as an artistic thinker may be seen in the way he put his play together—and in what he merely pointed to as unsaid.

Shylock is one of the two or three major figures in *The Merchant of Venice*. Yet he appears in only five of the twenty scenes of the play. He is assigned seventy-nine speeches in the play. Shylock, in his central speech in the play (his fortieth speech, a good Biblical number), has this to say in response to his fellow Jew, Tubal, who had reported to him, "Your daughter spent in Genoa, as I heard, one night fourscore ducats" (III:i:95-99):

Thou stick'st a dagger in me. I shall never see my gold again. Fourscore ducats at a sitting, fourscore ducats! Some might wonder that he makes so much of his ducats here, rather than of his daughter. But the daughter is lost—she is now almost as if she had never been for him—whereas he had had hopes of retrieving what could be retrieved, his ducats. We notice that twice in this speech, he makes much of fourscore, that is of eighty. Is it too speculative a suggestion to conjure up one additional speech for Shylock, to add to the seventy-nine speeches provided him by Shakespeare? Perhaps Shylock's signing of the deed, which is to be sent to his house for that purpose, should be considered his eightieth speech (IV:i:394-95). What should he, as someone saved from killing another in cold blood, have thought if not said on that occasion, or at the time of the confession of faith he is obliged to make (IV:i:396)? My talk today is, in effect, a contribution to the missing speech by Shylock.

To speculate as I have, and to proceed as I now propose to do, does testify to my generally high opinion of Shakespeare as a thinker. It is often easy to overlook how much deliberate control a skillful artist has over his subject, especially when fierce passions (whether or not shared by the artist) are allowed to be vented. One is tempted to see an artist's particularly effective presentations as the result of uncalculating "inspiration"—as a kind of effusion of the spirit.

The control of the artist is obvious, of course, in how the parts of *The Merchant of Venice* are fitted together. We need not pause on this occasion to point out the obvious—this has been done many times by students of theater—except to notice that the trial scene is
crafted into the great theater that it is: Shylock is given more than enough rope, if not to hang himself, then to bind himself firmly ever after.537

What we will linger on, in our further investigation of Shakespeare’s treatment of the Jew, is how Shylock and his daughter are presented—how they are represented by someone who has thought about what Judaism is and means.

IV.

Shakespeare is quite astute in his descriptions of Judaism. Certainly, he himself does not seem to share the low passions of a Gratiano, Bassanio’s friend, who abuses the fallen Shylock unrelentingly (IV:i:311f). In fact, Bassanio himself is one of the few Gentiles in the play, perhaps the only major one, who does not speak harshly to Shylock. Perhaps it is this moderation that makes him worthy of Portia’s wealth and beauty.

Jessica has, on stage, only two speeches to her father. These are not long before she flees his house, taking away a casket of valuables. In her first speech to him (II:v:10) she says, “Call you? What is your will?” It is in response to this that he tells her he is going out to supper that night, leaving her the keys to everything (II:v:12). Thus, we first hear her asking whether he has called her and what his will is. This emphasis upon the will of the father does seem to conform to what is indicated throughout the play about Judaism as very much concerned with law, with the law, a law that requires and secures obedience even when it is not understood by those who are called (as Moses was?).538 Her second (and last) speech to Shylock finds her simply lying to him about what the servant has just said to her, a servant who had alluded to Jessica’s imminent flight (II:v:43).

Are not these two speeches related? Does an undue emphasis upon will (in the domineering father, or in the domineering divinity) lead to evasion, especially when love beckons one in a community which is characterized by considerable freedom and mobility? Portia too is bound, in her marriage arrangements, by the will of her father. We hear her lament, “[S]o is the will of a living daughter curbed by the will of a dead father” (I:iii:23). Portia, however, does not openly defy that will; but she may well “deceive” her father also, in that she may signal Bassanio which choice to make among the three caskets (III:ii:63f). Still, she does appear to conform to her father’s will in manipulating the disposition of her father’s caskets of valuables. That is to say, the Christian daughter is
more inclined to be hypocritical (or is it statesmanlike?) than the Jewish daughter? The two speeches of Jessica to her father sum up their relationship: she must either conform to his will or she must deceive in order to rob and abandon him.

We continue with Shakespeare's portrayals of Jews. None of the three Jews we hear on stage—neither Jessica nor Shylock nor Tubal—ever uses any form of the word *nature*. It is a word used by others—by Solanio (I:i:51), for instance, and by Portia (IV:i:175). Is not Jessica herself somehow immune to distinctions between the natural and the unnatural? And so she can conduct herself most unnaturally toward her father.

But there may be still another reason Jessica, like Shylock and Tubal, does not use *nature*: this may be the influence of her Judaic heritage. An opinion about the universe in which everything is always due to God, directly or indirectly, has no need of *nature* (or of the related notion, chance?). This can be seen in the total absence of the word *nature* from the Hebrew Scriptures. Thus, Shylock can refer to the act of generation in his fourteenth speech, as “the deed of kind” (I:iii:81), which contemporary editors sometimes translate for modern readers as “act of nature.”

The unavailability of nature as a guide points up the significance of law, which is a kind of convention (even when the source is divine?). When Shylock, in his most famous speech, does try to use the idea of (but not the word) *nature* in insisting that Jews and Christians are in many ways alike, he is reduced to invoking natural similarities that are put in physical terms: “Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions?” etc. (III:i:51-57). When he “rises” above the physical, it is only to *revenge*, which may be the physical spiritualized (III:i:59-63).

And so the law becomes the decisive guide for Shylock, even though he uses it to serve his passions rather than to consider the proper ends of law. He has distorted the law, seeing it more as something personal to him rather than as a community concern and response. Still, he can be moved by a legal interpretation, as may be seen in his response to Portia’s manipulations: “Is that the law” (IV:i:312)? Portia deceives him, certainly as to her credentials, perhaps as to what the law in fact is. Shakespeare seems to approve of her doings here.

An emphasis upon the law, which governs so much of a Jew’s everyday conduct, is related to still another difference between Christian and Jew: for the Jew, material possessions matter more
because the world is substantially here, and temporal happiness is vital (IV:i:372-75). Wealth is related, too, to one's concern for the family. Shylock can look down on Christian husbands who would sacrifice their families for a friend or for love, as Bassanio says he would do to save Antonio (IV:i:293f). Much is made of sexuality at the end of the play, between Portia and Antonio, Jessica and her husband, and Gratiano and his wife, but is not this in the context of a ratification of the dismantling of Shylock-style families? A concern for love, even love between spouses, is not the same as a concern for family.

The Jewish obligation to take the temporal seriously means, among other things, that one must be careful with one's wealth. Of course, thinkers such as Aristotle evidently considered the charging of interest to be unnatural, as distinguished from running risks and thereby making profits, or incurring losses, as merchants do. Shylock is not restrained by considerations of the unnatural. But then, neither are we, since most of us now agree that it is not only legitimate but only fair that those who take our money for their profitable ventures should pay us something for the use of our money. Do we, like Shylock, have no natural restraints upon us in these matters, without having that which the pious Jew would have, various divine restraints, including deeply-felt obligations of charity?

Shylock, in attempting to justify the charging of interest, uses the Biblical story about Laban, Jacob, and the sheep to support the proposition that one should look out for oneself (I:iii:67f). Does Shylock fail, however, because he does not properly look out for himself? He allows his usual shrewdness to be suppressed as he is swept along by his hate. In this he is a Jew who is somewhat liberated by the freedom of the Venetian republic. An old-fashioned Jew would have counselled him that it was reckless to go after Antonio as he does—that among Christians, too, blood would eventually tell. Or, as an Aristotle would say, nature will assert herself eventually, whatever the doctrines (whether about law, about gain, or about the divine) that people are captivated by from time to time.

V.

We have been looking, for the most part, at how Jews are presented in The Merchant of Venice—but, of course, these are Jews in a Christian society. It has been observed by Allan Bloom, a most instructive commentator on this play, "Shylock and
On Trial

Antonio are Jew and Christian, and they are at war as a result of their difference in faith.548 If one is to grasp fully Shakespeare’s remarkable portrayal of Jews, something more should be said about the Christians in this play. Christians tend to be somewhat opposed to Jews with respect to the matters we have noticed about Judaism here, such as the status of the family and of law. This may be seen as well with respect to dietary restrictions, which Jews make much of and Christians little if anything of (I:iii:29f). This is not to deny that most Jews today are, in many respects, for better as well as for worse, much influenced by Christianity and by post-Biblical developments.549

One critical difference in Shakespeare’s play between Christian and Jew is that there does not seem to be in Judaism any obligation to martyrdom, certainly not to the extent it is found in Christianity. This seems to be related to what we have already noticed about the importance of this world to the Jew. This also bears, no doubt, on Christian assessments from time to time of the sincerity of seeming conversions by Jews to Christianity. It should make us wonder what the enduring significance is of Shylock’s own forced “conversion,” especially after he has had time to reflect on what has happened to him (IV:i:385).550

Mercy overrides for the Christian that justice which is grounded in law, even though Portia and her colleagues do not seem to make much use, in dealing with the devastated Shylock, of the mercy they have extolled. Consider, for example, how different the play would have been if Portia had begun to suggest, in public, some understanding of how Shylock had become the monster he was on this occasion.

Does not Shakespeare himself (“Gentle Will,” as he was sometimes known) seem to prefer mercy to law? This may be, in part, a Christian influence upon him. Even so, does he not implicitly criticize, if not repudiate, both Christianity and Judaism, preferring to them an ancient virtue rooted in nature?551 Shakespeare proposes, in effect, to correct the Bible by leaving other stories and teachings for the English-speaking peoples, especially with respect to the relation between religious faith and statesmanship.

Still, one must wonder whether Shakespeare has himself grasped sufficiently the distinctive characteristics of relations between Christians and Jews. May not he, in his genius, have presented more than he himself fully understood, especially since he was, for
one reason or another, never fully able to see Judaism for what it was and is?

VI.

It should go without saying that the reservations one may have about what Shakespeare does in *The Merchant of Venice* should not be taken to disparage the remarkable things he does do, including his insights into both Jews and Christians. One is reminded of what he does, also in a Venetian setting, for Moors and Christians in *Othello*. Thus, as Professor Bloom has observed,

Othello and Shylock are the figures who are the most foreign in the context in which they move and to the audience for which they were intended. In a sense, it is Shakespeare's achievement in the two plays to have made these men—who would normally have been mere objects of hatred and contempt—into human beings who are unforgettable for their strength of soul. For the first time in European literature, there was a powerful characterization of men so different. . . . Whether they liked these men or not, the spectators now knew they were men and not things on which they could with impunity exercise their vilest passions.  

Still, it seems to me, we are not induced by Shakespeare's presentation to despise Othello, and even to exult at or at least enjoy, his overthrow the way the typical audience is with what happens to Shylock. Nor do we have the epithet "Moor" rubbed in, the way "Jew" is. To such a response Mr. Bloom has this concession to make: "Shakespeare does not understand Judaism, for he saw it from the outside; he looked at it, as no man rightfully can, from a purely political point of view." I shall have something to say about this soon, but consider first another caveat from the same source.

We are reminded, by Mr. Bloom, of the limits of toleration and of the Enlightenment. Thus he observes,

It is very well to tell [Antonio and Shylock] to live together, but in any confrontation of the two they are bound to quarrel. What is prudence for one is robbery for the other; what is kindness for one is mawkish sentimentality to the other. There is no middle ground, since they see the same objects as different things; common sense cannot mediate between them. If there is to be harmony, one must give in to the other . . . .

And again he observes,

[Shakespeare] was of the conviction that it was of the nature of man to have varying opinions about the highest things and that such opinions become invested in doctrine and law and bound up
with established interests. When confronted with one another, these opinions must quarrel. Such is life, and that must be accepted with manly resolution.\footnote{555} Thus the limits of Enlightenment and toleration are here faced up to. About this, too, I shall have something to say soon.

VII.

Let us consider first the significance of the defense that Shakespeare did not understand Judaism, because “he saw it from the outside.” Yet did he not have access to—indeed, did he not rely upon—the best that is available about Judaism, not individual Jews (who may be bad as well as good) but rather the Bible itself, with which he seems to have been quite familiar and upon which he draws in this play? One must wonder how anyone familiar with, say, the book of \textit{Isaiah} could characterize Jews as they are characterized in \textit{The Merchant of Venice}. Besides, should Shakespeare not have been able, by talking to sensible people who had travelled, either in Europe or in books, to determine what Jews of his day were really like?\footnote{556} Certainly, one should know what has happened to Jews throughout Christendom—and that should move one to be particularly scrupulous about both seeing justice done and promoting a proper compassion. Instead, Shakespeare presents on stage a seemingly plausible version, in what Shylock attempts to do to Antonio, of the notorious “ritual murder” blood-libel that Jews have suffered from for centuries all over Europe.\footnote{557}

Another way of putting all this is to notice that although Shakespeare saw the ancient Greeks and the ancient Romans, as well as the modern Italians, also from the outside, he came closer than he did with respect to the Jews in depicting \textit{them} in their highest form. True, Shakespeare’s depiction of Jews may be better than that of most playwrights of his day—but his is bad enough and has the peculiar disadvantage of being more likely to endure because he tells a much better story. What endures is not only Shylock’s memorable “Hath not a Jew eyes?” speech, but also an image of the Jew that cannot help but be both painful and harmful and hence ugly. Another indication of Shakespeare’s failing here is the way he treats Jessica, the unfaithful daughter, who is never criticized by the Christians in the play and is left in apparent prosperity, having been enticed to flee from the “hell” of her father’s house to the “heaven” that Christian love and fellowship promise (II:iii:1f, V:i:1f).

At the very least, it seems to me, Shakespeare should have been
aware of the limits of his information—and should have conducted himself accordingly.  

VIII.

Let us now consider the warning that enlightenment and toleration cannot be expected to do much good with respect to the kind of conflict seen between Christian and Jew in this play. Certainly, it is prudent to be cautious about the expectation of any enlightenment wherever longstanding prejudices and radically different allegiances are to be found.

But the argument which attempts to excuse Shakespeare because he did not know Jews well enough, or in their highest manifestations, is an argument which depends (does it not?) on the assumption that enlightenment does help correct one's misconceptions or prejudices. Still, it can be added, although Shakespeare would have been helped had he known more about Jews, that is not likely to help moderate the typical believer. For the believer can be threatened, not reassured, when he perceives how deeply others differ from him with respect to what he considers the most important matters.

Should not this limitation of public opinion caution us in any use of talents which help shape public opinion? The more astute one makes Shakespeare in depicting Jews—and astute he is!—the more questionable can be regarded the way he leaves Jews for his audience. I hope I never forget how much a sophisticated theater audience I once observed here in Chicago enjoyed the downfall of Shylock, a Shylock played very well by a distinguished Jewish actor.

There may be limits, of course, in what one can do about the prejudices of one's countrymen if one is to retain one's reputation and one's influence upon them in other matters. Perhaps, indeed, Shakespeare could not have simply praised the Jews in a play for the London stage. But nothing compelled him, so far as I know, to use them on that stage: he could simply have left them alone. Nor does it seem to me sufficient justification to suggest that he treats the Jews as openly as he does in order better to question (if not even to bind) Christianity covertly. I am reminded of, among other things, the remonstrance by the rabbi, "Where is it written that the price of salvation must be the life of Haim, the washerman?" In any event, it is far from clear to me that the radical questioning of Christianity since Shakespeare's time has done mankind in general, and the Jews in particular, the good that some of
those moved by what Leo Strauss called "antitheological passion" had once anticipated.\textsuperscript{561}

IX.

The story about the rabbi and Haim the washerman with which I began is not altogether unsentimental. Another story, also culled from the recent Yom Kippur service I attended, is made of firmer stuff and is salutary to recall here as we bring this meeting to a close. It is a much older story, based on the Talmud, and goes like this:

During the Hadrianic persecutions, decrees were promulgated imposing the most rigorous penalties on the observers of the Jewish Law, and especially upon those who occupied themselves with the promulgation of that Law. Nevertheless Hananiah ben Teradyon conscientiously followed his chosen profession; he convened public assemblies and taught the Law. Once he visited Jose ben Kisma, who advised extreme caution, if not submission, saying, "My brother, I hear that you occupy yourself with the Torah, even calling assemblies and holding the scroll of the Law before you."

To this Hananiah replied, "Heaven will have mercy on us."

Jose became impatient on hearing this, and responded, "I am talking logic, and to all my arguments you answer, 'Heaven will have mercy on us!' I should not be surprised if they burned you together with the scroll."

Shortly thereafter Hananiah was arrested at a public assembly while teaching with a scroll before him. Asked why he disregarded the imperial edict, he frankly answered, "I do as my God commands me." For this he and his wife were condemned to death, and their daughter to degradation.

His death was terrible. Wrapped in the scroll, he was placed on a pyre of green brush; fire was set to it, and wet wool was placed on his chest to prolong the agonies of death. "Woe is me," cried his daughter, "that I should see you under such terrible circumstances!" The martyr serenely replied, "I should indeed despair were I alone burned; but since the scroll of the Torah is burning with me, the Power that will avenge the offense against the Torah will also avenge the offense against me."

His heartbroken disciples then asked: "Master, what do you see?" He answered, "I see the parchment burning while the letters of the Torah soar upward."\textsuperscript{562}

The dedication, pious resolve, and dignity exhibited in this story are also on display, of course, throughout the Bible—and again remind us of the unjustified and otherwise unfortunate shortcomings of \textit{The Merchant of Venice.}\textsuperscript{563}
It is sobering to recognize how and perhaps why Shakespeare went astray in failing to make explicit, however much he sensed, the enduring worth of Judaism. It is well for us to be aware of such limitations as we deal with strangers, either the strangers among us or those in other lands—strangers whom we do not know as well as our interests, our fears, and our natural flaws persuade us to believe we do.

We may have, however, one advantage over the most gifted artists. The artist as artist, in presenting things “as they are,” must make much of the “outward shows” of particulars, of bodies, of this people or nation as against that people or nation (III:i:73). He must, in short, present things as either this way or that way. It may be possible for us lesser mortals, when properly instructed—that is, when properly questioned?—, to be open, as perhaps the artist by nature cannot be, to the Socratic insistence that we should always be aware of what we do not know.564

10. Thomas More, the King, and the Pope565

I.

I put you on notice by reporting that my long-suffering wife observed to me just the other day that there is one serious fault with my lectures: I try to say too much. Audiences, she pointed out, don’t really want to learn everything I try to tell them. To this only one answer can prudently be made, especially by an incorrigible husband, and that is, “You’re right, my dear, you’re right.” But perhaps I can dare add, in the safety of this company, a useful correction: part of my audience does want to learn everything I try to tell them, that part of the audience which I myself represent. A lecture permits one to see what can be publicly said, and said in a salutary manner, about the subject under consideration. It permits one to learn something about both one’s subject and the form in which such a subject may be discussed.

The subject this evening is the trial of Sir Thomas More. Serious as the subject is—for it is about an Englishman who was canonized in 1935, four hundred years after his execution as a traitor566—I believe it instructive to open and close what I have to say with stories. Thomas More himself, it should be remembered, jested even on the scaffold.567

Not too long ago I was at a University of Chicago party where I found myself talking to a professor of law and to a criminologist about the problem of deterrence of criminal behavior. This led to the law professor’s saying that he had seen deterrence work when
applied clearly, firmly, and with dispatch. He cited the experience of the Army during the Second World War when the rule was promulgated that anyone absent without leave for longer than a certain period (seventy-two hours, let us say) would be tried by a formal court-martial rather than be subjected (as had previously been the case) to the more informal (and generally less rigorous) company discipline. The immediate result of the new rule, the law professor continued, was a marked reduction in extended AWOLs. To all this the criminologist, who tends to be rather dubious about the effects of deterrents, replied, "Was this really a change in behavior or only a change in classification?" The law professor replied in turn that it was indeed a change in behavior, certainly not a change in classification alone. "How do you know that?" the criminologist wanted to know. "Because," the law professor explained, "I was in the legal office on an Army post at the time the new rule went into effect—and the number of long AWOLs dropped remarkably. People knew what the rule was—the Army had made an effort to make that clear—and men absent without leave made it a point to return just within the seventy-two-hour limit. It had become obvious to them that it was now too painful to stay away beyond that limit." To all this the criminologist answered in his gravelly voice, "Now I will tell you what really happened. I remember that rule very well. I was a top sergeant at the time—and I would say to my company clerk, when someone was missing, 'Don't put him down as AWOL until we see when he gets back.' If a sergeant had a man AWOL whom he didn't want to lose through a court-martial, he would protect him in this fashion. I remember a cook I had, a very good cook—but every once in a while, he would take off with some woman, and when he did, you can be certain he didn't watch the clock. But he would come back eventually, and I would deal with him in my own way. He couldn't do me any good in the stockade. So, I don't believe the rule changed behavior at all, no matter what you people down at the post legal office thought, but it certainly changed classifications."568

What in fact did happen? Was this intelligent top sergeant's manner of response to the regulation the typical response by non-commissioned officers? Or was the Army lawyer's impression correct? I believe I have said enough about this problem to remind you of the difficulty of determining how "facts" about human beings are to be interpreted. I do not mean to suggest that there is no correct answer to any question about human motivation and be-
behavior, but only that it is often difficult to know when one has probed deeply enough into the evidence and the relevant arguments to arrive at the correct answer.\textsuperscript{669} I conclude my report on this conversation by noting the only contribution I made to it—and that was to observe, at its conclusion, that deterrents were shown by the skeptical criminologist to have some effect after all, in that this particular Army regulation had affected, and in a rather marked way, the behavior of top sergeants! Top sergeants, it seems, are intelligent, restrained, and informed enough to be affected by rules and to know how to deal with them effectively: otherwise they are not likely to get to, and to stay, where they are. But what about the ordinary would-be criminal? That issue, of what shapes human conduct, remains with us. It is indeed an old issue, and one which we do deal with, if only indirectly, as we examine the 1535 trial of Sir Thomas More.

II.

Old issues never die, they only seem to fade away—and then they reappear, sometimes unexpectedly or disguised, in new forms and with renewed energy. The issues about which men differ, even unto death, are not trivial or transitory, whatever may be the case of the circumstances which occasion them. For the issues about which men differ address themselves—sometimes more obviously, sometimes less so—to fundamental questions about how human beings should live and die, about how they should be governed, about what makes for happiness here and salvation hereafter. Contending opinions about justice are relied upon—and the prudent man tries to do justice to all of them, to give each of them what is its due, and to promote and preserve thereby what is truly human.

A ruler issues a decree about family relations. Somebody conscientiously defies that decree, invoking religious teachings reinforced by age-old tradition. The issue is joined; passions are aroused; the ruler crushes his opponent, but not without sustaining a mortal wound himself.\textsuperscript{570} This pattern, if pattern it can be called, is as old as an ancient tragedy; it is as new as yesterday's headlines.

It was only a few months ago that the Vatican issued a declaration in which it reaffirmed, despite the trends of the day, certain old teachings:

Never, under any pretext, may abortion be resorted to, either by a family or by a political authority as a legitimate means of regulating births. . . . In reality, respect for human life is called for from the time that generation begins. From the time that an
ovum is fertilized, a life is begun which is neither that of the father nor of the mother; it is rather the life of a new human being with his own growth. . . . It may be a serious question of health, sometimes of life or death, for the mother; it may be the burden represented by an additional child, especially if there are good reasons to fear that the child will be abnormal or retarded . . . . We proclaim only that none of these reasons can ever objectively confer the right to dispose of another's life, even when that life is only beginning . . . .

Thus, the proposition continues to be maintained by the Church that there are definite limits to what the community may do to regulate births, a proposition to which most advocates of extensive access to abortion would probably agree. Of course, both sides may be mistaken as to where those limits are to be found.

It was only a few thousand years ago that Antigone declared herself in unalterable opposition to the decree of a ruler who would have left her brother's corpse for the birds and the dogs to devour. To the ruler's rebuke, "And still you dared to overstep [my] laws?", she responded in words which can be revived every generation in one form or another,

For me it was not Zeus who made that order. Nor did that Justice who lives with the god below mark out such laws to hold among mankind. Nor did I think your orders were so strong that you, a mortal man, could over-run the gods' unwritten and un-failing laws. Not now, nor yesterday's, they always live, and no one knows their origin in time. So not through fear of any man's proud spirit would I be likely to neglect these laws, draw on myself the gods' sure punishment.

And yet, in such controversies, one must, if one wishes truly to understand and to judge responsibly, hear both sides of the question. When the question is so vital as to keep reappearing in so many different forms, the prudent observer suspects that there is indeed something to be said on both sides. Take Antigone, for example. Her nobility is evident; less so, her injustice. That is, she is prepared to sacrifice the welfare of the city—for it is in the name of the city's welfare, and not without reason, that the ruler decrees that the body of the "traitor" should be denied burial—she is prepared to sacrifice the welfare of the city for the sake of what we might today call someone's spiritual well-being. The ruler, on the other hand, proceeds as if concern for one's family can be entirely subordinated to political concerns: he proceeds as if the city does not need families to sustain and nourish it, those associations
which are linked by blood and which do not reason and organize themselves as cities do.\textsuperscript{575}

Antigone neglects the interests of the city; the ruler neglects the interests of the family—and each turns out to be particularly vulnerable by virtue of that which is neglected. She is cast out of the city and takes her life, prematurely as it turns out;\textsuperscript{576} he is immersed in the city and loses the family he had counted upon.

The family is today—perhaps it has always been—the natural habitat of what we now know as the individual, the private person, the self. The family does depend on the city, not only for protection but also for instruction and guidance. But members of a family are bound together by attachments which the city, as such, cannot comprehend: they look inward to those of like blood; they thus invoke a standard which not only questions the city’s prerogatives but can even dismiss the city as essentially conventional or arbitrary in its origins. When one begins to challenge the city in the name of family and ties of common blood, one may be well on the way (if one is enlightened) to also challenging the city in the name of the family of man and the ties of a common species. Thus, the city—the country, the political order—is threatened both from within and from without: in the name of the family from within, in the name of mankind from without.\textsuperscript{577} The city tries to meet both of these threats, sometimes with “a bad conscience.” It tries to meet these threats by insisting that the natural habitat of the human being is really the city, however much the determination of that city’s boundaries and ways may depend on chance. The city insists as well, when it knows what it is doing, that an emphasis upon the sovereignty of the family means, in effect, anarchy, and that an emphasis upon the sovereignty of mankind means, in effect, a universal state, temporal or spiritual—and that both the sovereignty of the family and the sovereignty of mankind are likely to mean, in effect, tyranny.

Such tyrannies—the tyranny of anarchy and the tyranny of universalism—are, when established, pervasive: the man of free spirit has nowhere to go, nowhere to hide. Such tyrannies can make the tyranny of a particular city look pale, and even benevolent, by comparison.\textsuperscript{578} Particular tyrants are far more likely to be temporary and circumscribed. It may also be argued that a particular tyranny may be little more than a desperate response to the threatened subversion of the community either by private will or by cosmopolitan pretensions.
III.

It is in these terms—or terms like these—that the case can be made for Henry VIII, Thomas More's sovereign.579 Such terms present Henry, for all his faults and for all his passions, as standing for a healthy political order, for a political order in which a people can run its own affairs with the minimum of deference toward either unpredictable private consciences or mysterious foreign potentates and with the minimum of reliance upon either outworn forms or restless experiments.

Henry died January 28, 1547. He was, when he died, in his fifty-sixth year and had reigned for thirty-seven years and eight months.580 Seventeen years later William Shakespeare was born—and grew to manhood in an England which permitted his genius to flourish, the England of Elizabeth for which the profligate Henry VIII and his canny penny-pinching father can be thought to have laid the foundations.

It must have been a great time to be alive—for it must have been a time when one could feel that one was fully a human being and hence truly alive.581 Such times are rare—and much must be endured in their fashioning and in their preservation.

Sir Thomas More endured a great deal. He was beheaded as a traitor on July 6, 1535, a dozen years before the death of his king. He was, when he died, in his fifty-eighth year, having spent the last year and a half of his life in the Tower of London. He was, only two years before he was executed, Lord Chancellor of England.582 He was as well the most learned man in England and perhaps her greatest lawyer. His book, *Utopia*, published in 1516, had made him one of the first men in Europe. It should go without saying that such a gifted and conscientious man should never have been killed, whatever his errors (or even crimes) may have been. Rather, such men should be cherished and argued with.583

Thomas More's troubles were generated by Henry's determination to leave a male heir to succeed him. The Wars of the Roses had taught England and her monarchs what civil war meant. Decades of war had ended in 1485 with the entronement of Henry VII.584 His son, Henry VIII, could never feel secure until the succession was assured. And for this, he thought, only a son would do. It was then far from certain that a woman could inherit the throne of England in her own right—and it would be irresponsible, some thought, to have to find out.585

Catherine of Aragon, the Spanish princess, the first of Henry's six wives (and mother of Mary), had not produced a son.586 She
had, after some twenty years of marriage, reached an awkward age for Henry: too old to bear children; too young to make him a widower. The solution which policy suggested—the replacement of one queen by another—sexual attraction confirmed in the form of the vivacious Anne Boleyn, who was to become the mother of the great Elizabeth. In most other places in the world and at most other times, the substitution of one consort for another, for dynastic purposes, would have taken place as a matter of course. Even in sixteenth-century Christendom this could have been arranged. It need not even have been called a divorce, but rather an annulment, a declaration that the marriage between Henry and Catherine had been invalid from the outset inasmuch as Catherine had been Henry’s deceased brother’s widow. Such a marriage, it was argued, by some, was prohibited by Church law. But whatever prohibition there was had been dispensed with to permit this marriage in the first place—and the Pope (Clement VII) could not be prevailed upon (perhaps in part because Rome was then at the mercy of Spanish troops) to revoke the dispensation and thus leave Henry free to remarry or, as the purists would have it, to marry for the first time.

In 1533 Henry replaced his first Catherine by his first Anne—and this in clear defiance of the Roman Church. Had the Pope granted the requested annulment, there would probably have been in England no significant opposition voiced, except perhaps by the pious Katherine herself, to the new marital arrangements. Certainly, it does not seem that there would have been any troublesome domestic objection “on principle” to such an annulment—and devout Catholics would have been able to live with it. Certainly, also, it must have been evident that the Pope could have—and, in other circumstances, might well have—come down on Henry’s side.

Did it make sense—does it make sense—for anyone to insist upon the defense, even unto death, of a decision which could, perhaps with as much canonical authority, have easily gone the other way? Is the pious man obliged to stand with the Pope, to the furthest extreme in matters of this sort, when he knows that the Pope need not have decided as he did? Besides, is a coerced Pope a reliable guide, a Pope who was probably subjected to far less coercion than the men who were sent to the Tower in his defense? Was it not likely that coercion far short of that applied to English dissenters would have induced the Pope and his advisors to see things as Henry did? Is a coercible Pope really to be regarded as the
Vicar of Christ? What, then, in such circumstances, does a man stand for when he stands with the Pope against his own king?

IV.

These questions and their like must have occurred to More while he was confined in the Tower. Such questions must have constituted the real trial of Thomas More—for they would have put what he was doing and why to a severe test. The severest test of all may have been the suspicion that he was sacrificing his life for what was essentially a chance position. It is one thing to die for what one considers to be the truth; it is quite another to die for what another man has been persuaded to pronounce to be true when one senses that that pronouncement is essentially arbitrary.

More's formal trial took place five days before he was executed. Parliament had promulgated both an Act of Succession and an Act of Supremacy. The first provided for the substitution of the issue of Anne Boleyn for the issue of Catherine of Aragon as heirs to the throne. The second provided for the substitution of the king for the Pope as Head of the Church in England. Thomas More, one gathers, had no difficulty with the Act of Succession: Parliament could make whom it wished King of England, whether legitimate or illegitimate issue of Henry or somebody else altogether.

Royal succession was one thing; spiritual succession (or supremacy) was quite another—and More was not prepared to say that Parliament, or anyone else on earth, could replace the Bishop of Rome as Head of the Church. But neither was More prepared to say that Parliament could not replace the Bishop of Rome as Head of the Church in England. He evidently believed that he would put his soul in peril if he should “accept” what Parliament had done and that he would put his body in peril if he should “deny” what Parliament had done. It was bad enough, he knew, not to accept what Parliament had done, for offices and privileges depended on taking the oath which recognized the king as Head of the Church. Further parliamentary and other maneuvers found Thomas More officially called upon (the only layman thus singled out) to subscribe the controversial oath. His refusal to do so led to his immediate confinement in the Tower. But until he expressly dissented from what Parliament had done in the Act of Supremacy and thereafter—which dissent would be considered treasonous in that it would question the legally prescribed extent of royal power and, in effect, the titles
of the king—he evidently could not (as the law was written) be tried, convicted and executed as a traitor.594

Thomas More was, within the confines of his great indiscretion, remarkably cautious. He remained silent: everyone knew he did not believe in what Parliament had done; but no one could testify on oath that he had heard More say he did not so believe. His was a most eloquent and, for the king, a most exasperating and perhaps even dangerous silence—and, it seems, when this king became exasperated, his lieutenants became desperate, so desperate that they could eventually produce a witness who was willing to testify that More had indeed said that which everyone believed he believed—and which virtually everyone else in the country had believed, or had said they believed, not too many years before.595 Other charges were included in the indictment, but they did not count for much. This was the one which mattered, and it did turn upon the testimony of what might well have been a perjured witness.596 Whether or not this witness perjured himself, however, More in effect confirmed what the witness had attributed to him by explicitly denying, after he had been convicted, that any Parliament could recognize anyone other than the Pope the Head of the Church in England.597

It remains a nice question, for students of legal ethics, whether a lawyer is permitted to put on the stand a witness who will perjure himself in testifying to what is essentially true. No, some will say, it was not true that More had ever denied the king’s titles. But was not the serious problem here that he did not believe the king to be Head of the Church? Was it not the belief which was critical here, not the statement of the belief?598 The voicing of a belief may be simply the best, perhaps the only practical, evidence as to the belief itself. But if a man in fact does so believe, and out of caniness indicates that belief in every way but the one which would condemn him (and all this to the detriment of domestic tranquility), why should not he be obliged and helped to take the consequences of what he truly believes?599

The case against More that we can be sure of, in that it depends not on possibly perjured evidence but on an interpretation, mistaken or otherwise, of the evidence everyone would have conceded, may be found in the remarks addressed by a prosecuting attorney to him:

Sir Thomas, tho’ we have not one Word or Deed of yours to object against you, yet we have your Silence, which is an evident
Is it not a tribute to the English deference to the rule of law that More could elude powerful enemies as long as he did? Should he, however, have driven foolish enemies to the extremity to which they did go? 

It seems that efforts were made, again and again, to persuade More to retreat from the lonely post to which he considered himself assigned. Assume, for the sake of analysis, that More truly believed that the eternal fate of his soul depended on not renouncing his opinion that the Pope (in spite of his inevitable human failings) was the Head of the Church, in England as well as elsewhere. Must not considerable credit be given to one who stands by what he believes in? But how much credit? What if that which is believed in should be utter nonsense? Or what if it should be socially disruptive?

Was it reasonable for More to believe that his soul would be perpetually condemned if he should acquiesce? Perhaps, one might say, if acquiescence was merely self-serving and clearly against his reason. But what did—what does—reason call for here? Could not—should not—a reasonable man have been able to figure out that eternal punishment would hardly follow because a man took one position rather than another in support of a pronouncement that was itself essentially arbitrary? But, it will be said in defense of Thomas More, it was not the correctness of the Pope’s pronouncement that he defended but rather the right and duty of the Pope, and the Pope alone, to make such a pronouncement, correctly or incorrectly. That papal right and duty obliged More to refuse to concede that the king could legitimately be regarded Head of the Church in England. Were not both the Pope and the king unreasonable, the one in refusing to grant what the other desperately believed he needed and perhaps in refusing to do so because of threats to his own principality, the other in not settling for what he had taken but insisting also upon verbal acknowledgment, not passive acquiescence, from every prominent man in his realm?

Could not—should not—the Pope have held back from acting publicly against the king? That is, a refusal to grant the annulment was one thing; public condemnation of the king was quite another. Should not the Pope have said, for the benefit of men such as More, that although he could not grant the annulment, he would depend on God to deal in His own way with Henry? Had the Pope...
conducted himself more prudently, it can be argued that Henry might not have gone so far as to have had himself declared Head of the Church in England or that that declaration would have had the consequences it did. How far is a reasonable man obliged to go in defending the unreasonable, or imprudent, decisions of others?

V.

We repeat a critical question for this occasion: Was it reasonable for More to believe that his soul would be perpetually condemned if he should acquiesce, if only for the time being, in what had been done by the Parliament of England? One answer to this question is provided in an assessment of Thomas More made in 1587, a half-century after More's death:

God had in most bountiful sort poured his blessings upon this man, enduing him with eloquence, wisdom, and knowledge; but the grace of God withdrawn from him, he had the right use of none, no, not of reason as it should be rightly used.604

We have seen how someone might question the rationality or sensibleness of what More did and allowed to be done to him.

Another answer to the question of More's reasonableness, and hence his correctness, in the circumstances in which he found himself is provided by the great European scholar and friend of More's, Desiderius Erasmus, who said of More that he was the English Socrates.605 What understanding of Socrates is relied upon here? And what does such a comparison oblige us to notice about More?

The similarities between Thomas More and Socrates are apparent. Both men were witty and urbane and hence wonderful companions; both were intelligent and learned men who were considered impractical in some ways, but who were deeply practical in appreciating the power of persuasion and example in bringing out the best in people; and, perhaps most important for those who see a similarity, both were good men who suffered death for the sake of the opinions they held.

The opinions they held, however, were quite different in appearance, and not only on practical questions. These differences can perhaps be summed up in the observation that More was a devout Christian while, of course, Socrates never had the opportunity to consider that faith. By noticing the differences between the two men, and the implications as well as the causes of those differences, one may be assisted in an effort to understand and fairly to pass judgment on More.
Thomas More made much more of his family ties and obligations than Socrates ever did. This, and several other features of More's understanding of things as well, may be seen in the epitaph More prepared for the tomb of Jane, his first wife, which tomb he intended also for Alice, his second wife, and for himself:

My beloved wife, Jane, lies here. I, Thomas More, intend that this same tomb shall be Alice's and mine, too. One of these ladies, my wife in the days of my youth, has made me father of a son and three daughters; the other has been as devoted to her step-children (a rare attainment in a stepmother) as very few mothers are to their own children. The one lived out her life with me, and the other still lives with me on such terms that I cannot decide whether I did love the one or do love the other more. O, how happily we could have lived all three together, if fate and morality permitted. Well, I pray that the grave, that heaven, will bring us together. Thus death will give what life could not.606

It is difficult to imagine Socrates not only able to please one wife, to say nothing of two, but also proclaiming his conjugal accomplishments to the world. More was cared for as he was, by his wives, his children and his stepchildren and foster children, in large part because he sincerely cared for them (or at least seemed to)—because, that is, he displayed himself as taking most seriously his family ties and duties. Socrates, on the other hand, sometimes seemed to regard his marital connections as something of a joke.607

It is also difficult to imagine Socrates seriously believing what More said in his wife's epitaph, that "death will give what life could not." Socrates conducted himself, by and large, as if the only life a reasonable man can really count upon is here on earth.608 Certainly, one does not find in any recollections of Socrates a lively expectation of personal immortality, whatever the arguments he might have made from time to time about the indestructibility of souls.609 Thomas More, on the other hand, seems genuinely concerned, or at least allows himself to appear genuinely concerned, about what his fate will be "there" if he should falter "here."

What More's fate will be, he seems to believe, depends on what he believes (the faith he subscribes to), a notion that would sound strange coming from Socrates. Socrates does speak of a Delphic oracle having induced him to pursue his unpopular and sometimes dangerous life of inquiry, but that life can be understood as an effort to test the oracle rather than in unquestioning obedience to it.610
It is instructive to notice that Socrates is distinguished much more by the questions he asks than by the faith he espouses. Thomas More, on the other hand, can be said to be characterized as believing himself to know the answers to the most important questions. Socrates pretended (or was it a pretense?) that his critical achievement had been to become aware of his ignorance, while More professed to know things about which Socrates simply could not be sure.

Thomas More also professed an allegiance to his sovereign of which Socrates would have been incapable. Would Socrates, in More's place, have tried to question the king, calling him to account for what he was saying about and trying to do to Socrates? Only if he believed such an inquiry useful? Neither death nor the law would have mattered as much to Socrates as they seemed to matter to More. Thomas More was a subject; Socrates, somehow, was not. More was a political man; Socrates said that he knew better than to try to be, observing that he would not have lived as long as he did had he devoted himself to public affairs.

Thomas More, in his exercise of political power, did things which one can hardly imagine Socrates doing. Thus, More could persecute and prosecute religious dissenters—whether ever to the death remains a question for the scholars to settle. He expressed, on more than one occasion (including in the epitaph which he prepared for himself), his hatred of heretics, and this at a time when a number of respectable men and even entire peoples in Europe had become “heretical.”

Socrates recognized, of course, the need for courts and executioners—but he was himself temperamentally incapable of supervising or performing such useful functions. Would he not have said that no thoughtful man, of mature years, should have conducted himself with the apparent inquisitorial fervor of Thomas More, no matter what the temper and the opinions of the times? Socrates was once directed by the rulers of Athens to go, with several others, to fetch a man for a questionable execution: the others went to fetch him while Socrates went home—and, he adds, had not that government fallen shortly thereafter, he himself probably would have been killed for this defiance. On the other hand, perhaps More stood as firmly as he did in part because he had seen despised heretics stand firmly in defense of false faiths. Did he, that is, learn from his victims? Did both the true faith and honor require that he be at least as steadfast as heretics had been?

These differences between More and Socrates should be pursued
even further, perhaps down to the differences of opinions which are at their root. Consider, for example, their respective attitudes toward pleasure. Socrates was, it is known, often unconcerned about various pleasures of the body; but he would never have said, as More is reported to have said, that "a perfect man should abstain not only from unlawful pleasures but from lawful." That is to say, Socrates was not particularly attracted by many of the things others found pleasurable; More acknowledged their pleasureableness, but resisted them.

Thus, Socrates dressed simply and was remarkably oblivious of cold and heat. He required less than most men did in order to be comfortable. More, on the other hand, made deliberate efforts to render himself uncomfortable—and, we are told, wore a hair shirt much of his adult life. There are reports as well that More deliberately scourged himself. It is difficult to imagine Socrates either wearing a hair shirt or scourging himself—or considering sensible any doctrines which called for or countenanced such mortifications of the flesh.

Their respective attitudes toward pleasure, then, bear thinking about and point to something even deeper, just as do their respective attitudes toward politics. Socrates, we have noticed, knew that he could not engage in politics and survive. More believed he could, and should, engage in politics. He was quite successful at it, and but for certain accidents would have survived and died in prosperity. Here, too, we find a key difference between the men: Socrates’ estrangement from the city was more nearly necessary than More’s.

Socrates’ way of thinking called into question, in an unavoidable manner, the things held most dear by the cities of the world. Socrates said he would have found accusers wherever he would have gone. On the other hand, any one of a number of developments, all of them quite plausible, would have saved More, keeping him from his fatal encounter with a king who very much wanted to keep Thomas More in his camp: Catherine could have borne living sons to Henry; or Catherine could have conveniently died, or Henry could have died; or the Pope could have been spared Spanish pressures; or More could have been out of the country when the troubles began.

All this suggests that the essential relations of Socrates and More to political life were quite different. In short, no ruler would ever say of Socrates what Charles V (the Holy Roman Emperor
and King of Spain, Catherine's nephew) is reported to have said to the English Ambassador upon learning of More's execution:

My Lord Ambassador, we understand that the King, your master, hath put his faithful servant and grave wise councillor, Sir Thomas More, to death. . . . If we had been master of such a servant, of whose doings our self have had these many years no small experience, we would rather have lost the best city of our dominions than have lost such a worthy councillor.625

VI.

To say that More's troubles were probably accidental is not to suggest that he did not feel deeply the call of his conscience. With an invocation of conscience we come to what may be the foundation upon which More's trial is based.

Conscience is, it can be said, essentially a Christian term. The Greek word, synderesis, once meant, literally, to know jointly. By the time of the New Testament it seems to have meant known with oneself. Relatively few uses of this word may be found in pre-Christian Greek. For example, one can go through Aristotle's long Nicomachean Ethics without noticing either the word conscience or any places where it might naturally be used.626 It is when one comes to the New Testament, particularly to the writings of St. Paul, that one finds important uses of conscience.627 Where the Christian writer uses conscience, Aristotle might have used knowledge of what is right or simply good habits; where the Christian uses guilt, Aristotle might have used shame.628

It is virtually impossible for us today not to use the word conscience—even when we mean by it something more old-fashioned, that is, pre-Christian. The contrast between conscience and a sense of shame is instructive: conscience is more private in its implications; shame, more community-minded. This may be why there does not seem to be much made of any term like conscience in the Hebrew Scriptures. The pious Jew is not expected only to look into his heart, although he should do that, but rather he is expected to take his bearings for the most part from the law which has been handed down to his people.629 It is when one comes to the New Testament, and to the doctrines generated by it, that one finds the repeated insistence upon the obligation "to take a stand," often against the things and people of this world—an obligation to stand by one's faith, by one's beliefs. This is an obligation which recognizes one as essentially on one's own, as obliged first and foremost
to save one's own soul, to look out for oneself. One is primarily a private man who should not care what others think about him.\footnote{630}

If one is not careful, such independence can degenerate into a disregard not only for what others think but also for thinking itself. That is to say, an emphasis upon steadfastness in one's conscience both depends on and reinforces an emphasis upon individual will and upon the sincerity of that will.\footnote{631} To make a virtue of sincerity is to mean, eventually, that there may be no standards to be invoked, no public discourse to which one may be responsible and in which one must participate. The more that Thomas More invoked his conscience, the less he said.\footnote{632} One of the things he did say, and this several times, was that he would be saved by following his conscience and his enemies would be saved by following theirs. Socrates, I believe, would have found this paradoxical assumption in need of considerable investigation.

\section*{VII.}

If sincerity is enthroned and if standards and argument are played down, there can come a time, and one sees this again and again in one's students, when it becomes fashionable to ask, whenever anyone tries to pass moral judgment, "Who is to say what is right?" This question does not merely recognize that it is often difficult to pass judgment because it is difficult to know the facts; rather, it says, in effect, that there are no knowable standards by which anyone should be bound. Among other developments which are likely to follow from the opinions generated by an emphasis upon private will and conscience are a legitimation of self-expression for its own sake and (in order that we might understand and perhaps shape, if only for the sake of therapy, the self which is being expressed) a concern for the unconscious, that chance constellation of psychic forces which determine who we are and what we do.\footnote{633}

There can be something admirable in steadfastness itself, unless the cause in which one is steadfast is simply odious.\footnote{634} But is not steadfastness something like courage, that virtue which Aristotle recognized to have so many dubious forms?\footnote{635} Steadfastness may be something like justice as well—but that virtue too has some dubious forms, as can be seen, for example, when it is regarded as essentially law-abidingness. Does not what is truly courageous and what is truly just depend on wisdom? Do not they depend not only on an awareness of the commands one has been given (the laws of one's city in the circumstances in which one finds oneself), but
perhaps even more on an understanding what the simply best would consist of?\textsuperscript{636}

An emphasis upon conscience tends to discount the primacy of wisdom. In fact, if sincerity and steadfastness are what count, then that for which one stands becomes secondary. The important thing is to stand for something, to "commit" oneself to something—and this, it is presumed, everyone can do. "Who is to say what is right?" Why, the man who knows, of course. It can be difficult to know who knows, just as it can be difficult to get to know. But neither effort will be made if it should be generally believed that there is a royal road to virtue and that that road is available to everyone, that there is nothing really to be learned but only something to be felt and done—and that what is important about what is done is that it be done and that it be done sincerely, that is to say, with a good conscience.\textsuperscript{637}

Of course, More does not deny that there are standards. His conscience tells him that there are, and that the Roman Catholic Church is the authoritative spokesman for those standards. What he chooses and to some extent examines, then, are not the standards but rather the guardians of the standards. But since he grants, in his extremity, the right to others to follow their consciences, he ultimately has no argument in support of one set of standards over another. It is indeed appropriate that perhaps the greatest martyr to conscience in the English-speaking world should have spoken so little about what he was doing and why.

VIII.

If one does not consider the call of conscience sufficient guidance, one can begin to consider such questions as, Is it better to be sincere but wrong or to be insincere but right? Clearly best, of course, would be to be sincere and right—that is, to enjoy performing the right action. Which is worse, that Thomas More believed he would be eternally lost if he affirmed the king's supremacy or that he only pretended to believe that? Or, put another way, did More make as much as he did of conscience and the salvation of his soul, despite the risk of misdirecting people's moral attention, in order to do what he could to advance certain temporal, even political ends?\textsuperscript{638}

Those ends may be, taking the best possible view of what More was attempting to do, reduced to one: wisdom should govern human affairs, not national interest, not the appetites of sovereigns, not partisan maneuvering, whether by laymen or by clergy. Did he
believe, that is, that respect for natural right and international law, both of which recognize the primacy as well as the fragility of reason in human affairs, depended, in his time, on a united Europe and that in turn depended on the Roman Church as the only available long-established religious institution in the Western world. Did the Church somehow stand for natural right (albeit in the form of "natural law"), for rules and limitations on the private desires both of individuals and of sovereigns, be they sovereign kings, parliaments or revolutionary movements? Are invocations of "conscience" and of "the laws of God" a way, a then-popular way (just as reminders of the right of revolution can be today a way), of talking about natural right? Does such support of natural right as a united Church provides require unquestioning public dedication to an established central institution which, in the nature of things, is subject to the caprices of particular men?

One price of such a unified moral authority—and unless moral teaching is unified it is not, for most people, authoritative—may be the risk of foolish, even cruel, campaigns against heretics. But the alternative to a unified moral authority, it may also be argued, is fragmentation of the human soul and of human communities, permitting the intensification both of futile pleasures and of national passions. Such fragmentation leads in turn to the unprecedented mindless atrocities of the twentieth century, in the light of which the cruelties of even the Inquisition pale by comparison.

Thus, one must ask, which is the more significant in understanding the role of Thomas More's Church in the sixteenth century, the coercion which we can detect behind some Vatican decisions or the deliberative form in which such decisions were couched? Coercion comes and goes—but the deliberative form, drawing upon and leaving precedents and a body of moral standards, remains available for use by men who are dedicated to realistic efforts to subject human affairs to the restraints and guidance of practical wisdom. All this apparatus can be repudiated and dismantled, in the name of the independence of individuals as well as of nations. But the alternatives may be the unleashing of private desires and the promotion of worldwide catastrophes—that is to say, anarchy within the human soul and ever more violent conflict among nations. Both kinds of disturbances promote tyranny.

It is along these lines that a case can be made for Thomas More, a case which sees him using, in the name of a humane and unified Europe, the language and forms of his time. It was a Europe which would permit a Shakespeare to emerge, a Shakespeare who
can be thought of as consolidating, at least for the English-speaking peoples, the moral legacy which More had stood for. To make such a case for More is to assume that he saw what we might be able to see as the evident difficulties with the public position he took. It is to recognize, that is, that there was indeed an urbane, intelligent and learned man behind the mask of a sometimes troublesome piety. It is to recognize, as well, that More trusted us to make, in changed circumstances, the case he was not in a position to make explicitly himself. A carefully orchestrated drama of trial and execution could be expected to interest people in More’s enduring aspirations, even people who would have little patience with hair shirts and mortification of the flesh. Perhaps, in any event, More depended on us to see him in the best possible light and thereby to cherish among ourselves both nobility of the human spirit and dedication to the rule of law.

IX.

I have, you will recall, promised you a concluding story. Such debts should be discharged.

It is important, I have in effect argued on this occasion, to find out what can be said on either side of serious issues. Only if one grasps and concedes the merits of each side, can one begin to understand what the issues are truly about and to engage the interest, resources, and good will of the contending parties for a sound resolution. This is the course of moderation, it seems to me, that moderation which partisan passions make so unfashionable.

I have just given you the moral of the story I have promised. Now for the story itself:

There was a rabbi, with a reputation as a marriage counsellor, who had an outspoken wife. She managed on one occasion to overhear her husband’s dealings with a contentious couple. First the woman came to the rabbi and laid out her complaints: her husband did not devote himself as much as she had once been led to expect he would to her and their children and that shortcoming everyone could see. This she said and much more. To all this, the rabbi replied, “You’re right, my good woman, you’re right. Do what you can.” She went home somewhat pacified.

Then the man came to the rabbi and told his side of the story: his wife was always trying to get her own way without making a serious effort to understand what was really important. This he said and much more. To all this, too, the rabbi replied, “You’re
right, my good man, you're right. Do what you can.” He also went home somewhat pacified.

Thereupon the rabbi’s wife upbraided him: “First the woman said thus and so, and you told her she was right. Then the man came and said thus and so, and you told him also that he was right. What kind of a rabbi are you anyway? Don’t you know you are supposed to decide who’s really right?” To which the good rabbi replied, “You’re right, my dear, you’re right.”

11. JOHN P. ALTGELD AND THE HAYMARKETERS

I.

The student of law who comes to the Haymarket Case, a century after the spectacular events of 1886-1887, confronts one surprise after another. One is reminded of how fascinating and yet inaccessible various combinations of particulars can be. If it is not one thing, it is another which can challenge us.

The pardon message by John P. Altgeld, of June 26, 1893 (a few months after he became Governor of Illinois), opens with this summary of the facts:

On the night of May 4, 1886, a public meeting was held on Haymarket Square, in Chicago; there were from 800 to 1,000 people present, nearly all being laboring men. There had been trouble, growing out of the effort to introduce an eight-hour day, resulting in some collisions with the police, in one of which several laboring people were killed, and this meeting was called as a protest against alleged police brutality.

The meeting was orderly and was attended by the mayor, who remained until the crowd began to disperse, and then went away. As soon as Capt. John Bonfield, of the Police Department, learned that the mayor had gone, he took a detachment of police and hurried to the meeting for the purpose of dispersing the few that remained, and as the police approached the place of meeting a bomb was thrown by some unknown person, which exploded and wounded many and killed several policemen, among the latter being one Mathias Degan. A number of people were arrested, and after a time August Spies, Albert R. Parsons, Louis Lingg, Michael Schwab, Samuel Fielden, George Engel, Adolph Fischer, and Oscar Neebe were indicted for the murder of Mathias Degan. The prosecution could not discover who had thrown the bomb and could not bring the really guilty man to justice, and as some of the men indicted were not at the Haymarket meeting and had nothing to do with it, the prosecution was forced to proceed on the theory that the men indicated were guilty of murder, because it was claimed they had, at vari-
ous times in the past, uttered and printed incendiary and seditious language, practically advising the killing of policemen, of Pinkerton men, and others acting in that capacity, and that they were, therefore, responsible for the murder of Mathias Degan. The public was greatly excited and after a prolonged trial all of the defendants were found guilty; Oscar Neebe was sentenced to fifteen years' imprisonment and all of the other defendants were sentenced to be hanged. The case was carried to the Supreme Court and was there affirmed in the fall of 1887. Soon thereafter Lingg committed suicide. The sentence of Fielden and Schwab was commuted [by the then-governor] to imprisonment for life; and Parsons, Fischer, Engel, and Spies were hanged, and the [signers of a 60,000-name pardon petition] now ask to have Neebe, Fielden, and Schwab set at liberty.\footnote{643}

I have referred to “one surprise after another.” There are various minor surprises, which I merely mention here: it was a time when men, including anarchists, routinely wore coats and ties.\footnote{646} It was also a time when such radicals could counsel each other to sell their watches and chains, or other personal property, in order to buy guns and dynamite for the revolution; it was rarely suggested that one should use theft or force in order to get the necessary weapons.\footnote{647}

I restrict myself to discussing on this occasion three particularly instructive surprises related to important statements by various parties to the Haymarket controversy. These are statements by the defendants and their associates, by the Supreme Court of Illinois in upholding the defendants' convictions, and by the governor in pardoning in 1893 the surviving defendants.

There was not much serious difference of opinion in the Haymarket Case as to the “facts” but only as to their implications. That makes our effort harder as well as easier. Particularly important was the question of whether men should have been held responsible in the way they were in this case for the public positions they had taken with respect to the labor unrest of the day.

II.

Our first instructive surprise. One is not accustomed today to hearing language as violent as that of the defendants and their associates when they attack the capitalists, the police as lackeys of capitalism, and the entire system of government (especially the courts along with the police). Some of this language must be “seditious,” \textit{if} anything is.\footnote{648} It is certainly far more impassioned than I expected it to be, reflecting perhaps both the intensity of the speak-
On Trial

ers' grievances and the extent of American liberty. Here are some samples (with their extensive italicizing omitted):

February 23, 1885.—The already approaching revolution promises to be much grander and more terrible than at the close of the last century, which only broke out in one country. The common revolution will be general, for it makes itself already felt everywhere and generally. It will demand more sacrifices, for the number of those over whom we have to sit in judgment is now much greater than that of the last century.649

March 23, 1885.—Yet one thing more. Although every day brings the news of collisions between armed murder-serfs of the bourgeoisie with unarmed crowds of people, ( strikers and the like,) we must ever and again read in the so-called workingmen's papers, discussions of the question of [whether] arming ought to be avoided in the associations of the proletarian. We characterize such pacifying efforts as criminal.

Each workingman ought to have been armed long ago. We leave it an open question whether whole [organizations] are able to completely fit themselves out in a military point of view, with all their numbers; but we say that each single one, if he has the necessary seriousness and the good will, can arm himself, little by little, very easily. Daggers and revolvers are easily to be gotten. Hand grenades are cheaply to be produced; explosives, too, can be obtained; and finally, possibilities are also given to buy arms on installments. To give an impulse in that direction one should never tire of. For not only the revolution proper, approaching with gigantic steps, commands to prepare for it, but also the wage contests of to-day demand of us not to enter into it with empty hands.

Let us understand the signs of the times! Let us have a care for the present, that we will not be surprised by the future, unprepared!650

October 8, 1885.—All organized workingmen in this country, no matter what views they might have otherwise, should be united on one point,—they should engage in a general prosecution of Pinkerton's secret police. No day should pass without a report being heard, from one place or another, of the finding of a carcass of one of Pinkerton's,—that this should be kept up until nobody would consent to become the bloodhound of these assassins.651

These men (in various publications and speeches for months and years before the Haymarket outbreak) indulged in the most intemperate talk, thereby playing with fire. At the very least, they ran the risk of exciting further the more excitable people among themselves. Their talk may not have moved "the masses" to action, but
it evidently impressed the newspapers, the police, the state's attorney, the trial judge, and the Illinois Supreme Court.

We must wonder what these men thought that they, as intellectuals, were doing. They were both severely provoked and most provocative in this recourse by them to what was, in effect, the right of revolution. Some of you will remember the intensity of similar labor disputes here in the Midwest in the 1930s.

Much of the *Haymarket Case* turned then, and still turns, around the question of how much, or in what way, one should be held responsible for incendiary language, even if no direct connection can be shown between that language and violent action. A considerable display of that language is to be found in an unexpected place, the *Illinois Reports* from which I have taken my samples. The Supreme Court prefaces its Opinion with rather extensive selections which seem to have been representative of the exhortations that people encountered in the defendants' publications and speeches.

III.

Our second instructive surprise. The Illinois Supreme Court's opinion is much more sober than I had anticipated. It is certainly far less impassioned than the defendants' language. The spirit of the court's approach is reflected in this short concurring opinion by one justice:

Not intending to file a separate opinion, as I should have done had health permitted, I desire to avail myself of this occasion to say from the bench, that while I concur in the conclusion reached, and also in the general view presented in the opinion filed, I do not wish to be understood as holding that the record is free from error, for I do not think it is. I am nevertheless of opinion that none of the errors complained of are of so serious a character as to require a reversal of the judgment.

In view of the number of defendants on trial, the great length of time it was in progress, the vast amount of testimony offered and passed upon by the court, and the almost numberless rulings the court was required to make, the wonder with me is, that the errors were not more numerous and more serious than they are. In short, after having carefully examined the record, and given all the questions arising upon it my very best thought, with an earnest and conscientious desire to faithfully discharge my whole duty, I am fully satisfied that the conclusion reached vindicates the law, does complete justice between the prisoners and the State, and that it is fully warranted by the law and the evidence.
The opinion of the court ran to more than 150 pages. That opinion was preceded by a dozen pages of syllabus, by almost 80 pages stating the case, and by a dozen more pages summarizing the briefs of the parties. Most of the pages that were used to state the case are given over to long quotations from the defendants and their associates.653

The space devoted to all of this by the court reflects both the intensity of the public controversy at the time and the fact that eight defendants were involved. No one ever argued that any of the defendants threw the fatal bomb, but no one denied that the defendants had advocated possession and use of guns and bombs, albeit in self-defense. One of the defendants was shown to be an expert bomb-maker—and he was to use a small bomb to commit suicide in jail while he was awaiting execution.654

The court’s 150-page opinion is not a mere harangue. Considerable care is devoted in that opinion to a review of the evidence and of various legal issues.655 In many ways, the Illinois Supreme Court’s opinion was like a solid closing argument by a prosecuting attorney. It is an informative, even conscientious, opinion, however much one might have to differ from it.

One cannot speak so kindly, however, of various police officers (especially Captain John Bonfield) and of the trial judge (Joseph E. Gary). All too many police were simply sadistic in their attacks on strikers, who sometimes provoked the police by their own attacks upon strikebreakers. The trial judge is, however rare, all too familiar, for he is one of a tradition that goes back to the notorious hanging judge, Lord Jeffreys.656 That tradition includes, in our own time, Harold R. Medina, of the Dennis case (the trial of the Communist Party leaders in the late 1940s),657 Irving R. Kaufman in the Rosenberg case (the atomic espionage case a few years later),658 and Julius J. Hoffman (in the Chicago Conspiracy Trial, in 1969-1970).659 Each of these three American judges did have a good side to him as well.

Sadistic policemen and bad trial judges are bound to turn up from time to time. Chance distortions cannot be avoided here—and so there is especially the need for timely interventions by a responsible press and sensible appellate courts. Perhaps this was too much to expect from the Illinois Supreme Court on that occasion, considering how violently the issues had been framed both by the defendants and by their enemies.
IV.

Our third instructive surprise. The governor's pardon message, issued five and a half years after the trial and executions, is a remarkable state paper. It, too, reflects considerable care with the record, but from a point of view obviously quite different from that of the Illinois Supreme Court.

The new governor had been under pressure from many respectable men to pardon the surviving defendants. He kept his own counsel, did his own research, and then issued a message which disturbed even some of those (of the more respectable type) who had sought the pardon. What had been sought was an act of mercy for guilty men (“they have suffered enough”). What the governor provided, instead, was a reassessment of the record which obliged him to find that the defendants had been innocent of the crime for which they had been convicted.

The governor says that he would not pardon these men if he thought them guilty: law and order must be upheld, the guilty must be punished. But he cannot find any evidence which connects in any significant way the admitted language of the defendants to the action of the unknown bomb-thrower. In fact, he concludes (but there is no substantial evidence of this either) that the bomb was probably thrown by someone who had a personal grievance against the police for a brutal assault upon him in a labor disturbance elsewhere.

The governor is particularly concerned about the way the jury was selected and the way the trial was conducted. Critical to his decision, furthermore, was his assessment of the trial judge. Altgeld conducted himself more as an appellate court reviewing a record than as a governor considering whether to set aside the demands or effects of the law. This is the opinion, or at least the dissenting opinion, that should have come out of the Illinois Supreme Court in 1887. Or, to put it another way, it is the kind of opinion that could come out of the United States Supreme Court today, a Brennan-like opinion working from rule-of-law (or due process) principles.

No doubt, it would have been politically prudent for the governor to have emphasized “mercy,” whatever he privately thought of the record. But is it not salutary to have an occasional established public figure openly addressing vital issues and finding against government misconduct? This may have permanently damaged Altgeld’s career—but there is much to be said for having on the record such a manifestation of informed spiritedness in a political
man. In calling spades spades, he gave everyone hope for an enduring law and order; in correcting "the Establishment" as he did, he implicitly rebuked the anarchists' condemnation of government. In fact, it can be said, Captain Bonfield and, to a lesser extent, Judge Gary were themselves somewhat anarchistic.

It is salutary that we have one American state paper which shows, in so dramatic a form, what can be said by men in authority against the abuse of authority. Of course, it can sometimes be "im-politic" to say such things—but politics is not everything; or rather, short-term politics must give way to a statesmanship that can illuminate and guide generations to come.

V.

I return briefly to the defendants. They were again and again irresponsible in what they said and how they conducted themselves, insofar as they had any effect. Various callous employers were also irresponsible, of course, but that is much more obvious to us and need not be stressed on this occasion.

One of the defendants (August Spies) testified "that he procured the cartridges of dynamite and coils of fuse and denoting caps found in his office [at his newspaper] for the mere purpose of experimenting, without explaining why he wanted to experiment. He stated that he showed these things, or some of them to the reporters [from other newspapers] . . . merely to give them something sensational to write about in their papers."663 In short, he wanted to be noticed—and he was!

Among the thoughtless consequences of what the defendants did with their agitation were the following:

They helped promote the use of bombs. Even if the Haymarket bomb-thrower was moved primarily by a desire for personal revenge, the social atmosphere to which the defendants as well as some employers and police contributed probably influenced the still unidentified bomb-thrower's decision, if not his ability, to act.

They probably affected the labor movement adversely, at least in the short-term, setting back the efforts to improve working conditions, whatever the long-term effects of the Haymarket martyrdoms.

Perhaps worst of all, they helped provoke the community to commit, with its executions, a great injustice.664

They made it more likely, that is, that innocent men would be executed, with perhaps the guiltiest of them all (in terms of immediate acts) being the one who committed suicide by explosive.
They brought out the worst in the police, the trial judge, the prosecuting attorneys and the press, thereby making the community uglier than it need have been.

They helped undermine the political career (whatever it may have done for the “eternal glory”) of a conscientious governor.

On the other hand, their thoughtlessness did give that governor an opportunity to vindicate the system they condemned.

VI.

It should be noticed that there was a certain commendable discrimination in the way the State of Illinois conducted itself, despite the excitement of the time and the awfulness of hanging four men.

This discrimination may be seen, as I have indicated, in the way the Illinois Supreme Court did face up to the record and arguments before it. It may be seen as well in the way three of the defendants were singled out to be spared hanging: the evidence does indicate that these three had not been as uninhibited as the others.

The supreme court is most guarded in what it says about Oscar Neebe, one of the defendants who survived to be pardoned. Notice what the court does, and does not, say about him: “We can not say that the jury were not justified in holding him responsible, along with his confederates, for the murder on Tuesday night [May 4, 1886] of one of the very policemen, whose death he was urging and advocating on Monday night.”

The jury-selection issue was probably not as critical as the defendants, or the governor, believed. Rather, the critical issue was, and still is, whether one should be held responsible for quite reckless talk. It may not be possible to establish cause and effect here—and yet it is only proper to discourage reckless talk. It remains a perplexing question what, if anything, can safely be done about it in our kind of regime.

VII.

One can put all of this another way by observing that it is often difficult to know what one is doing. Surely it is not enough, in justifying oneself, to protest that it has not been proven that what one said or did was clearly connected to what somebody else did. Should not the defendants have recognized that if they constantly talked the way they did, the community would naturally be apt to hold them accountable for certain misconduct by others?

We can be reminded of how difficult it is to know what one is doing by returning, if only briefly, to the opinion of the Illinois
Supreme Court. That court, in ruling firmly and at length against the defendants, did so with remarkable honesty: it set forth at great length the defendants’ opinions—opinions about labor’s grievances, about capitalistic exploitation, and about political corruption. Thus, the opinions of the defendants were given far more exposure in the *Illinois Reports* than they otherwise could ever have had through their insignificant newspapers.666

Thus, every lawyer or judge in this state, if his professional library is to be adequate, must find room on his shelves for some eighty pages of the most impassioned criticisms of the legal system he serves. Those attacks are preserved and easily made available to us all, a century later, by courtesy of the Illinois Supreme Court.667

The decisive refutation of those impassioned criticisms of our system of government is not found, however, in what the Illinois Supreme Court did but in what Governor Altgeld dared to say, and to teach us about the rule of law, in explaining why it was “clearly [his] duty” to act as he did.668

12. NOTORIOUS DEFENDANTS IN OUR TIME

12-A. Herman Wilhelm Goering, et al.669

I.

Almost a half-century has passed since twenty-two Germans, including the surviving leaders of the Nazi regime, were put on trial before an international military tribunal in Nuremberg, a city notorious in the history of the rise of the Nazi Party to power in Germany in 1933.670 The trial opened in the bomb-damaged Palace of Justice on November 20, 1945, some six months after the surrender of Germany. “The Tribunal on September 30 and October 1, 1946, rendered judgment in the first international criminal assizes in history.”671 Interest in the Nuremberg Trial continues to this day, as testified to both by the very large enrollment in a course I have on the trial this term at the Loyola Law School and by the size of the audience here today. That interest is intensified at times by such conduct as that associated with the Gulf War.

The student of the Nuremberg Trial should be reminded of the great puzzlement, if not even deep distress, that we have upon observing how callous, or at least detached, people can sometimes be when exposed to conduct and suffering that naturally shock the sensibilities of a decent community. I myself was reminded of what the natural response can be in such circumstances while watching a Mexican-American reenactment last Friday of the Pas-
sion story in the streets of San Antonio. Much of that Good Friday presentation could be responded to as theatrical, especially since a raised platform in El Mercado was the site of much of the outdoor drama. But there was a moment, before the on-stage performance, which had a different effect, at least on me, partly because it caught me completely by surprise. It happened that the movement of the actors to the stage (where Pilate, Herod, and others would carry on) passed within a few yards of where I was standing, something that I had not expected. Not only that, but the actors were already playing their parts, and this included a Roman soldier whipping before him a bound and stumbling Jesus. It seemed so much like “the real thing,” and was so little expected by me, that I could notice in myself a natural impulse to move forward to intervene, if only to protest the inhumanity I was witnessing. Fortunately I stopped myself in time—or, perhaps I should say, unfortunately, for I suspect such a response by a naive gringo would have been salutary or at least memorable. In any event, I am intrigued by my impulse and recall my having wondered, upon seeing the German people close-up at the end of the Second World War, what had happened to their natural sensibilities during a just-completed war in which horrible atrocities that defy description had been done on such a large scale in their name.

I also saw at that time how the major German cities had been flattened by aerial bombardment, so much so that one could stand in the center of Berlin, say, and not see an intact building in any direction. The damage done to the German cities was far worse than anything I saw at that time in either Paris or even London. (It was not until 1951 that I saw the devastated cities of Coventry and Rotterdam.) Few of us Americans who saw such devastation, and the misery of desperate Germans, were likely to recall, however, that deliberate assaults upon civilian population centers were once “universally” condemned as contrary to the rules of war.

My earliest personal recollection of the Nuremberg Trial goes back to my tuning in, while serving as a flying officer somewhere over Western Europe in a United States Army Air Corps plane, to a radio broadcast of the passing of sentences by the tribunal. This must have been on October 1, 1946. I do not recall that I had any reservations about what was being done on that occasion, which included the pronouncement of one death sentence after another.

One fact should be recognized at the outset of any account of the Nuremberg Trial: the men who were responsible for deeds of the enormity documented in that trial had to be dealt with somehow.
Hanging was too good for various of them, even if they were, in a sense, insane.

The indefensibility of the Nazis’ documented deeds of horror is evident from the way the defendants, including the most guilty among them, consistently presented themselves during the ten months of the trial. Particularly instructive were their final statements, in which most of them attempted to put considerable distance between themselves and the monstrous deeds that had by that time become all too familiar.

No doubt, the defendants were moved by a desire to save their skins. But there seems to be more than a concern for mere self-preservation evident in those statements. Personal self-esteem, if not even a troubled conscience, may also be exhibited there, especially by those who considered themselves doomed from the beginning of the trial. Thus, I do not believe that Hermann Goering was playacting when he expressed resentment upon hearing the British prosecutor refer to his “friend Himmler.” Heinrich Himmler was obviously so awful a man that none of the defendants wanted to be associated with him in any way. Various of the defendants were also concerned about their long-term reputations and the standing of their families. Almost all of them expressed as well a dedication, probably sincere in some cases, to the well-being of the German people.

In addition, it seemed, most of the defendants did come to care for what the tribunal thought of them. The seriousness with which the tribunal conducted itself month after month contributed to this, as did the gravity and extensiveness of the deeds that were marshalled against the defendants. This became a drama that naturally impressed itself upon all of its participants.

II.

The Nuremberg Tribunal conducted a trial based on an indictment in which each of the twenty-two defendants was charged on two or more of four counts. The four counts have been summarized in this fashion:

Count One charged the common plan or conspiracy to seize power, establish a totalitarian regime, prepare and wage a war of aggression. Count Two charged the waging of wars of aggression. Count Three charged the violation of the laws of war, and Count Four charged the crimes against humanity, the persecutions and exterminations.

These four counts are grounded in the Charter of the Interna-
tional Military Tribunal, signed in London on August 8, 1945, by representatives of the United States, France, Great Britain, and the Soviet Union.\(^6\) Count one (the conspiracy count) and count two draw upon the Crimes Against Peace provision in the Charter, count three upon the War Crimes provision, and count four upon the Crimes Against Humanity provision. The three provisions read:

(a) **CRIMES AGAINST PEACE:** namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing;

(b) **WAR CRIMES:** namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;

(c) **CRIMES AGAINST HUMANITY:** namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.\(^6\)

The Charter, "in order to ensure fair trial for the Defendants," directed that "the following procedures shall be followed":

(a) The Indictment shall include full particulars specifying in detail the charges against the defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the defendant at a reasonable time before the Trial.

(b) During any preliminary examination or trial of a defendant he shall have the right to give any explanation relevant to the charges made against him.

(c) A preliminary examination of a defendant and his trial shall be conducted in, or translated into, a language which the defendant understands.

(d) A defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of counsel.

(e) A defendant shall have the right through himself or through his counsel to present evidence at the Trial in support of his de-
fense, and to cross-examine any witness called by the Prosecution.682

Critical to the way the trial was conducted and to its results were the following two directives in the Charter:

Article 7. The official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8. The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determine that justice so requires.683

These directives were essential to the trial, especially since the Nazis, if not the Germans generally, made much of the “Fuehrer Principle.” That principle obliged one who had sworn allegiance to the Fuehrer to do whatever he was ordered to do by superiors who were part of a chain of command that led back to the Fuehrer.

III.

The International Military Tribunal was made up of a judge and his alternate from each of the four principal signatories.684 Most of these judges were civilians, even though the tribunal sat under military auspices in the American Zone of Occupied Germany.

The Indictment [prepared by the Prosecutors of the four nations] was presented at the first public session of the Tribunal, held October 18, 1945, at Berlin. It had organized by choosing the Right Honourable Lord Justice Geoffrey Lawrence of Great Britain as its President. His patience and Britannic calm did much to impress Defendants, their counsel, and spectators with the fairness and dignity of the proceedings.685

These are the words of Robert H. Jackson, chief of the American prosecution team.686

Of the twenty-two defendants, one of them, Martin Bormann, was tried in absentia.687 Two other defendants would have been tried: the senior member of the Krupp family, who was severed because of his senility,688 and Robert Ley, who committed suicide before the trial began.689 Several others would have been included if they had not died before the war ended: Adolf Hitler, Heinrich Himmler, Joseph Goebbels, and Reinhard Heydrich.690

Three of the twenty-two defendants were acquitted of all charges and released by the tribunal.691 Four defendants received sentences ranging from ten to twenty years, three received life sentences, and twelve were sentenced to death.692 One of these twelve, Bormann,
was probably already dead; another of them, Goering, committed suicide in his prison cell while awaiting execution. The remaining ten were executed on October 16, 1946, a fortnight after the tribunal delivered its judgment.693

The eminence of the defendants and the scope of the deeds documented during the trial provided a testing of the principles and practices of a regime which was radically nationalistic and, in its own terms, deeply patriotic.694

IV.

The first of the set of crimes described by the Charter of the tribunal are the crimes against peace. These are drawn upon in the indictment for count one, the conspiracy count, as well as in count two.695 Vital to these two counts, if not to all four, is the recourse by a government to wars of aggression. Justice Jackson, in justifying the first two counts, speaks of

the re-establishment of the principle of unjustifiable war [as being] traceable in many steps. One of the most significant is the Briand-Kellogg Pact of 1928, by which Germany, Italy, and Japan, in common with ourselves and practically all the nations of the world, renounced war as an instrument of national policy, bound themselves to seek the settlement of disputes only by pacific means, and condemned recourse to war for the solution of international controversies.696

Serious questions were raised then, and have been heard since, as to whether a justiciable crime could be based on such an approach. Several of the defendants denied that Germany had incurred any guilt in the way she had conducted her foreign affairs, especially after what had been done to her through the Treaty of Versailles after the First World War.697 One difficulty here is that of determining where one starts in weighing the equities of a controversy.698 The status quo at any particular time for one country may be partly the result of serious injustices visited upon it by other countries a generation or two earlier. It must be a rare country that does not have a plausible grievance against others. Even rarer, perhaps, may be countries with no questionable conduct in the way they have conducted their foreign affairs from time to time.699

The bitter grievances of the German people, as well as a general economic debacle, had been exploited by the Nazis in coming to power.700 A sensible and just assessment of the foreign policy of a country, including its recourse to war, may depend too much on "history" to provide a reliable basis for judicial (as distinguished from political) decisions.
It is indicative of the difficulty of dealing properly with the crimes against peace offenses (counts one and two) that although all twenty-two defendants were charged with count one, only eight of them were convicted on that conspiracy count.\textsuperscript{701} This suggests that such charges should be used with extreme caution hereafter, especially if a conspiracy charge permits saddling defendants with the intentions and deeds of others that they might have known little or nothing about.\textsuperscript{702} As for the somewhat more restrained count two, sixteen of the twenty-two defendants were charged with that. Four of them were acquitted.\textsuperscript{703} The twelve convicted on count two included the eight convicted on count one. That is, barely half of all of the defendants were convicted of crimes against peace.\textsuperscript{704}

It is somewhat reassuring, considering the problems I have been noticing about the crimes against peace, that only one defendant was convicted and sentenced on count one and count two alone. That was Rudolf Hess, Hitler's most intimate associate before he flew off to Scotland on a harebrained mission in the middle of the War.\textsuperscript{705} It is also somewhat reassuring that Hess's life sentence may not really have mattered much to him, considering the mental condition he was obviously in throughout the trial and, evidently, for some time before. It may have seemed to the tribunal that no meaningful freedom was available for him, no matter where he happened to be during the rest of his life.\textsuperscript{706}

Far less questionable than the crimes against peace charges were the war crimes charges and the crimes against humanity charges.\textsuperscript{707} Hess aside, then, the defendants who were convicted were punished (at least in part) for offenses that do not require much in the way of historical investigation, political analysis, or legal argument to recognize as deserving of condemnation.

V.

It can be a matter of considerable dispute whether a country's grievances and circumstances call for, or at least excuse, a war on any particular occasion. But how a war should be conducted, once embarked upon, is guided by the laws of war, a body of rules (some of them spelled out in treaties) which seem to be widely accepted, at least by and among the Western nations. These rules direct how prisoners of war should be treated, how conquered peoples are to be used, and how war itself is to be fought in a variety of circumstances.\textsuperscript{708}

Not only were war crimes offenses generally known, so was the
mode of punishing them, with national military tribunals usually relied upon. That was the practice well before Nuremberg. All but three of the defendants who were convicted on any count were found guilty of war crimes.709

Crimes against humanity are at least as unambiguously reprehensible as war crimes. There was no question during the trial but that terrible things had been done by the Nazis to millions of innocent people. None of the defendants tried to justify these offenses. In fact, all but three or four of them, in their closing statements, spoke against these offenses in the strongest terms.710 So reprehensible were these offenses, which could be resorted to on this scale only under cover of war, that the Nazis never acknowledged them publicly during the war, even while they were winning and were still confident of ultimate success.711

The principal concern of most of the defendants was to establish that they had not even known of the crimes against humanity, that those crimes had been the doings of Hitler and the men closest to him for this purpose (such as Himmler and Goebbels).712 It is significant that all of the defendants who were sentenced to death were found guilty of crimes against humanity.713

VI.

Most of the defendants, having insisted that they never knew of the atrocities of the concentration camps, described themselves as horrified upon learning about them, some of them for the first time (they said) during the trial.714 I do not believe that anyone ever said during the trial, “I always knew about these things, approved of them, and even helped carry them out. They were harsh measures that were necessary for the purgation and salvation of Germany,” etc. etc. No monuments were erected, either in words or in stone, in praise of these mammoth massacres. Defeat, it seems, unnerved even the most fanatical believers with respect to these deeds, the more so because the Nazi faith depended for its mystique on assurances about the ultimate success of the overall Nazi program.

It was harder, of course, for the defendants to deny knowledge of the foreign policy of the Nazi regime than it was for them to deny knowledge of the programs of systematic killings in the camps. Those defendants who were involved in the formulation and execution of that foreign policy had to deal with it differently at trial from the way they dealt with the crimes against humanity and the war crimes. But then, I have argued, the rights and
wrongs of foreign policy are much more difficult to sort out, especially when the observer steps back from immediate engagement in a war which threatens his country.\textsuperscript{715} The enormity of the crimes against humanity, on the other hand, becomes more and more obvious as they become better known: to know such crimes is, for most people, naturally to hate them.

It can be difficult to determine what to make of those defendants (if any there were) who were indeed ignorant of the atrocities of the regime they supported for a decade. Which is worse in such matters, to be cynical or to be gullible?\textsuperscript{716} Cynicism consists here in supporting men whom one suspects to be ruthless, if not even evil, in the hope that from such support something good will come about for oneself, if not for one's country. Gullibility consists here in supporting men whom one does not really know, entrusting them with vast powers, in the irresponsible hope that one's country will benefit. Goering, who proclaimed that he remained loyal to Hitler to the very end, insisted that he had not known of the slaughter in the concentration camps.\textsuperscript{717} He never seemed to appreciate what he was revealing about a regime, or about loyalty to the leader of a regime, in which the "Number 2 man at that time in all Germany"\textsuperscript{718} was not informed about, or did not know of, atrocities of the scale systematically practiced by the Nazis for years.

This, almost as much as the atrocities themselves, points up the deep irrationality of the Nazi regime.

\textbf{VII.}

Almost all of the defendants agreed—some explicitly, others tacitly—that it was inexcusable to order, to perform, or to support the terrible things done in the concentration camps and elsewhere. They conceded, in effect, that such conduct should be punished by someone.

In speaking as they did, whatever some of them may have "really" believed, the defendants reflected what had to be said publicly about such deeds. By speaking as they did, they repudiated in effect the principles of the Nazi regime. When they tried to describe these atrocities, they could not help, it seems, but refer again and again to them as insane or mad.\textsuperscript{719} The immediate perpetrators of these atrocities in the camps certainly exhibited madness in the way they mistook the human beings they personally killed for vermin or other deadly pests that had to be exterminated.\textsuperscript{720}

The inability of the defendants after the war to speak on behalf
of these deeds mirrored the inability of the Nazi government during the war to publicize the extermination “service” it was rendering the German people and the European community. The natural limits of what human beings can openly acknowledge doing to one another seem to be evident here. Despite years of virtually unchallenged control of their country, the Nazis still could not depend on the German people at large to accept what was happening. In fact, if the defendants are to be believed, the leaders directly responsible for systematic atrocities could not even depend on most of their Nazi Party colleagues with respect to these matters.\textsuperscript{721}

The madness of the overall Nazi enterprise was exposed to public view once the massive military defeat of Germany made people face up to reality. So grotesque were the atrocities that the most guilty among these defendants would have been in a bad way, even if they had not been captured, tried, and punished.\textsuperscript{722} It is awful and deeply demoralizing to have done such things, whether or not one is exposed and dealt with. The sustained and disciplined evil of the Nazi regime has seemed to me, for more than four decades now, to be simply incomprehensible, which is perhaps another way of saying that it was indeed a mad enterprise.\textsuperscript{723}

Perhaps we will see published some day memoirs of thoughtful Russian observers at Nuremberg who were aware of what Joseph Stalin and his minions had done back home. American observers were probably reassured that the Japanese relocation camps were significantly milder both in purpose and in effect, whatever might be said about the treatment of slaves and Indians in nineteenth-century North America.\textsuperscript{724}

It does make a difference in these matters whether a policy is publicly known. An effort to justify a questionable policy can, in an otherwise civilized community, contribute eventually to transforming that policy into something that is justifiable. The systematic concealment by the Nazis of their worst crimes does reassure us that they were sufficiently aware of the terribleness of their deeds for the purpose of the criminal law.

VIII.

It was not only the defendants who were on trial at Nuremberg, but also the tribunal and, in effect, the victors in the Second World War. It was noticed several times during the trial that the defendants were given much more of a hearing than they had allowed, or had even pretended to allow, their victims.\textsuperscript{725}

The tribunal conducted itself fairly well. It is not difficult, upon
examining the record, to see why the tribunal acted as it did in the
disposition of various cases. If the Russian judges and Justice
Jackson, as the American prosecutor, had gotten their way, how-
ever, there would not have been the three acquittals. That
would probably have been unfortunate for the long-term effect of
the proceedings.

The tribunal did what it did in full view and with a voluminous
public record. It was taken seriously, which was reinforced by its
sense of dignity, its orderliness, and its evident discrimination be-
tween defendants in its final judgment. It perhaps helped, on
this landmark occasion, that the defendants were Germans: their
almost instinctive respect for authority permitted the proceedings
to be carried on with the appropriate solemnity.

It can be useful to lay down, or to reaffirm, rules and standards
in this fashion. Governments, or men in government, may be
guided by such things. The law, from whatever source, does in-
struct us as to good and bad. It does not always need physical
sanctions in order to make a difference in guiding us.

One way or another, that is, the exercise of power has to be mod-
erated if both the powerful and their victims are to be spared evil
deeds. Particularly sobering here is the counsel given by a defend-
ant, one of the three acquitted, in his closing statement:

The prosecutors have expressed the horror of their nations at the
atrocities which occurred. They did not expect any good from
Hitler, and [yet] they are shattered by the extent of what really
happened. But try for a moment to understand the indignation
of those who expected good from Hitler and who then saw how
their trust, their good will, and their idealism were misused. I
find myself in the position of a man who has been deceived, to-
gether with many, many other Germans of whom the Prosecu-
tion says that they could have recognized all that happened from
the smoke rising from the chimneys of the concentration camps,
or from the mere sight of the prisoners, and so forth.

I feel that it is a great misfortune that the Prosecution has pic-
tured these matters in such a way as if all of Germany had been a
tremendous den of iniquity. It is a misfortune that the Prosecu-
tion is generalizing the extent of the crimes which are in them-
selves horrible enough. As against this I must say that if anyone
once believed in Hitler during the years of peaceful reconstruc-
tion, he only needed to be loyal, courageous, and self-sacrificing
to go on believing in him until, by the discovery of carefully-
hidden secrets, he could recognize the devil in him. That is the
only explanation for the struggle which Germany carried on for
68 months. Such a willingness to sacrifice does not grow from
crime, but only from idealism and good faith, and from clever and apparently honest organization. I regret that the Prosecution has undertaken to generalize the crimes, because it is bound to add still more to the mountain of hatred which lies upon the world. But the time has come to interrupt the perpetual cycle of hatred which has dominated the world up to now. It is high time to call a halt to the alternate sowing and reaping of new harvests of hatred. The murder of five million people is an awful warning and today humanity possesses the technical means for its own destruction. Therefore, in my judgment, the Prosecution should not replace one hatred by another.\textsuperscript{730}

IX.

I have noticed that war crimes, of which all but three of the convicted men were found guilty, had been long recognized and occasionally punished, at least in the Western world. I should also note that the defendants complained that the crimes against peace and the crimes against humanity charges were \textit{ex post facto} in that there had been no previous authoritative declaration that these were offenses subject to formal adjudication and punishment.\textsuperscript{731}

The war crimes convictions do tend to soften the concern one might have here about anyone convicted as well for the two seemingly \textit{ex post facto} offenses. And, to carry my somewhat technical response further, the use at Nuremberg of the crimes against peace and the crimes against humanity charges tends to legitimate \textit{them} for possible use "next time." This can be considered to be a service to which the reluctant defendants contributed.\textsuperscript{732}

Even so, the student of the Nuremberg Trial who might be moved by the \textit{ex post facto} concern should be reminded that most of the defendants themselves did speak of the massive atrocities as deserving punishment. Further, the student should consider what the principal purpose is of a prohibition against \textit{ex post facto} laws. Is not the prohibition relied upon to make sure that a man is not caught by surprise, having to answer charges for acts that he could not have anticipated would ever be regarded as criminal?

None of the defendants, it seems, questioned that someone should be able to do something to the men responsible for the systematic atrocities for which the Nazis were responsible. No law or precedent was needed to alert men to the evil of such acts, acts which they diligently concealed from public view.\textsuperscript{733} Besides, it is hardly likely that it would have made any difference to the instigators of those deeds if the well-known worldwide abhorrence of
such deeds had been formalized in a treaty or other instrument. Nor is it likely that the most evil of men hereafter will be deterred by what happened at Nuremberg, especially if they are confident of success in their projects. But this does not keep the judgment of Nuremberg from having a salutary effect. It affirms civilized standards for the world at large, standards which can be invoked by those who want to arouse opposition in their own country to the doings of evil men amongst them. It provides some retribution, even if not deterrence, in the worst cases. And it perhaps guides aright some of those who might be tempted or directed to do terrible things.

There was, we have noticed, no serious doubt at Nuremberg that someone should be able to do something about the perpetrators of the worst Nazi atrocities during the Second World War. Whether anyone would be able to do so might depend on chance, including both the chance of who is detected and apprehended and the chance of whether a tribunal is made available. When the crimes against humanity are as elemental and extensive as they were here, shocking the entire world upon discovery (and even silencing their perpetrators), it would make a mockery of justice to pretend that the perpetrator of such deeds could not have known that he might be punished some day for what he did.

It will hardly do, then, to defeat justice by invoking traditional rules, such as the _ex post facto_ prohibition, on behalf of men who had repudiated in the most comprehensive way one elementary rule and standard after another. Those rules are made for men, not men for those rules: their spirit and purposes should not be forgotten. One end of law is justice, gross violations of which are subject to correction even in the absence of explicit promulgation of rules by a sovereign power. A dedication to justice helps legitimate the very existence of sovereign power.

X.

We should also notice that there may not be even a technical _ex post facto_ problem when dealing with atrocities committed by the Nazis outside Germany, which is where most of them took place. The occupied countries, once liberated, need not recognize German laws and practices: the people of those countries had not invited the Germans; nor had they authorized the Germans to set aside the laws of the occupied countries.

This particular argument might not seem to apply to the atrocities committed in Germany against German nationals, such as the
Jews, before as well as during the war. But are not such domestic offenses, on the scale and with the intensity seen here, something like piracy? Pirates have long been regarded as the common enemy of mankind, to be summarily dealt with by their captors—and civilized victors should take this kind of response into account when dealing with the perpetrators of crimes against humanity.736

Furthermore, the punishment of Germans for what they did in Germany, even when there was no German law explicitly forbidding what was done, may be a variation upon the exercise of the right of revolution. One's sense of humanity naturally reacts against what the Nazis did in their crimes against humanity, no matter what passports their victims happened to hold. There is here a natural sense of revulsion, from which a right of revolution readily flows. Among the prerogatives of the victors in such circumstances is the right, and perhaps the duty, to deal with monsters one way or another. Prime Minister Churchill, for example, argued during the war that the worst Nazis should, upon being captured, simply be shot.737

XI.

The Germans, well before the Nazis came to power, made a lot of the state and the authority of those acting for the state. Justice Jackson, in his opening statement for the prosecution said that "the German people [are] accustomed to look upon the German State, by whomever controlled, with a mysticism that is incomprehensible to [the American] people."738 One manifestation of their virtual worship of the state was the emphasis placed by them upon the oath of allegiance.

Most of the defendants at Nuremberg, we have noticed, made much of the German people, a people who did yearn for something higher and who could be appealed to on that ground.739 The Germans' long-standing, and deeply ingrained, dedication to loyalty, justice and fellow feeling could be drawn upon by their leaders—but in such a way as to strip them of any regard about how outsiders were treated.740 Most Germans, whatever they suspected, may not have known that the Jews were being routinely slaughtered in the concentration camps741—but they had known for years that it had become very dangerous to be a Jew in Germany, and they had tolerated that corrupting state of affairs.742

Fundamental to the German, or any other, emphasis upon the state is a reliance upon legal positivism, with its reliance in turn upon the sovereignty of the will. The most authoritative willing in
these circumstances emanates from the state. The principal ideologist of the Nazi Party, Alfred Rosenberg, put the Nazi ideal in this way in his closing statement (shortly before he was convicted on all four counts and sentenced to death):

Among other matters, the Soviet prosecutor stated that the entire so-called “ideological activity” had been a “preparation for crime.” In that connection I should like to state the following: National Socialism represented the idea of overcoming the class struggle which was disintegrating the people, and uniting all classes in a large national community. Through the Labor Service, for instance, it restored the dignity of manual labor on mother earth, and directed the eyes of all Germans to the necessity of a strong peasantry. By the Winter Relief Work it created a comradely feeling among the entire nation for all fellow-citizens in need, irrespective of their former party membership. It built homes for mothers, youth hostels, and community clubs in factories, and acquainted millions with the yet unknown treasures of art. For all that I served.743

Rosenberg speaks here of creating “a comradely feeling among the entire nation,” of uniting all classes “in a large national community.” But one highly placed defendant after another reported that the most reprehensible programs which we can recognize as characteristic of the Nazi regime had been thoroughly hidden even from the leadership for years. What sense of community can there be when that can happen? One is reminded of Aristotle’s insistence that Babylon was not a polis: part of it had once fallen to the enemy without that being known for days in some other parts of Babylon.744

XII.

The true believers among the Nazis, some of the defendants reported, were particularly disturbed by the willingness of Hitler to see Germany destroyed with him when the end came.745 This revelation exposed to them the abyss that had always been there.

To speak of an abyss here is to notice once again the profound irrationality at the core of the Nazi regime. This led to, and depended on, conduct that could not be acknowledged or explained, highly destructive conduct that could not really be understood by others. It could not even be truly understood by those immediately involved in such conduct.

Leo Strauss used to say that the only principle the Nazis had was hatred of the Jews.746 Is that what a fervent nationalism comes down to, then, a hatred of the other? The Jews were, for the
Nazis, "the other" *par excellent* (with the far-roaming Gypsies, perhaps, a runner-up). This was not, however, simply a matter of the Nazis *using* the Jews in order to advance their interests. Rather, they would obsessively destroy Jews even when it did not serve their immediate wartime interests to do so.\(^7\)

The Jews were perceived as a continuing threat, perhaps ultimately because the Nazis sensed that, however patriotically a German Jew might act from time to time (as during the First World War), he looked to something higher than the state for his highest inspiration and guidance. And those things—both the Jew and the One to whom he looked—the Nazi could not bear to contemplate.\(^7\)

XIII.

Whatever their limitations, the Nuremberg proceedings deferred to forms and justice in ways that the Nazis never could.\(^7\) No doubt, some hypocrisy could be detected there, not least because of what the Russians were being subjected to at home and were themselves doing at that very time in eastern Europe.\(^7\) Even so, the Nuremberg judges *were* acknowledging that others would be justified in subjecting *them* in turn to the same standards.\(^7\)

Although serious differences were already developing between the United States and the Soviet Union during the course of the trial, the prosecutors and judges of the four powers could pretty well agree about the substance of the crimes against humanity.\(^7\) Nature was thus publicly reaffirmed by all the parties: that is, it cannot be too often pointed out that fundamental moral standards were invoked and acknowledged by everyone at Nuremberg, including by the defendants who had been loyal to Hitler and by the two judges who had been appointed by Stalin.\(^7\)

What were these Nazi defendants entitled to at Nuremberg? That their trial and condemnation would be an affirmation of their humanity. They were, to some degree, redeemed by their trial, having been given an unearned opportunity to state their positions upon discovering the worst things about themselves. They were given an opportunity thereby to make a contribution to that vindication of natural right which the Nuremberg Trial does stand for in a relativistic age.

An opportunity was also given the defendants, which several took advantage of, to protest what was then being done to the Germans by their conquerors.\(^7\) Among these critics was Hans Frank, who was executed for crimes committed by him as gover-
nor of Occupied Poland. Frank had been so moved by the revelations of the trial, it seems, that he said on the witness stand that “a thousand years would not suffice to erase the guilt brought upon [the German] people because of Hitler’s conduct in this war.”

His closing statement included sentiments that could well have been endorsed by many of his fellow defendants:

I am grateful that I was given the opportunity to prepare a defense and justification against the accusations raised against me. In this connection I am thinking of all the victims of the violence and horror of the dreadful events of war. Millions had to perish unquestioned and unheard. I surrendered my war diary, containing my statements and activities, in the hour when I lost my liberty. If I was really ever severe, then it was above all toward myself, at this moment when my actions in the war were made public.

I do not wish to leave any hidden guilt which I have not accounted for behind me in this world. I assumed responsibility on the witness stand for all those things for which I must answer. I have also acknowledged that degree of guilt which attaches to me as a champion of Adolf Hitler, his movement, and his Reich.

I deferred until my trip downtown this morning the preparation of the conclusion of this talk in which I want to caution against the sentimental repudiation of all forms of strength, a repudiation to which all too many intellectuals may be inclined because of the dismal records of both the Nazis and the Stalinists in the twentieth century. But it should never be forgotten that it had required superior strength, physical as well as moral, to subdue the Nazis and bring them to justice. It does not bode well for civilization if the use of strength is repudiated by all but the wicked.

I began today by recalling my experience last week in San Antonio with a Good Friday celebration. I had this morning, as I biked downtown along the lake front from Hyde Park on this Eastern Orthodox Good Friday, another instructive experience. I came upon a falcon that had just grounded a pigeon. Here, too, strength was very much in evidence, brought to bear on a mild-mannered victim by a bird of prey whose power and majesty excited attention, if not even admiration. And this I can say although I am one of that minority who find pigeons to be attractive birds.

The Nazis fancied themselves the falcons, if not the eagles, of the world, entitled by the laws of nature to feast upon the pigeons they conjured up. There is indeed something natural, and hence in a sense proper, in the way the falcon conducts itself. But we must never lose sight of the fact, providentially recalled for us by my
falcon's display this morning, that what may be natural and acceptable in a fierce bird is not to be tolerated in human beings by anyone who truly understands the dictates of nature.  

12-B. Julius Rosenberg, Ethel Rosenberg, and Morton Sobell

I.

Twenty-six years after Julius and Ethel Rosenberg were executed at Sing Sing Prison, a leading member of the Chicago bar recalled

that the reaction of the Government attorneys involved to Justice [William O.] Douglas's stay [of execution, on June 17, 1953 had been] one of "outrage." For "at that stage when everything had been thought to have been passed upon by the Supreme Court itself"—indeed a number of times—[Justice] Douglas "had blocked the normal course of judicial procedure." And so Chief Justice Fred Vinson was prevailed upon by the attorney general and this lawyer "to reconvene the Court, which had just adjourned for the summer." 

This recent recollection, by a lawyer who was at that time acting solicitor general, is rather curious. His "outrage" itself borders on the outrageous, unless it is assumed that he does not realize what he is saying. It is implied in the article which reports on an interview with this Chicago lawyer, that "everything" had been reviewed by the Supreme Court, when in fact very little had been, inasmuch as the Court had repeatedly refused to take the case for substantive review. Justice Hugo L. Black concluded his dissenting opinion of June 19, 1953, seven hours before the execution of the Rosenbergs,

It is not amiss to point out that this Court has never reviewed this record and has never affirmed the fairness of the trial below. Without an affirmanonce of the fairness of the trial by the highest court of the land there may always be questions as to whether these executions were legally and rightfully carried out.

It is also implied in the solicitor general's recollections, as well as by other apologists for the way the Rosenberg case was handled by an indignant government, that Justice Douglas's stay of execution would have prolonged unconscionably what had already been unduly prolonged proceedings, when in fact the other two capital cases upon which the Court issued opinions that very week in June 1953, had been in the courts substantially longer.

The circumstances of the Rosenberg case were such that, it seems to me, "the reaction of the government attorneys involved"
should have been one of relief rather than one of “outrage.” That is, whatever they thought as professionals of the technicalities either of the question raised before Justice Douglas or of the way that that question had been raised, they should have been relieved that there would be time for further reflection, and especially that a new president would be given more time to consider executive clemency in the event all judicial remedies invoked on behalf of the condemned couple failed.

One cannot pass responsible judgment on what happened then and how lawyers and others conducted themselves, however, without recalling how the *Rosenberg-Sobell case seemed to us in June 1953.*

II.

I should state at the outset of my necessarily incomplete review of this case that I am not an “expert” in the matter. I did read with some care, many years ago, the entire trial record. I have followed discussions of the case over the years. And I have long been intimately associated with Professor Malcolm Sharp, whom I first met in 1948 when I entered the University of Chicago Law School. He was one of the lawyers for the Rosenbergs in the last desperate weeks of the case in June 1953. This review of the *Rosenberg-Sobell* case is, in part, a recognition of the fair-mindedness of Malcolm Sharp as a resolute champion of lost causes—and especially those causes which seem to him to bear on the passions which account for war.

I begin this review of the case by drawing upon an account in *New Times,* an account sympathetic to the Rosenbergs. This account was first called to my attention during a Chicago television appearance I made in 1975 with Michael Meeropol, the older son of the Rosenbergs. The *New Times* article includes these observations which, I believe, would be generally agreed upon:

On July 17, 1950, a 32-year old engineer named Julius Rosenberg was arrested in his home, while his older son Michael listened to the Lone Ranger on radio, and was charged with participating in an espionage conspiracy. A little less than a month later, his wife, Ethel, 34, was arrested on the same charge. Ethel and Julius, both the children of poor Jewish immigrants, had grown up in poverty on New York’s Lower East Side. Like many of the Depression generation in America, the couple had turned sharply to the Left; they probably were members of the Communist Party. Shortly after their marriage, Julius went to work as a junior engineer for the government’s Signal Corps. Their first son,
Michael, was born in 1943, the second, Robert, in 1947. In 1945 Julius was fired from the Signal Corps for Communist associations. He went to work for a private firm, and then became a partner in a small machine shop. One of the other partners was Ethel's younger brother, David Greenglass.

Julius and Ethel Rosenberg were charged [in an indictment of August 17, 1950] with masterminding an espionage ring that had spirited the atomic secret out of the United States to the Soviet Union. On trial with them was another engineer, Morton Sobell, accused of being part of the espionage ring but not with participating in the atomic theft. . . . The trial [of Julius and Ethel Rosenberg, Morton Sobell and David Greenglass] opened in the U. S. District Court in New York City on March 6, 1951, under Judge Irving R. Kaufman—at 40, one of the youngest men on the federal bench. Judge Kaufman now sits as chief of the United States Court of Appeals for the Second Circuit . . . .

On April 5, 1951, at the conclusion of their trial for conspiring to commit espionage in violation of the Espionage Act of 1917, the Rosenbergs were sentenced to death; Mr. Sobell was sentenced to thirty years in prison, the maximum for his more limited offense. The next day Mr. Greenglass was sentenced to fifteen years in prison. Mrs. Greenglass was never indicted.

The principal criminal acts charged against the Rosenbergs and the Greenglasses were alleged to have taken place in 1944 and 1945 and to have taken advantage of Mr. Greenglass's employment as a machinist on the atomic-bomb development at Los Alamos, New Mexico. Information about the atomic bomb collected by Mr. Greenglass was passed on, it was alleged, to the Russians. The atomic bomb was used, as we all know, at the end of the war with Japan in August 1945. In September 1949, President Truman announced that the Russians had set off a nuclear explosion of their own.

In February 1950, Klaus Fuchs, a prominent nuclear physicist who had worked on the atomic bomb in the United States as well as in Great Britain, was arrested in England. He was tried there and convicted on the basis of his confession that he had furnished considerable atomic-bomb information to the Soviet Union. He was sentenced on March 1, 1950 to fourteen years in prison. The arrest of Mr. Fuchs led to the detection and arrest in this country of Harry Gold, who had been Mr. Fuchs's courier in the United States. This in turn led to the detection and arrest (on June 15, 1950) of Mr. Greenglass, who thereupon implicated the Rosenbergs.
In the meantime—that is, since June 1950—the United States had been engaged in the Korean War. In late 1950, the Chinese entered the war.

III.

The tenor of those ugly times is suggested by the following excerpt from the rather disturbed and disturbing speech made by Judge Kaufman when he sentenced the Rosenbergs to death:

I believe your conduct in putting into the hands of the Russians the A-bomb years before our best scientists predicted Russia would perfect the bomb has already caused, in my opinion, the Communist aggression in Korea, with the resultant casualties exceeding 50,000 and who knows but that millions more of innocent people may pay the price of your treason. Indeed, by your betrayal you undoubtedly have altered the course of history to the disadvantage of our country.\textsuperscript{771}

The words “your treason” suggest that the Rosenbergs may have been, without due regard for constitutional limitations, sent to their death for “treason,” an offense which was neither alleged \textit{nor provable} by the government.\textsuperscript{772} In effect, Judge Kaufman may have condemned the Rosenbergs either for a mistaken prediction by “our best scientists” or for a mistaken judgment by the secretary of state who discounted publicly, before the North Koreans’ move south in 1950, the importance for the United States of the Korean Peninsula.\textsuperscript{773} The \textit{Rosenberg} case was, at least in part, a sedition case, as well as a treason and an espionage case: the political opinions associated with the defendants affected both the judgment of and the sentences pronounced by the trial judge.

The tenor of the times is also suggested by what Gloria Agrin, who as a young lawyer had helped Emanuel Bloch and his seventy-four-year-old father Alexander Bloch in the defense of the Rosenbergs, says now in response to those who suggest that Mr. Bloch lacked sufficient trial experience and that he was too polite and acquiescent during the trial:

Bloch was an experienced trial lawyer, but he was working under tremendous handicaps. We had no way of even hiring investigators. He was improvising all the way through the trial. We couldn’t even get a lawyer to come in to assist us at the trial. Bloch and I were isolated. Left-wing lawyers walked across the street when they saw us coming—they didn’t want to be tarred by the spy brush. Bloch was working without fee. Both of us went broke. We lost our shirts.\textsuperscript{774}

I have been told by several lawyers who knew Mr. Bloch (who
died of a heart attack in January 1954) that he felt “terribly isolated” from the bar during most of the time he had this case. He knew his limitations as a criminal trial lawyer and realized he was risking mistakes which might prejudice the case for his clients, but he could not get competent criminal lawyers to advise him or, as an experienced and successful Chicago trial lawyer told me a decade ago, “even to talk to him.”

The tenor of the times is suggested as well by the fact that both parents of young children should have been executed the very day that the Supreme Court vacated a stay of execution which had promised at least a summer of relief—and this for giving to a wartime ally “the secret” of “the A-bomb.” Serious doubts have also been raised from time to time about the propriety of the government having treated the Rosenbergs as if they were equally culpable.

The critical question in thinking about such a case as this is, it seems to me, a simple one, “Was justice done?” My own answer is today, as it was a quarter of a century ago, “No.” I believe now, as I did then, that the sentences exacted both of the Rosenbergs and of Mr. Sobell were grossly excessive—and this I say without assuming any of them innocent and without assuming that the death penalty is never proper. Thus, the excessiveness, even brutality, of the sentences was enough to make what happened unjust.

In some ways, what was done to Mr. Sobell was even worse than what was done to the Rosenbergs. One could attribute the killing of the Rosenbergs to the passions of the day. But keeping Mr. Sobell in prison for more than eighteen years, even if the evidence upon which he had been convicted had been far stronger than it was, was the product of bureaucratic callousness and political spinelessness.

The evidence against the Rosenbergs was considerably more substantial than that against Mr. Sobell. But almost all of it came down essentially to the question of who was to be believed, the Rosenbergs or the Greenglasses. Mr. Greenglass, it will be remembered, was Mrs. Rosenberg’s younger brother. The Greenglasses confessed to espionage and were backed up, in their claims about what they had done, by the erratic Harry Gold. Mr. Gold testified to absolutely no personal contact with, and to little if any knowledge of, the Rosenbergs. The Greenglasses’ confessions would have made about as much sense with the Rosenbergs out of the picture as with them in it. That is, either the Greenglasses made their own contacts with a critical Russian diplomat in New
York or the Rosenbergs did. One account seems to me, working from the trial record alone, about as likely as the other.

Each couple had considerable interest in telling the story it did. The Rosenbergs thereby removed themselves from involvement in a serious matter; the Greenglasses thereby minimized their roles, portraying themselves as instruments of their elders, the Rosenbergs. It should be added that there seems to have been bad blood between the two couples, partly because of difficulties encountered in the small business they had operated together after the war. Who was to be believed? The jury evidently believed the Greenglasses as did the trial judge and the prosecutors, who included, among others, Irving Saypol and Roy M. Cohn.778

I add “the prosecutors” because it seems to me that the prosecution, as well as the government attorneys on appeal, firmly believed that the Rosenbergs were guilty. I have never believed that the current search through government files will turn up evidence that government attorneys were a knowing party to a frame-up. A frame-up theory is much less interesting and instructive than what I suspect really happened. For one thing, frame-up (like conspiracy) theories make far too much of malice and deliberation and not enough of incompetence and passion, and hence chance, in human affairs.

To say, however, that “the government” was sincere is not to say that it behaved as it should have. It was, in various ways, unscrupulous and self-righteous; it made far more of the danger to the country resulting from the alleged espionage than it was entitled to do; and it did not take due account of the radically changed circumstances since 1944-1945.779 In addition, it did not permit sufficient leeway for the possibility that the Greenglasses were lying about one or both of the Rosenbergs.

My impression has always been that neither couple was particularly believable, that both sides stretched the truth somewhat. But more critical is whether the Greenglasses should have been believed to the extent they were, since the burden of proof in such cases is the Government’s. If both the Rosenbergs and the Greenglasses were involved in espionage, it need not have been quite as sophisticated and extensive as the Greenglasses described it. For one thing, David Greenglass seems to have been rather gullible. I suspect that he believed a lot of things that were not so—and then embroidered them somewhat to make his case even more persuasive with the authorities who were threatening his immediate family.
Thus, I suspect (assuming the guilt of the Rosenbergs) that David Greenglass might well have been told by Mr. Rosenberg that a console table—the famous console table around which the newly-discovered-evidence motions turned at the end—had come from the Russians and that it had been fitted up for micro-filming, when in fact neither statement by Mr. Rosenberg was true. It would not be beyond Mr. Greenglass or his wife to add (on this assumption) that they had even been shown a place hollowed out in the table for a camera.

On the other hand, the Greenglasses (assuming the Rosenbergs innocent of atomic espionage) could have figured that the Rosenbergs really had gotten them into all this trouble through ideological indoctrination and that the Greenglasses should not alone pay the penalty, with perhaps no one anticipating death penalties if the blame were thus spread out. That is, the Greenglasses (still assuming the Rosenbergs innocent of espionage) might have found themselves getting in deeper and deeper—and, with even younger children than the Rosenbergs had, they too were in a vulnerable condition. Later, they probably lost their nerve, as did the government officials who did not intervene to stop the executions. But all this is conjecture. The fact remains that the Rosenbergs were executed. The Greenglasses dropped out of sight once Mr. Greenglass was released from prison in 1960.

IV.

In preparing this review of the case, I have been helped most of all by reconsidering Malcolm Sharp's book, Was Justice Done? The Rosenberg-Sobell Case.

It is significant that Mr. Sharp's book would not be published in the 1950s by any large commercial publisher. Nor was Mr. Sharp's book generally reviewed, even though he was widely respected as a Chicago-School, “free market” law professor.

The introduction provided for the Sharp book by the Nobel Prize chemist, Harold C. Urey, is like a breath of fresh air for anyone familiar with the record of and discussions about the case. The common sense of a truly intelligent man can be refreshing. Thus Mr. Urey shrewdly observes, “What a bother console tables must have been to Yakovlev [the Russian diplomat]! Why not give your spies cash and let them buy their own tables?”

Of the testimony about the hollowed-out table and the micro-filming, Mr. Urey can say, “Now I wish to ask some simple questions of technically trained men. On what principle do you think
this device worked? How would you design it? Whom would you get to do the cabinet work? How much would it cost? Why not buy an ordinary commercial device and keep it permanently in a locked closet? How would you prevent visitors from lifting the top and exposing this device to view? Well, ask your own questions. This is all obviously nonsense."

Mr. Urey might well be right, even though I can see (as I have indicated) that this “nonsense” could have originated with the Rosenbergs themselves. But since this story about the table is on its face highly questionable, a fair-minded court would have responded to the proffer by the defense of the newly discovered table in a much different way from Judge Kaufman and the courts on appeal. This reminds me of still another observation by Mr. Urey: “After considerable conversation with lawyers on this subject, including one who worked on the government side of the case, I conclude that lawyers are more interested in the law than in justice.”

The most important point which comes out in Mr. Urey’s analysis is one I have already suggested: It is quite plausible to account for atomic espionage in this situation without the Rosenbergs being involved. In fact wherever one reads “Rosenberg” in the prosecution’s account, the words “some Russian” would do as well. In addition, Mr. Urey points up the potential injustice in any case that depends almost exclusively on accomplice testimony: “One criminal accuses another who again accuses another until perhaps an innocent person is accused and then the chain is broken and we give the maximum punishment to the innocent person.”

Anyone interested in the Rosenberg case should look at Mr. Urey’s analysis for a vivid statement of the case for the defendants. One should study as well Mr. Sharp’s exposition, a most remarkable book which should be reprinted (but with an index). Although he has himself spoken highly of subsequent discussions of the case, I believe his account will remain the decisive one for thoughtful students of the case. *It soberly assesses all critical evidence available during the appeals and upon which the parties and the courts acted.* One way of stating the superiority of the Sharp book is to say that it draws on law and ethics more than it does on social science, history, and ideology.

Mr. Sharp is fair both in his statement of the case for and the case against the Rosenbergs and in his explanation of why he takes the calmly partisan position he does. It shows us how this sort of thing should be done. And so I could say a few years ago, to a
gathering of University of Chicago graduate students in political science,

One model I can hold up to you of a useful curbing of indignation without sacrificing one's dedication to virtue and the common good may be seen in Mr. Sharp's book, published in 1956, on the Rosenberg-Sobell Case, Was Justice Done? Because of its disciplined examination of the complicated passions of others, it remains the best book written on that disgraceful episode in our history. Great harm was done because of the indignation which blinded our government at that time. But great harm can be done as well because of indignation evoked among the unwary upon learning of the callous deeds generated by the indignation of others.790

The careful reader, even though he may differ in his conclusions, comes away from Mr. Sharp's book reliably aware both of what the evidence was and of what the issues were. It is too bad that this book was not available for the Supreme Court to read. It is a pity, that is, that the Rosenbergs were not kept alive long enough for such a masterly lawyer's brief to be written on their behalf.

Mr. Sharp is still convinced of the Rosenbergs' innocence. I never have been. But, I should at once add, his conclusion does not rest on the original trial record alone but rather on that record as supplemented by two additional things: (1) the 1953 "newly-discovered evidence" and its significance (that is, the console table and how would-be witnesses with respect to it conducted themselves in his presence), and (2) his considerable association with the defense attorneys who had known the Rosenbergs and their friends. He believes that these lawyers, people themselves of intelligence and sensitivity, were convinced of the innocence of their clients. He would grant that it is probably impossible to prove innocence, but he believes it highly significant that the people he knows to have been closest to the Rosenbergs were themselves convinced of innocence. He is aware, of course, that clients can mislead their lawyers even in capital cases.791

When Mr. Sharp gives such reasons for his belief in the Rosenbergs' innocence, he may tacitly concede that anyone such as an appellate judge, who limits himself to the record of the trial, could have believed that the jury's verdict was justified. Mr. Sharp does provide a valuable account of the case—both of the evidence and of interpretations of that evidence—and thereby points up once again the problems with recourse to the death penalty in such cases.
It is important to notice that Mr. Sharp's book was written for the most part in the fall of 1953, in the months immediately after the execution of the Rosenbergs. It is based on evidence, standards and arguments then available. I have emphasized this because in passing judgment on men, one is obliged to work primarily with what was known and knowable in their particular circumstances. This is the nature of practical judgment.

The decisive criticism to be made of what was done then need not, and indeed probably should not, depend on what we have happened to learn since. The critical considerations were then available for assessment: considerations with respect to what the Rosenbergs might have done, with respect to what others might have done, with respect to the quality of the admissible evidence brought forward and the standards being applied, with respect to the haste with which the proceedings were moved along at the end, and with respect to the behavior of various judges and lawyers.

For example, one need not deny that there were any atomic-bomb secrets to steal in order to be able to realize that the secrets stolen could not have been as momentous as the prosecution, the judges, and the government's lawyers on appeal allowed themselves to believe. That is, I do not consider it sensible to argue, as some advocates for the Rosenbergs now do, that there were never any secrets to steal. Both the Russians and the Americans evidently thought there were. Besides, in these matters, one's intentions can be important.

That the secrets were not momentous—whatever the Green-glasses or the Rosenbergs might have thought in 1945—is indicated by an observation in Bertrand Russell's generous review of Mr. Sharp's book:

[Judge Kaufman] seems to have thought, as most non-scientific Americans apparently did, that there was something which could be called the "secret" of the bomb, which was thought of as analogous to a magic formula in medieval necromancy. . . . This whole conception is quite wide of the mark. There was very much less that was secret about the atom bomb after Hiroshima than was popularly supposed.792

It is implied, in Lord Russell's insistence upon the mistaken notions about atomic secrets held by "non-scientific Americans," that the scientific community knew better at that time. They knew that what Judge Kaufman and people like him believed and said was woefully exaggerated—and yet that fearful community, with a few
honorable exceptions such as Mr. Urey, remained silent. The defendants could not draw upon the scientific community for an informed defense, one which could have legitimately played down the seriousness of what the Rosenbergs were supposed to have done and which could have led to much more effective cross-examination of government witnesses.

The passions of the Cold War, which were not unrelated to passions left over from the Second World War and which had been intensified by the outbreak of the Korean War, made it difficult for most Americans to remain moderate. Domestic anti-Communism was at its worst in those days—and it was obvious to everyone that the Rosenbergs were involved with Communism. Anti-Communism was particularly virulent on the east coast, especially in circles which included a number of ex-Communists.

One cannot help but wonder, of course, what the role was in this case of prejudice against Jews. Virtually all of the major figures in the case at the trial level were Jewish, as were a number at the appellate level. What does that prove? I repeatedly heard it suggested at the time that critical to this case may have been a defensive Jewish vindictiveness toward, or at least ostracism of, any Jews suspected of notorious misconduct which endangered the entire Jewish community. Is not this perhaps a natural, however unfortunate and ultimately self-defeating, response by some Jews to centuries of persecution? The prospect of anti-Jewish prejudice does seem to have affected Judge Kaufman. It affected also the organized Jewish community which, by and large, laid low during those desperate years.

In a sense, perhaps, the Rosenbergs were sacrificed to the welfare of Israel. It is instructive in this connection to remember that Mr. Truman, who had been so critical to the international legitimation of Israel, was the President who should have commuted the Rosenberg death sentences. That is, he should not, as the retiring President, have left this problem for his successor to deal with in his first months in office.

Dwight Eisenhower was unfortunate enough in those days to have as his attorney general another impassioned New Yorker pressing him not to intervene. Once the Rosenbergs were killed, it can also be said, Mr. Eisenhower did begin to develop more sensible relations with the Russians.

VI.

Were both of the Rosenbergs involved in atomic espionage? We
probably never will know, unless critical documents come out of eastern Europe or the Greenglasses repudiate their confessions or people close to the Rosenbergs confess. Even so, a careful assessment would have to be made of whatever documents or confessions should be offered us. This points up the limits of historical research: the most critical information and arguments are, I have suggested, already available to us, and have been since 1953. A trial record is necessarily incomplete; gaps and discrepancies can always be found by those who have an interest in finding them.

We can, in the years ahead, expect more and more critics of the government to find and develop problems with the official version of the Rosenberg case. The government is far less likely to assign intelligent people to researching and making its case. Thus we can now expect, among intellectuals generally, the development of the opinion that one or the other, if not both, of the Rosenbergs must have been innocent. The principal argument will then be about whether the Rosenbergs were framed by the authorities or by the Greenglasses alone.

One thing which always has been clear to me about the case is that the Rosenbergs were very unlucky people. Indeed, they seem to have been "born losers." (So, for that matter, were the Greenglasses, perhaps even more so, but that is not as evident.) The Rosenbergs were, despite their considerable posturing, far less sophisticated than they believed themselves to be—and they were chronically unlucky: in business, in their associates, in their relatives, in their politics, and in having had someone they knew assigned to Los Alamos.

Their bad luck is reflected also in their timing. They would have been far better off if they had been caught either much earlier or much later—either "in the act" (in 1944-1945) or much later (say, after 1960). Instead, they were caught at the worst possible time, which meant that they suffered from an ex post facto effect in how they were treated. They were regarded as having intended far worse than they could have, even if guilty of the offenses charged.

Another thing that is clear to me is that there were people in the American government, the bar, the law school faculties, the scientific community, and the press who should have known better. These leaders simply should not have permitted the execution of those convicted spies, whatever their opinions about guilt or innocence. But far too many respectable people and organizations timidly remained silent. Legal and bureaucratic "momentum" does build up in such matters—and it can be very hard to resist. It
should be evident, upon any conscientious review of the *Rosenberg* case, that rules and standards are important if justice is to be done by the government. But also important, perhaps even vital, are people of integrity and magnanimity, as well as of common sense, in high office.

I return to an earlier observation. Our need is not so much for more data as it is for a more sensible assessment of the data we have had for two decades. To fall into the habit of looking for more and more data can even be harmful, partly because it places the emphasis upon mere information rather than upon judgment and the standards to be applied in assessing the available information. The information usually available in such matters as the *Rosenberg* case, which information is always bound to be "incomplete," should be assessed in the light of what we know and should know about human nature and about the times we live in. Only thus can we have a proper confidence in our institutions and in our ability to make good use of those institutions from day to day.

No research should be needed to oblige one to say that the sentences imposed upon the Rosenbergs were barbaric and should never have been carried out as they were, even if they were guilty of the crimes charged. Nor should research be needed to permit us to recognize the merit of Justice Black's complaint when the Supreme Court ("led" by an unfortunate Chief Justice) was panicked into vacating Justice Douglas's stay of execution:

Surely the Court is not here establishing a precedent which will require it to call extra sessions during vacation every time a federal or state official asks it to hasten the electrocution of defendants without affording this Court adequate time or opportunity for exploration and study of serious legal questions.

I should add that it is not a sufficient justification for what the American public permitted with respect to the Rosenbergs that there were among the Russians thousands of Rosenberg cases. That there were thousands is evident, as Mr. Sharp has recently pointed out, in reports from the Soviet Union. The dreadful Russian experience, it seems to me—to say nothing of the Nazi experience—is a good reason for not sitting quietly by when the first such cases appear among us.

These developments must be challenged in their beginnings—for the sake of the would-be perpetrators of injustice as well as for the sake of their likely victims. Thus, Lord Russell could say, in his review of Mr. Sharp's book, "Apart from the question whether the
verdicts were right, there is something utterly horrifying about the indecent haste shown by all the authorities in the last stages of the Rosenberg Case." Or, as Malcolm Sharp has recently recalled, "It was an episode of governmental insanity"—and this is so, he too would add, apart from the question whether the verdicts were right.

VII.

How should a lawyer conduct himself in such a situation as was presented during the final days of the Rosenberg case? Should not the Government attorneys have considered Justice Douglas's stay of execution as a godsend, whatever the merits or the sources of the legal questions submitted to him?

The principal legal question at the end was whether the Atomic Energy Act of 1946, which provides that the death penalty cannot be imposed without the recommendation of the jury in certain cases, had superseded, for purposes of sentencing, the statute under which the Rosenbergs had been condemned. One can agree with Justice Felix Frankfurter that the questions presented the Court in the last days of the Rosenberg case were "complicated and novel." It is difficult for me to determine, from the opinions of the Justices, what the proper answers to these questions should have been.

Does not this difficulty reflect the inferior quality of the opinions that the Justices were able to come up with on such short notice? Certainly there was undue, even "indecent haste" at the end. This is further indicated in the opinions of the three dissenting Justices, which make sad reading for anyone dedicated to the deliberative processes on which the rule of law depends. Thus, Justice Black protested,

It is argued that the Court is not asked to "act with unseemly haste to avoid postponement of a scheduled execution." I do not agree. I do not believe that Government counsel or this Court has had time or an adequate opportunity to investigate and decide the very serious question raised in asking this Court to vacate the stay granted by Mr. Justice Douglas. . . . Certainly the time has been too short for me to give this question the study it deserves.

Justice Frankfurter was so rushed that he could not even file his dissenting opinion until three days after the executions. The Frankfurter opinion includes these observations:

Neither counsel nor the Court, in the time available, were able to go below the surface of the question raised by the application for
a stay which Mr. Justice Douglas granted. More time was
needed than was had for adequate consideration. . . . We have
not had the basis for reaching conclusions and for supporting
them in opinions. Can it be said that there was time to go
through the process by which cases are customarily decided
here?

Even the then-Acting Solicitor General seems to recognize the
problem:

Justice Black made some remark implying that I wasn’t as well
prepared as I usually was before the Court and, of course, he was
correct. On the other hand, although I knew perfectly well, due
to the lack of time to prepare, that I hadn’t the time to master all
the legislative history or read all the cases, I thought that the
main line of our argument was perfectly reasonable and
correct.

Compare, however, Justice Frankfurter’s statement on this very
point:

In all matters of statutory construction, one goes, especially these
days, to the history of the legislation and other illuminating
materials. It is almost mathematically demonstrable that there
just was not time within twelve waking hours to dig out, to as-
semble, and to formulate the meaning of legislative
materials.

But why did there have to be, for the solicitor general as for
everyone else, this (unprecedented?) “lack of time to prepare”? All
this is spoken of by the solicitor general almost as if there had been
here a necessity beyond human reflection and choice. Consider,
also, how he speaks of his duty in these circumstances: “[M]y job
as the Government’s lawyer was to defend the Government’s posi-
tion as long as I could do so in good conscience; and certainly the
Government’s position was more than respectable.” The “gov-
ernment’s position” is spoken of by him as if it somehow existed
independently of the men who were defending it. But, in fact, the
solicitor general and the attorney general were themselves deter-
mining the government’s position, not merely defending it. In
these matters, is not the “government’s position” to be determined,
in large part, by what it should be? Is not what it should be some-
ting that responsible officers are obliged to be sensible and decent
about?

Why, then, was there such un lawyerlike haste? In order, it
would seem, to attempt to stop the agitation, in this country and
abroad, of the question, “What should be done with the
Rosenbergs?” I have yet to hear any other explanation that makes
any sense at all. That is, the executions were rushed, in the spirit of impassioned partisanship, in order to deprive us of the opportunity, sorely needed, to think about what was being done in our name.

It is difficult for me to escape the conclusion that what the authorities did here was, however sincere, far worse than anything that we know to have happened in connection with Watergate. This kind of misconduct by the authorities is hardly likely to produce or to maintain a sensible and humane people dedicated to the rule of law.\textsuperscript{811}

In such desperate circumstances, a lawyer (who is, after all, a member of a privileged class, trained to be "above the battle")—should have the good sense and the fortitude to say to a client, even if that client should happen to be the Government of the United States, "What you propose to do is simply wrong, and I for one am not going to help you do it."

\textit{12-C. The Communist Party of the United States}\textsuperscript{812}

Subversion has been defined as "a systematic attempt to overthrow or undermine a government or political system by persons working secretly from within."\textsuperscript{813} The danger of subversion can seem particularly ominous to any constitutional regime defined as much as the United States has always been by dedication to a body of political principles. The heightened fear of subversion felt from time to time in the history of the United States has prompted a variety of repressive measures by both national and state governments in this country.

Perhaps the most revealing encounter with the issue of subversion by the United States Supreme Court was its review in 1961\textsuperscript{814} of a challenge by the Communist Party to the Subversive Activities Control Board (SACB) created by the Internal Security Act of 1950.\textsuperscript{815} That board was obliged to determine, on request of the Attorney General, whether a designated organization was to be stigmatized as a "Communist-action" or "Communist-Front" organization for which various duties and disabilities were prescribed. Special attention was to be paid to whether the organization thus investigated with a view to its being virtually outlawed was dominated by a hostile foreign power. Harry Kalven has said of this legislation, "It was in a real sense the major government attack on Communism in the United States and hence a political development of high import. . . . [I]t is quite possibly the precedent which carries the greatest threat to political freedoms in

The five-to-four decision of the Supreme Court in the 1961 case displayed the Justices dividing along the lines quite common in civil liberties cases of that period. The opinion of the Court, a curious mixture of technical competence and foolish conjectures, was written by Justice Frankfurter. He devoted more than one hundred pages in support of the Court's holding that Congress was entitled to establish a repressive regulatory program grounded in a series of elaborate legislative "findings."

The first of these legislative findings, set forth in the Act, was,

There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (government and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist dictatorship in the countries throughout the world . . .

Congress also declared in its findings that although Communist-action organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves.

The first amendment authorities relied upon by Justice Frankfurter in 1961 began with the unfortunate 1919 opinion of his mentor, Justice Holmes, in Schenck v. United States.

Three of the four dissenting members of the Court (Chief Justice Warren, Justice Douglas and Justice Brennan) wrote opinions in Communist Party v. SACB questioning the constitutionality of the Internal Security Act and the propriety of its implementation by the SACB on procedural, evidentiary, self-incrimination, bill of attainder and other grounds. Particularly memorable was the counsel with which Justice Black began and ended a dissenting opinion that made much more than did the others of the first amendment:

I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish. The
first banning of an association because it advocates hated ideas—whether that association be called a political party or not—marks a fateful moment in the history of a free country. That moment seems to have arrived for this country... This widespread program for punishing ideas on the ground that they might impair the internal security of the Nation not only sadly fails to protect that security but also diverts our energies and thoughts from the many far more important problems that face us as a Nation in this troubled world. I would reverse this case and leave the Communists free to advocate their beliefs in proletarian dictatorship publicly and openly among the people of this country with full confidence that the people will remain loyal to any democratic Government truly dedicated to freedom and justice—the kind of Government which some of us still think of as being "the last best hope of earth." 823

The influence of the complicated Frankfurter opinion in this 1961 case has thus far chanced to be slight, partly because it was even more tedious than his opinions usually were by this time, partly because it evaded facing up to key issues, and partly because relations improved considerably between the Soviet Union and the United States during the following decade. Also, it eventually became generally apparent that the Communist Party of the United States had been inconsequential ever since, if not even before, the imprisonment of its principal leaders in 1951. 824

Long before then, however, the various repressive measures sanctioned by the Supreme Court since the Second World War had significantly damaged healthy political discourse in the United States. Particularly insidious was the common practice, legitimated in Justice Frankfurter's 1961 opinion, of considering any group suspect which dared to express too many of the opinions that the rulers of the Soviet Union were identified with. Such official subversion of republican institutions, which Justice Black had warned against, contributed perhaps to critical misjudgments in the 1960s with respect to genuine American interests in Indochina and thereafter to disturbing question, especially among the young, about whether the people of the United States truly govern themselves.

12-D. David T. Dellinger, et al. 825

I.

The Chicago Conspiracy Trial of 1969-70, United States v. Dellinger, et al., following upon the 1968 Democratic National Convention in Chicago, aroused considerable interest in both legal and
A reconsideration of it, with special attention to the recently published recollections of perhaps the most thoughtful defendant in that trial, should be instructive, especially as other controversial politicized trials (such as those connected with the Iran-Contra dealings) engage public attention.\(^{827}\)

It will be remembered that American involvement in the Vietnam War escalated after the election of Lyndon Johnson in 1964. This proved particularly disturbing to many young people who had gotten the impression that the president was the "peace candidate" during the 1964 election campaign. Mr. Johnson's troubles, in Vietnam and consequently at home, became so oppressive that he announced, in early 1968, that he would not run for reelection. This was after he had been effectively challenged by Eugene McCarthy in several Democratic Party primaries.

The Democratic nomination was then left to Eugene McCarthy, Hubert Humphrey and Robert Kennedy to sort out. After the murder of Mr. Kennedy, it became apparent that the administration and the Democratic Party regulars would throw their support behind Mr. Humphrey, the then-Vice President. The convention in Chicago was destined to be the place where this decision would be sealed, but not without last-ditch resistance from supporters of Mr. McCarthy and from opponents of Mr. Humphrey and the Johnson administration. That same summer the Republican Party nominated Richard Nixon for the presidency.

Highly-publicized disturbances during the convention issued both from various antiwar groups and from the Chicago police force.\(^{828}\) The Chicago Conspiracy Trial, following upon the convention, collected in the dock eight men who were alleged to have been primarily responsible for the disturbances which had marred the nomination of Mr. Humphrey. This trial, which began during the first year of the Nixon Administration, ran between September 1969 and February 1970. The United States Attorney for the Northern District of Illinois who had been appointed by the Democratic Administration was held over, evidently so that he could conduct the Conspiracy Trial prosecution.

Five defendants were found guilty by a Chicago jury of having crossed state lines with the intention of inciting a riot during the August 1968 convention. Each of the five convicted defendants was sentenced to five years imprisonment and fined five thousand dollars (as well as the costs of prosecution, assessed at $41,748.60). Eight defendants and their two lawyers in this federal trial were sentenced for contempt of court after having been pronounced
guilty by the trial judge of courtroom behavior intended to disrupt the orderly administration of justice. The contempt sentences ranged from two months and eighteen days (for one of the defendants) to four years and thirteen days (for one of the lawyers).\footnote{829}

II.

Tom Hayden, one of the defendants, has recently published a memoir which includes an extended account of the Chicago Conspiracy Trial.\footnote{830}

I looked in upon an average of two to three sessions a week during the five months that the trial was going on. (I had press privileges which permitted me to avoid the lines of people almost always waiting for admission to the crowded courtroom in the federal building in downtown Chicago.) Mr. Hayden's account of the trial is interesting, providing a quite instructive addition to the many descriptions already published of that legal monstrosity.

Mr. Hayden is one of the more remarkable figures of his generation to have come out of the civil rights and antiwar struggles in this country after the Second World War. He does not report anything of note about the trial that I recall \emph{not} to have happened the way he tells it. His account of the trial, as of much else in the book, is considerably better than I thought twenty years ago that he or any of his colleagues would ever be able to write about those events. My concluding remarks, in the account of the trial I published in 1971, assessed in this fashion the conduct of the principal participants:

It should be noticed, before concluding this survey of the Chicago Conspiracy Trial, that there was (on the part of the Government, the judge, and the defendants alike) much about this months-long encounter which was contrived, shallow, and hence tiresome. . . . It should also be noticed—and this is attested to by the bickering in court between defense counsel and prosecutors and between the defendants and the judge as to who among them had really been closest personally to Martin Luther King and to Robert F. Kennedy—that this trial was, just as had been the 1968 Democratic National Convention, a "civil war" among American "liberals." . . . All that was proved by such "civil war" was that everyone embroiled in both the Convention and the trial should have known better.\footnote{831}

One can see from the Hayden account how the civil rights movement, and the distrust of authority that that legitimated, led into the antiwar movement. One can also see the hopes that had been nurtured by Martin Luther King and the Kennedy brothers before
their untimely deaths, hopes which tended to induce rebellious youth to enlist in public-spirited endeavors of a more or less respectable character.

III.

After the Democratic National Convention, with Mr. Nixon elected (not without their help), Mr. Hayden and those of like mind considered themselves badly beaten. The Hayden account of the 1968 struggles ends with these observations:

Rarely, if ever, in American history has a generation begun with higher ideals and experienced greater trauma than those who lived fully the short time from 1960 to 1968. Our world was going to be transformed for the good, we let ourselves believe not once but twice, only to learn that violence can slay not only individuals, but dreams. After 1968, living on as a ruptured and dislocated generation became our fate, having lost our best possibilities at an early age, wanting to hope but fearing the pain that seemed its consequence. As Jack Newfield wrote, after 1968, "The stone was at the bottom of the hill and we were alone." In short, these young people were defeated and demoralized.

But they were not destined to be “alone” for long, thanks to the miscalculations of President Nixon, Mayor Daley (acting through the United States attorney in Chicago) and others who decided to prosecute. Why? To discourage further protests? To teach the young a lesson, meting out the punishment that they deserved? Or simply because they could? It is hard to be sure.

Mr. Daley felt humiliated, for he was astute enough to appreciate that he had helped defeat Mr. Humphrey, a candidate who had not been resolute enough to impress upon the mayor what should not happen on the streets of Chicago. Particularly galling for Mr. Daley was his awareness that he had dirtied up his liberal credentials and, even so, had failed in his effort to protect his city from looking bad.

Mr. Daley and his lieutenants could not bear facing up to the fact that they had lost control of the situation. One of the sillier decisions of the city administration during convention week in 1968 had been its refusal to allow demonstrators to march to the amphitheater where the convention was meeting, a march which would have required several miles of walking in the August heat, an exertion that would have calmed down everyone.

Even sillier was the refusal to allow the demonstrators to stay in Lincoln Park, three miles from the downtown area around the Hilton Hotel where the celebrities and cameras were. Instead, the
demonstrators were, in effect, driven into the Grant Park area, across from the Hilton—and that proved to be an explosive situation.\textsuperscript{835}

The trial judge too had had some liberal credentials, having successfully presided over the first desegregation hearings in a northern school district. But he had always been autocratic in court—and at times he could be almost unbelievable in his arbitrariness and nastiness.\textsuperscript{836}

Then there was the United States attorney, who gambled. This case, some believed, was going to make his public career—but it ended up derailing it. Even so, he has evidently been successful as a respected litigator.

Mr. Daley, too, never recovered from his 1968 ordeal. It is appropriate to return to these matters during the very week that his son has been elected Mayor of Chicago—and as something of a reform candidate at that!

IV.

The "overkill" resorted to by the authorities, local and federal, permitted the antiwar movement to have a cause, or occasion, around which to regroup. It became easier to see how the United States government was misbehaving against the defendants in Chicago than against the Vietnamese in Southeast Asia. Months of extensive mass media coverage followed the indictments. The Nixon administration allowed itself to be saddled with the mistakes of the Johnson administration in more ways than one.

The Chicago Conspiracy Trial defendants (originally eight of them) figured from the outset that they would be convicted, and that they would be packed off to jail for five to ten years. It was not for them a happy prospect. But because they believed they had nothing to lose, they exploited the situation with verve. They became quite astute here, more so than they had been during 1968. The United States attorney and the trial judge played right to the defendants' strength. After a while, these authorities did not seem to be able to do anything to extricate themselves from the mess they were in.

The defendants were thus rehabilitated with the help of their enemies. They were offered a challenge which permitted them an opportunity to respond nobly. They managed in their response to capture the imagination of youngsters across the country, which was testified to by the dozen or so people camped out night after
night on the sidewalk outside the federal building, even in the bit-
terest cold weather.837

At times, the trial judge and the United States attorney were
astonishingly misguided, as when they resorted to the public
shackling and gagging of one of the defendants, the only man of
color among them.838 One could not help but wonder at that time
what the authorities could have been thinking—and how the legal
community could have permitted that sort of thing to be done on
several occasions. This spectacle, perhaps more than anything else,
suggested a weakening, if not a breakdown, in the sense of commu-
nity in the country at large.

Why the “overkill”? Partly because the president, the attorney
general and their advisors evidently believed their own propa-
ganda. This susceptibility is related to that hollowness which
makes much of power, or ambition, for its own sake. One must
wonder whether this spiritual emptiness led, perhaps necessarily,
to the Watergate debacle within a few years.

V.

The extent to which the defendants were able to exploit the op-
portunities thrust upon them by the authorities during the 1969-
1970 trial is remarkable. It is revealing also to see, upon learning
now the way the defendants spoke among themselves then about
their trial, how threatened and sometimes even desperate they
often felt. They did manage, however, to conceal their anxiety
from public view and conducted themselves with bravado and even
with wit. The Hayden account is particularly instructive in that it
exposes to view the “human dimension” of such events.839

One tends to see such notorious people as facades only. Mr.
Hayden indicates how the defendants did differ from one another,
how their personal lives mattered and what shambles their private
affairs sometimes were in.840

The actions and sentiments of the defendants were all too often
dubious. This is acknowledged in the Hayden account. But also
recognizable is a certain decency about them, as well as an open-
ness to argument and to moral appeals, more so than one could be
sure of as one watched their antics during the Chicago Conspiracy
Trial.841

VI.

The best as well as the worst of the legal system could be seen at
work during that trial and its aftermath.
The worst is suggested by an observation made in my 1971 account of the Chicago Conspiracy Trial:

None of the participants in this prosecution conducted themselves as they should have. The Government was the victim of its unbridled indignation, the defendants of their sentimental self-indulgence, and the judge (like Mayor Daley during August, 1968) of his injudicious vanity. But a fairminded critic of the defendants would have to recognize in them at least a perverse gallantry. Thus, there was in the Conspiracy Trial much that seemed a replay, in slow motion, of what happened in Chicago during Convention Week, with the same questionable behavior on the part of all the principal parties involved in both “confrontations.”

The worst in the antiwar movement could be seen in the “crazies” who resorted to senseless violence in their exhibitionism and desperation. The Weathermen phenomenon is a case in point, something which is repudiated in the Hayden account, as is the willingness of some of the more rebellious to identify themselves with the likes of Charles Manson and his barbarities.

The worst on the government side could be seen in the way the trial judge routinely conducted himself, in the way the Justice Department carried on, and in the way the Federal Bureau of Investigation was used (and was using the political and judicial system). It was evident at the time, and is referred to in my 1971 account, that there was another “conspiracy” at work here: the chief judge, the trial judge, the United States attorney, and the Federal Bureau of Investigation coordinated various moves in a highly improper manner. This is now confirmed by several F.B.I. documents reprinted in the Hayden account. It also seems that the government had an informer among the defense attorneys’ staff.

It is still something of a mystery to me why the police ran amok the way they did during convention week in Chicago in August 1968. The ultimate responsibility for that must rest with the city administration, however provocative the antiwar demonstrators may have been.

The best in the legal system can be seen in the way the United States Court of Appeals for the Seventh Circuit (in Chicago) corrected what the trial judge had done, reversing all of the convictions on the substantive charges. Thus, it was recognized in a 1981 opinion by the court of appeals what had been done by that court a decade before: Prosecutorial and judicial misconduct have been acknowledged and fully reflected in radical reductions and nullifications of the earlier sanctions in this proceeding. Both the trial
judge and the United States attorney have been repeatedly, sometimes harshly, criticized over the years by the court of appeals sitting in Chicago.\textsuperscript{447}

These criticisms were anticipated, in effect, by what the jury did at the trial itself. All of the defendants were acquitted by the jury of conspiracy charges. Two others were acquitted of all other charges as well. Without the conspiracy counts,\textsuperscript{448} and the relaxation of the rules of evidence thereby permitted, there would not have been either the kind of trial there was or any conviction of a serious felony. Even as it was, one of the jurors is quoted as saying, "I just voted five men guilty on speeches I don't even remember."\textsuperscript{449} The most that could be said against various of the defendants' August 1968 conduct in Chicago is that they indulged in highly irresponsible speeches.\textsuperscript{450}

Also a credit to the legal system was the way the trial on the contempt charges was conducted by a federal judge brought in from Maine to review all of the evidence. He, properly enough, found that there had indeed been some instances of contempt—far fewer than the trial judge had tallied—but he added that no useful purpose would be served by sentencing to jail any of those he found guilty of contempt.\textsuperscript{451}

The way that judge handled the contempt hearings won the respect of the defendants. What is particularly remarkable is that this "imported" judge managed to get, from the record and testimony, a reliable "feel" for what we had observed in the courtroom several years before.\textsuperscript{452} Thus, the federal courts refused to permit the original trial judge to impose criminal-like contempt penalties without permitting defendants a proper criminal trial.

VII.

It is heartening to see that "the system" did work, not only in the courts but also in the community at large, with the political institutions of this country finally managing to come to grips in a sensible way with the problems of the Vietnam War. Mr. Hayden's own career is illustrative, with his successes as an elected (and reelected) member of the California legislature.\textsuperscript{453}

It is instructive to see what the limitations, as well as the aspirations, of the young rebels were—and how ill-equipped their elders were in dealing with them. One has to make an effort to be generous to the authorities who, either because of the arrogance of power or because of an unreasonable and unreasoning fear, conducted themselves so foolishly. No doubt, some of them might
have conducted themselves better if the attorneys for the defendants had been able in turn to restrain their own self-righteousness.854

A common phenomenon in the repressive episodes in this country during the 1950s and 1960s was that the victimizers could regard themselves as the victims, which could lead them, years afterwards, to become sullen, embittered, and silent. This, too, suggests that the authorities never understood what was going on. On the other hand, the Chicago Conspiracy Trial defendants and some other defendants were made better by their experiences. They at least could be prouder of how they had conducted themselves than could their opponents, who all too often hardened into caricatures of themselves.855

By and large, the young among the Left had their sympathies enlarged and their understanding deepened by their experience, not least by their eventual recognition of those mistakes of theirs that had authoritarian, destructive tendencies. All too many of the right, on the other hand, had their worst tendencies legitimated by the Reagan administration and by the money and influence temporarily available to them.856

Perhaps the most heartening thing about this return to the Chicago Conspiracy Trial is the observation that the truth, more often than not, does manage to see the light of day and is more likely than not to be recognized as such. Perhaps we are also seeing this, on a much grander scale, in the revelations coming these days out of the Soviet Union, a regime which for more than half a century made all of the participants in the Chicago Conspiracy Trial seem rather tame, if not even civilized, by comparison.857

12-E. Richard M. Nixon, et al.858

I.

Our press has, with a handful of exceptions, responded with outraged protest to the September 8 announcement of a presidential pardon for Richard M. Nixon. In this respect the press reflects the attitude in political matters of all too many intellectuals today.

The thoughtful political man asks, when confronted with an irrevocable development such as this pardon, “Now that that’s done, how can it best be lived with?” That is, one should ask, “What response on my part does the common good call for?”

Of course, vigorous protest may be what is clearly called for if the action announced is so unjust—in that it is harmful to the community or to innocent parties—as to require immediate correction
or, at least, measures insuring that it cannot happen again. Is that the case here?

What would have been the effects of Mr. Nixon’s trial? Some say that it would have been shown thereby that men in high office cannot “get away” with misbehavior. But has it not long been the opinion of the country that Mr. Nixon should not be jailed for his conduct in office? Besides, it is a rather low view of mankind which assumes that a man who has been obliged to resign the presidency in disgrace will be getting away with something if he is not actually brought to trial and convicted of a criminal offense. Has not Mr. Nixon’s dismal fate sufficiently warned all future presidents and their subordinates against conduct which can be fatal to an administration? We should also consider, in defense of the pardon, what the effect would have been among the public of an acquittal of Mr. Nixon after a trial. Should we have run that risk once he was forced out of office?  

II.

Some say that the most unfortunate aspect of the Nixon pardon is that it deprives the American people of the opportunity to learn “the full story” about Watergate and other presidential misconduct. But are not the essential facts already known to us? Indeed, have not the most important facts long been known by everyone who has carefully followed Mr. Nixon’s career of the past quarter century? What of importance remains to be learned either about him or about his most recent misconduct? When does the need for essential information degenerate into a desire for mere scandal?

There are, of course, still ways of learning even more than we have already about the Nixon administration if we are so minded. Congressional investigations come to mind, for instance. But are further probings worth the inevitable turmoil in Washington, if not in the country at large? Should not we take due account of the risks run by permitting even more of what we have had so much of the past two years? Do we not have enough genuine problems to concern ourselves with in the months ahead?

One unfortunate effect of the outcry against the presidential pardon is that it probably has made the president reluctant to clear the docket completely of the Watergate and related offenders. Such comprehensive pardoning would probably be healthy for the country, especially if coupled with immediate amnesty for everyone (not just draft evaders) who has acted in conscientious opposition to our misconceived involvement in Indochina. (The harassed nurse,
Jane Kennedy, comes to mind, as does another victim of the Cold War, Gordon Liddy. Is it not at least plausible that both the presidential misconduct and the illegal war resistance are legacies of the Cold War? Should not all that be put behind us in a mature manner?

One can even add to the catalogue of failings of the Nixon administration that the president did not, before resigning his high office, relieve his successor of the burden of granting blanket pardons with respect to both Watergate and war resistance. But he seems to have been too distraught to perform this valuable service for the country—if not unduly concerned to nurture public sympathy which would protect him upon his return to a vulnerable private life.

This failing by Mr. Nixon should remind us of the serious mistake made by Harry S. Truman on leaving the White House in January 1953—the mistake of not commuting the death sentences of Julius and Ethel Rosenberg upon conviction for wartime espionage on behalf of an ally. Within six months the Rosenbergs were dead. President Ford can be understood not to want a similar blot on his record.

Perhaps the most important effect of the presidential pardon, despite the initial outcry it has provoked, is that it reduces the unpredictable effects of a continued pursuit of Mr. Nixon. The anti-Nixon people, although they sometimes do not seem to realize it, have won a remarkable victory. Is not this the time for them to exhibit generosity, the kind of generosity which Mr. Nixon himself, to his detriment, was not capable of in his days of triumph toward his enemies? Would not generosity now make it less likely that Mr. Nixon's supporters will harbor a divisive bitterness? Is there not serious danger of turning Mr. Nixon and his inept associates into martyrs? The further we push with investigations, trials and punishment, the more likely we are to oblige the ordinary citizen to consider the awkward question, "What did the Nixon people do anyway to warrant this much suffering?"

III.

The most serious criticism one can make of the Nixon pardon may be that it prematurely risked the much-needed "credibility" of a new president. But was it not best for Mr. Ford to act quickly, if at all? Why should he have played games with Mr. Nixon, prosecutors, juries and the American people? Besides, the damage in-
curred by Mr. Ford depends in large part on how the pardon is seen—and here we return to the conduct of the press.

The immediate public response is rarely decisive in such matters, except among the timid or the superficial. That response may yet turn into a general sense of appreciation for forthright decency on the part of the president, especially if the press should now be mature enough to recognize its duty to moderate the volatile public passions which are inevitable in a democracy.863

That is, the press (and intellectuals generally) should take care lest the spectacular usurp among us the place of the thoughtful. Is it not partly because of journalistic addiction to the spectacular, at the expense of careful examinations of problems and character, that someone such as Mr. Nixon was permitted to survive and prosper as long as he did in American public life? Even so, his talents and his accomplishments should not be lost sight of—for these, too, contributed to his remarkable career.864

13. FROM LILLIAN AND WILLIAM GOBITIS TO MICHAEL HARDWICK 865

I.

Peter Irons, a graduate of the Harvard Law School and a professor of political science at the University of California, San Diego, explains how he came to prepare his book, The Courage of Their Convictions (p. x):

During my law-school years I read hundreds of Supreme Court opinions, and noticed the lack of any description of the parties in most opinions. They were simply names on paper. After I began teaching law, I decided to write a book about three of the Court’s worst decisions, those that upheld in 1943 and 1944 the wartime internment of Japanese Americans. I tracked down the original defendants . . . and learned from talking with them about their courage in facing prison for resisting the concentration camps into which their families and friends had been herded at gunpoint . . . . [I]t struck me that many other Americans had displayed equal courage in asking the Supreme Court to uphold their rights under the Constitution. I decided to find and talk with a number of these people and to put their stories into a book.

He explains as well the selection of cases he made for this book (pp. x-xi):

I chose sixteen cases which I considered important and interesting. They spanned five decades, and involved four major issues: religion, race, protest, and privacy. I felt that these sixteen cases would adequately represent those years and issues. . . . These are
not, I know, the same cases that others would choose; there are dozens of equally significant cases from the past fifty years, and many fascinating people who began them. But one point of this book is that in fact thousands of Americans have taken courtroom stands on principle and conscience. Not all have reached the Supreme Court, but all have shared a belief in a living Constitution.

Professor Irons has compiled a collection of cases that should be of interest to the general reader as well as to college students considering the study of law. It should also be useful for law school courses on the Supreme Court, on appellate practice, and on civil liberties. The reader is challenged to consider the assumptions about “a living Constitution” that Mr. Irons takes for granted, assumptions that do need more examination than civil libertarians are inclined to undertake.

II.


Each of the sixteen controversies has two accounts, one by Mr. Irons describing the case, the other by the featured participant giving his or her impressions of it. An interesting photograph accompanies each case.

III.

It should be instructive to consider in some detail one of Mr. Irons’s cases, illustrating thereby how he proceeds. The last case in his collection, Bowers v. Hardwick, deals with a Georgia sodomy statute (pp. 379-403). How the law deals with homosexuality is likely to claim more and more judicial attention in the coming decade, however limited actual sodomy prosecutions may be.
The underlying issues here depend on what the character and extent of "the right of privacy" should be in American constitutional law. How far does that right go and how should it be implemented? The five decades spanned by Mr. Irons's cases, we have seen, "involved four major issues," ranging from religion to privacy (p. x). Or perhaps we should say that these issues, at least as presented by Mr. Irons, range from one form of individuality to another.882

The first of Mr. Irons's sixteen accounts describes the challenges faced by Jehovah's Witness children called upon to participate in flag-salute ceremonies in public schools (pp. 13-35). The Witnesses, as presented in the Irons book, are attractive people, capable of lives of productive serenity, however trying their fellow citizens have no doubt found them on occasion. These religious fundamentalists, who may not always be sensitive enough to the obligations of citizenship, have nevertheless managed to contribute significantly to the development of civil liberties in twentieth-century America. Although they have at times aroused the worst elements in some of their fellow citizens, they have inspired others to do well in their public deliberations and decisions. This can be seen (in Mr. Irons's book) in the rulings in favor of the Gobitis children (Lillian and William) made by both the federal district judge and by the appellate judges who dealt with the case in Pennsylvania. The United States Supreme Court would have done well to follow their lead sooner than it did.883

Readers can appreciate what Mr. Irons's approach contributes to the study of constitutional law when his accounts of cases are compared with the official reports. Thus, Justice White's opinion for the Court (which divided five-to-four) in Bowers v. Hardwick is summarized in this fashion in the syllabus prepared by the reporter of decisions:

After being charged with violating the Georgia statute criminalizing sodomy by committing that act with another adult male in the bedroom of his home, respondent Hardwick brought suit in Federal District Court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy. The court granted the defendant's motion to dismiss for failure to state a claim. The Court of Appeals [for the Eleventh Circuit] reversed and remanded, holding that the Georgia statute violated respondent's fundamental rights. Held [by the United States Supreme Court]: The Georgia statute is constitutional. . . .

(a) The Constitution does not confer a fundamental right upon homosexuals to engage in sodomy. None of the fundamental
rights announced in this Court's prior cases involving family relationships, marriage, or procreation bear any resemblance to the right asserted in this case. And any claim that those cases stand for the proposition that any kind of sexual conduct between consenting adults is constitutionally insulated from state proscription is insupportable . . .

(b) Against a background in which many States have criminalized sodomy and still do, to claim that a right to engage in such conduct is "deeply rooted in the Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious . . .

(c) There should be great resistance to expand the reach of the Due Process Clauses to cover new fundamental rights. Otherwise, the Judiciary necessarily would take upon itself further authority. The claimed right in this case falls far short of overcoming this resistance . . .

(d) The fact that homosexual conduct occurs in the privacy of the home does not affect the result . . .

(e) Sodomy laws should not be invalidated on the asserted basis that majority belief that sodomy is immoral is an inadequate rationale to support the laws. 884

The discussions of the Georgia case by Mr. Irons and by Mr. Hardwick himself do not seem to me to appreciate the strength of the arguments indicated in points (b), (c), and (e) of the case syllabus. Even so, the accounts in the Irons book of what happened to Mr. Hardwick and how that bears on one's understanding of the case do make the controversy come alive more than did any of the five opinions filed in the case (the opinion of the Court by Justice White, the concurring opinions by Chief Justice Burger and Justice Powell, and the dissenting opinions by Justices Blackmun and Stevens). 885 The opening paragraphs of Mr. Irons's account indicate the enlivening contributions of his book (pp. 381-82):

Early in the morning of August 3, 1982, Officer K. R. Torick entered Michael Hardwick's house in the Virginia Highland neighborhood of Atlanta, Georgia. Torick carried a warrant for Hardwick's arrest on a charge of failing to appear in court for drinking in public. Several weeks earlier, Torick had ticketed Michael outside the bar where he worked, for carrying an open beer bottle. Torick later claimed in his official report that, when he arrived to serve the arrest warrant, one of Michael's housemates answered the door and admitted the officer. "The roommate told me he didn't know if Hardwick was home but said that I could come in to look for him. While walking down the hallway inside the house, I saw a bedroom door partially open."
Torick entered the bedroom and promptly arrested Michael and his male companion for violating the Georgia sodomy statute. While Michael and his friend were dressing, Officer Torick searched the room and discovered a small amount of marijuana, which he confiscated. Handcuffing his prisoners, Torick drove them to the central police station, where they were booked, photographed, and fingerprinted. Officers then tossed Michael and his friend into the holding tank, informing both guards and prisoners in graphic terms of the charges against the two gay men. They spent most of the day behind bars before friends were permitted to post bail for their release. Torick never served the arrest warrant: Three weeks earlier, Michael had appeared in court and paid a $50.00 fine for the public-drinking ticket, which wiped out the warrant.

Shortly after his sodomy arrest, Michael accepted an offer by the Georgia affiliate of the American Civil Liberties Union to begin a test-case challenge of the law. Michael understood the risks in this effort. Conviction for sodomy carried a maximum prison term of twenty years. . . . Michael also risked the unwelcome glare of publicity. . . . After his first encounter with officer Torick, Michael was attacked and badly beaten by assailants who knew his name. Wider publicity might expose him—and other Atlanta gays—to vigilante violence.

Justice Stevens, in his dissenting opinion, complained about the incompleteness of the record that had come to the Court after a motion to dismiss:

Indeed, at this stage, it appears that the statute indiscriminately authorizes a policy of selective prosecution that is neither limited to the class of homosexual persons nor embraces all persons in that class, but rather applies to those who may be arbitrarily selected by the prosecutor for reasons that are not revealed in the record of the case or in the text of the statute. If that is true, although the text of the statute is clear enough, its true meaning may be "so intolerably vague that evenhanded enforcement of the law is a virtual impossibility." 8

Mr. Hardwick’s recollection of how his encounters with the Atlanta police began offers support for the proposition that he had been “arbitrarily selected” for arrest and harassment (pp. 393-94):

I had been working for about a year in [an Atlanta] gay bar that was getting ready to open a discotheque. I was there one night until seven o’clock in the morning, helping them put in insulation. When I left, I went up to the bar and they gave me a beer. I was kind of debating whether I wanted to leave, because I was pretty exhausted, or stay and finish the beer. I decided to leave, and I opened the door and threw the bottle into the trash can by
the front door of the bar. I wasn't really in the mood for the beer.

Just as I did that, I saw a cop drive by. I walked about a block, and he turned around and came back and asked me where the beer was. I told him I had thrown it in the trash can in front of the bar. He insisted I had thrown the beer bottle right as he pulled up. He made me get in the car and asked me what I was doing. I told him that I worked there, which immediately identified me as a homosexual, because he knew it was a homosexual bar. He was enjoying his position as opposed to my position.

After about twenty minutes of bickering he drove me back so I could show him where the beer bottle was. There was no way of getting out of the back of a cop car. I told him it was in the trash can and he said he couldn't see it from the car. I said fine, just give me a ticket for drinking in public. He was busting my chops because he knew I was gay.

If this is indeed what happened in Atlanta that night, triggering the series of events that led to a policeman relentlessly pursuing a supposed culprit with a dubious arrest warrant, that does bear on whether sodomy laws are so apt to be selectively enforced that their true meaning is, in Justice Stevens's words, "so intolerably vague that evenhanded enforcement of the law is a virtual impossibility." It seems hardly likely that a heterosexual couple would have been pounced upon in their own bedroom the way Mr. Hardwick and his male companion were, even if they had been engaged in an act of sodomy. It hardly suffices, in the course of an attempt to justify the conduct of the state in this case, to be reminded (as we are by Chief Justice Burger in his concurring opinion) that Blackstone described sodomy as "the infamous crime against nature," an offense of "deeper malignity" than rape, a heinous act "the very mention of which is a disgrace to human nature," and a "crime not fit to be named."  

IV.

One can see from the accounts of Bowers v. Hardwick in Mr. Irons's book a few of the forms that harassment of homosexuals (or, for that matter, of anyone who is obviously unconventional) can take. One can also see how much pressure homosexuals consider themselves to be under, usually much more from unofficial than from official sources.

One may still doubt, however, that it makes much difference in practice whether or not there is a sodomy law on the books. Sodomy laws are seldom enforced these days in the United States. Mr.
Hardwick recalls that he himself did not know before his troubles began that there was such a law in Georgia (p. 402), a recollection whose significance does not seem to be appreciated in the Irons book. On the other hand, the flag-salute laws of the late 1930s and the 1940s were often enforced, leading to expulsions from schools of reluctant youngsters whose parents then had to provide otherwise for the schooling required by law.

The known official reluctance to enforce sodomy laws today makes such laws largely irrelevant in determining how people conduct themselves. It must be a rare couple, whether heterosexual or homosexual, which stops to consider, before engaging in certain evidently quite common practices among heterosexuals as well as homosexuals, whether they happen to find themselves for the moment in a state which still numbers an old-fashioned sodomy law among its statutes. (Almost half of the states do.) I doubt that such a statute has much, if any, “chilling effect” anywhere in this country today, even though it can be politically difficult to arrange for formal repeal, especially in the south.

One suspects that the Supreme Court resented being put in an “impossible” position, in that it was being asked to use up some of its political capital by declaring unconstitutional various statutes that were for almost all practical purposes long dead. Mr. Hardwick’s ACLU lawyers had hoped for a guilty finding against him at the trial-court level (pp. 382-83):

Without an adverse judgment, they could not begin the appellate route that led through state courts to the U. S. Supreme Court. Before the case reached trial, Fulton County District Attorney Lewis Slaton pulled the case from the court’s docket by refusing to present the charges to a grand jury for indictment. Slaton, a sixty-year-old, no nonsense prosecutor, declined to discuss his reasons for keeping the case out of court. Most likely, he did not want to arouse the Atlanta gay community and its enemies, who obeyed an uneasy truce in the Virginia Highland area and in Piedmont Park, where gays congregated and competed in softball leagues, complete with uniforms, raunchy team names, and cheer-leaders. Slaton undoubtedly knew that Officer Torick’s expired warrant, his earlier arrest of Michael, and disputes over how he gained entrance to Michael’s house might embarrass the police and prosecutors.

Unlike many prosecutors who defended entrapment tactics and police sweeps of parks and gay bars, Slaton kept a relatively tight rein on his troops. Most of the gays arrested in public places, even if the police witnessed acts of sodomy, were simply charged with the misdemeanor offense of “public indecency.” Slaton
later explained his views to an Atlanta reporter: “Consensual sodomy should be a misdemeanor, not a felony,” he said, “but nobody has the courage to push it that way.” But the law remained on the books as a felony, and Michael Hardwick had been arrested for sodomy. Slaton’s refusal to prosecute did not protect Michael from indictment at some time before the four-year statute of limitations expired. [Emphasis added.]

Thus, it was the refusal of the Fulton County district attorney to prosecute that led to Mr. Hardwick’s effort to get the federal courts to declare that the Georgia sodomy law violated the United States Constitution and could not be enforced.

Even so, is there not something seriously wrong with people, whether heterosexual or homosexual, who perform (and permit others to perform in their presence) acts of sodomy described in the book (pp. 383, 397) as having been easily witnessed by police or others in public places? Both they and those who tolerate such provocative conduct in their midst should not be surprised if the community’s sense of decency is so offended as to lead to repressive measures that can in turn also get out of hand. If there is in public places that sort of conduct, whether heterosexual or homosexual, the natural sensibilities of the community do have to be reckoned with, no matter how the due process clauses of the fifth and fourteenth amendments are interpreted.

V.

It should be evident that it is virtually impossible to enforce the sodomy laws still on the books in this country if the couples engaged in the proscribed conduct are, as they should in any event be, reasonably discreet. It should also be evident that “equal protection” problems abound if such enforcement as there is should exempt heterosexuals, as it almost always will be by a prosecutor who wants to survive politically. Nothing would spur outright repeal of the remaining sodomy statutes, as well as promote favorable court rulings, in this country as much as prosecution of an occasional heterosexual, which can perhaps happen if one of the offending couple is moved to testify against the other when they become estranged. Do not experienced prosecutors know that these are “no-win” cases?

This may have been a “no-win” case for the ACLU also. The accounts of the case in the Irons book, however, do make it seem more sensible for Mr. Hardwick to have pressed his appeal than I had gathered it to have been either from press reports and or from the five opinions of the Justices. Still, Mr. Hardwick’s own ac-
count reminds us that the layman often cannot understand critical features of his own case. The duty here of lawyers to explain what is going on and is likely to happen, especially when the result sought is mostly "symbolic," is of course critical.

This is not to deny, by the way, that Mr. Hardwick may have "lucked out" after all: he is presented as a man who has come to enjoy serving as a spokesman against the discrimination and other indignities against which homosexuals routinely complain (pp. 400-03). The long-term effect of this decision on the developing law of privacy remains to be seen. Perhaps we would now be better served in this area by systematic legislative enactments than by ad hoc and, all too often, erratic judicial interventions.890

VI.

It is unfortunate that Mr. Irons neglects, in his instructive account of this case, the dissenting opinion by Justice Stevens. Justice Stevens is particularly troubled by the rationale of the state's concern with only homosexual sodomy when the Georgia statute relied upon clearly applies to heterosexual sodomy as well. Still, the Justice does make an observation about the prerogatives of the community that are easily overlooked these days:

Society has every right to encourage its individual members to follow particular traditions in expressing affection for one another and in gratifying their personal desires. It, of course, may prohibit an individual from imposing his will on another to satisfy his own selfish interests. It also may prevent an individual from interfering with, or violating, a legally sanctioned and protected relationship, such as marriage. And it may explain the relative advantages and disadvantages of different forms of intimate expression.891

The community's legitimate interest in the family and in those institutions and practices (including sexual relations) which serve the family should need no justification. But there is a notion abroad in the land, if not more and more around the world, that one belongs only to oneself. This can even lead to the insistence that there is no authoritative community by which the individual should be bound, except perhaps with respect to elementary concerns about the protection of life, limb, and property.892 It does not seem to be sufficiently appreciated that individuals need communities not only to protect them but also to shape, nourish, and elevate them into human beings worthy of enduring respect and capable of genuine happiness.

Disparagement of the community may be seen also in the ten-
dency, both in the dissenting opinions in *Hardwick* and in the two accounts of the case in the Irons book, to ridicule any justification of a statute because it is very old. No doubt, old mistakes can be perpetuated in ancient laws. But, by and large, the antiquity of a statute suggests that it is likely to be keyed to the community’s awareness of the dictates of nature. One concern that decent communities have long had is to keep sexuality as fine and satisfying as it can and should be.

Still, it should at once be added, homosexuals should be able to get on with their lives, free of mean-spirited harassment. Most homosexuals, we are now given to understand, probably cannot help having the inclinations and feelings that they have by the time they are adults. The principal difficulties homosexuals face these days are not due ultimately to their own preferences and conduct, but rather to that dominant heterosexual public opinion which has made it so fashionable, if not even an imperative, to express oneself sexually more and more. There is something to be said for the concern expressed by one of the lawyers for the State of Georgia before the United States Supreme Court (p. 388) about the development of “a constitutional right which is little more than one of self-gratification and indulgence.” But in these matters self-indulgent heterosexuals have long since corrupted public tastes. Compare, again, the *Gobitis* situation: although modern religion also makes much of (if it has not even led the way in legitimating) individual choice and private life, Jehovah’s Witness children were taught (and in turn taught others) that one should try to submit to the most elevated guidance and that one should sacrifice oneself as much as possible to proper community interests. Citizens with old-fashioned tastes are likely to find the innocent pleasures, if not even gaiety and joy, of the Gobitis circle, whatever reservations one may have about it political as well as its religious doctrines, more congenial and healthier than the desperate measures to which “consenting adults” are now driven in efforts to express themselves in their secular affairs.

VII.

Mr. Irons’s book helps us see that we need to secure a more humane view of the law without becoming merely sentimental. Certainly, we need to see better than we usually do the people involved in celebrated legal controversies.

Consider, for example, the way the eleven convicted leaders of the American Communist Party were described in 1951 by the
Supreme Court in *Dennis v. United States*.893 A portrayal of one of those leaders four decades ago, in the manner Mr. Irons employs so effectively, would have provided a healthy antidote to what is recorded about Communist Party prosecutions in the pages of the *United States Reports*. My own candidate for such an account of the *Dennis* case would have been Robert G. Thompson, who went into hiding for a few years in order to avoid the imprisonment to which he was eventually subjected. I wrote this about him in 1965:

It is sad to observe recently the public reaction to the sentimental request of Robert G. Thompson—a Second World War hero (Distinguished Service Cross) who was subsequently imprisoned under the Smith Act as a Communist Party leader—that he be buried in Arlington Military Cemetery. Much of our patriotism these days is characterized by a lack of grace and of generosity, to say nothing of gratitude.894

Also salutary would have been, seventy years ago, an account, again in the Irons mode, of the people behind the glittering facade erected in 1919 by Justice Holmes in *Schenck v. United States*.895 If Mr. Schenck, his collaborators, and his opponents had been seen as the decent human beings they were, it is doubtful that Justice Holmes’s facile “clear and present danger” talk would have been permitted to have the disastrous effect that it did in the intellectual community generally, where it could come to be regarded as a useful contribution to freedom of speech theory. Professor Irons helps us appreciate, with his accounts of *Barenblatt v. United States*896 and *Elfbrandt v. Russell*,897 how dubious the “Red Scare” cases have been in this country ever since the First World War. He should be encouraged to develop even more accounts of the people behind the cases that get to the United States Supreme Court, perhaps devoting one such collection to those government officials who exhibit “the courage of their convictions” in pressing claims on behalf of the public interest. One could well begin with the “no nonsense prosecutor” in Georgia (pp. 18-19) who refused to present charges against Michael Hardwick to a grand jury and with the Quaker federal district judge in Pennsylvania (pp. 382-83) who “ordered the Minersville school board to readmit the Gobitis children and to excuse them from participation in the flag-salute ceremony.”

**CONCLUSION**

A vital question again and again noticed in the talks and essays collected here has to do with the bearing of *nature* upon the legal, moral, and political judgments we make and upon how we should
conduct ourselves with respect to the kinds of cases and controversies reviewed in this collection. The significance and yet ambiguity of nature is suggested by this description of a spectacular bird by an English naturalist a century and a half ago:

It is scarcely possible for the imagination to conceive anything more rich and gorgeous than the golden-green color which adorns the principal part of the plumage of this splendid bird; or more elegant and graceful than the flowing plumage which sweeps pendent from the lower part of the back, forming a long train of metallic brilliancy. Nature appears to have ordained that birds possessing unusual brilliancy of plumage should be inhabitants of retired and obscure situations; and in strict conformity with this law the Resplendent Trogon, by far the most beautiful of its tribe, is only to be found in the dense and gloomy forests of the southern state of Mexico, remote from the haunts of civilized man.

Much of what I have done in this collection can be considered an attempt to clear ground and lay down seed for a proper cultivation (by others, if not by me) of the idea of nature and of that sense of right and wrong (or natural right) upon which people naturally draw. Critical to much of what I have said, and to the way I have conducted my inquiries and made my preliminary assessments in one case after another, is the proposition that the principles and standards relied upon in my analyses can indeed be thought about. Particularly important here can be the nurturing of that prudence which permits one to sense when one knows enough to be able to judge and to speak responsibly in a variety of circumstances, circumstances which can be very much shaped by chance.

It is one thing to figure out what natural right calls for in any particular situation. It is, unfortunately, quite another thing to be able to share one's conclusions effectively with one's less thoughtful or more passionate fellows. The helpful uses here of divine signs, and of other forms of revelation, should be apparent. Consider for example this episode, as recalled by a nineteenth-century preacher in Kentucky:

During the late struggle of the Greeks to regain their liberty, a body of Turks were, in 1824, encamped in a part of Greece, and committed every kind of excess upon the inhabitants. One of these barbarians, an officer, had pursued a Greek girl, who took refuge in the house of a widow. The widow met him at the door, and mildly attempted to dissuade him from forcing his way in to seize the girl. Enraged, he drew his saber, but when in the act of attempting to cut down the widow, it snapped in two pieces before it reached the victim. The wretch paused, but drew a pis-
tol to accomplish his purpose in that manner, but it missed fired; and when in the act of drawing a second [pistol], he was forcibly dragged away by one of his companions, who exclaimed, "Let her alone! Do not you see that her time is not yet come?"

Thus, it is most instructive to notice in this story, that barbaric officer's humane comrade, a fellow Muslim in need of an argument to accompany his own salutary recourse to force, could usefully draw upon providence in promoting the dictates of justice.

NOTES

1. T. HOBBS, LEVIATHAN ch. 31; see also infra note 900. The reader is urged, as with my other publications, to begin by reading the text of this Article without reference to its notes, except for the note at the beginning of each of the Parts of this Article. The opening note for each Part indicates the occasion for which that Part was originally prepared.

2. See, e.g., G. ANASTAPLO, THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT 798 n.32 (Antigone and Oedipus), 294-305 (Schenck), 312-23 (Chicago Conspiracy Trial), 824 (Dennis), 825 (Rosenberg) (1971). I do not discuss here cases that I have discussed more than enough elsewhere. See, e.g., id. at 331-418; Anastaplo, What Is Still Wrong with George Anastaplo?, 35 DE PAUL L. REV. 551-647 (1986); infra note 814.

Other published discussions by me of cases are noticed infra notes 6, 99, 788, 821, 841, 861, 881. For references to still other cases that could usefully be discussed, see infra notes 27, 75, 106, 121, 161, 203, 212, 239, 374, 375, 407, 529, 697, 807, 833.

3. See, e.g., infra text accompanying note 430. Consider also John Milton's Areopagitica:

He that can apprehend and consider vice with all her habits and seeming pleasures, and yet abstain, and yet distinguish, and yet prefer that which is truly better, he is the true warfaring Christian. I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary, but slinks out of the race where that immortal garland is to be run for, not without dust and heat. Assuredly we bring not innocence into the world, we bring impurity much rather: that which purifies us is trial, and trial is by that which is contrary.

J. MILTON, COMPLETE POEMS AND MAJOR PROSE 728 (1st ed. 1957) (emphasis added). Someone such as Socrates might take issue with what is implied here about human nature and original sin. See, e.g., infra Part 10 (§ V). Would not Thomas More, on the other hand, have found such talk congenial? Id. For what has been said about the trials to which Abraham was subjected, see infra text accompanying note 290. On nature, see infra note 899. On original sin, see infra note 49, 95.

Judges, too, are themselves put to decisive tests, as may be seen in about half of the cases and controversies discussed in this Article. See, e.g., infra note 811. The judges herein include a goddess and the citizens of Athens, as may be seen in Aeschylus' Oresteia. See infra Part 2. Consider, on the relation between what goes on in everyday life and what is presented by the artist, this introduction to the great Aeschylean trilogy:

No one knows for sure when human beings first gathered together to watch their fellows stage a play. And no one knows when formal trials became regular events in the lives of civilized communities. There is not evidence that these institutions developed together. But the watching of trials seems to have much in common with the watching of plays. Speech, action, and props are arranged to display events that are not really occurring as they are watched. In each care, a staged representation imitates past or possible events, and elicits the
passions and judgements of the assembled spectators. Perennial interest in accounts of "dramatic" trials, the continual popularity of courtroom dramas and movies, and recent interest in televised crimes and trials, all suggest that dramatic reenactment and judicial judgement are fundamentally related to each other.

Perhaps it is not accident that the first and foremost drama of the Western world is about the establishment of institutional public justice. Presented in a city where, at different times, the same citizens are required to constitute themselves as collective spectator in the theatre and collective jury in a court of law, community come to look together to see that justice is done. As such, it is one of the deepest meditations on human beings as moral and law-abiding beings, and on what is necessary to heal individuals, families, and communities when they have been violated. But it is even more than a mediation on justice and punishment, even more than a guide for those who make institutional arrangements for handling such matters. The trilogy itself, staged for citizen-spectators, contributes, as the courts do, to making justice visible. No wonder Aeschylus wanted to tell this story in the theatre.

Flaumenhaft, Seeing Justice Done: Aeschylus' Oresteia, Interpretation, Fall 1989, at 69; see also id. at 105-07.

4. I return, however briefly, to these general considerations in my Conclusion to this Article. An extensive discussion by me of the themes and arguments drawn upon here, including the relation of justice to freedom and that wisdom on which true freedom depends, is anticipated in another collection I am now preparing. See Anastaplo, On Freedom: Explorations, 23 Tex. Tech. L. Rev. (forthcoming).

5. This talk was given at the University of Chicago Basic Program Weekend on The Idea of Paradise, Alpine Valley Resort, East Troy, Wisconsin, May 16, 1981. The original title of this talk was The Trials of Adam and Eve in the Garden of Eden.

The parenthetical citations in the text are to the Book of Genesis. The translation of Genesis used here is that found in R. Sacks, The Lion and the Ass: Commentary on the Book of Genesis (1991) (commentary on Genesis chs. 1-10 originally published in Interpretation, May 1980, at 29). Citations herein are to the Interpretation version.

6. See, e.g., Plato, Apology of Socrates 22b-c; see also G. Anastaplo, Human Being and Citizen: A Beginning to the Study of Plato's Apology of Socrates, in Human Being and Citizen: Essays on Virtue, Freedom, and the Common Good 15, 17 (1975) [hereinafter Human Being and Citizen]. Unless otherwise noted, citations to Plato in this Article are derived from Stephanus' Renaissance edition of the Platonic texts. See infra note 317.

7. Can there be true justice without divine rule or providence? See L. Strauss, Natural Right and History 150 n.24 (1953); see also infra notes 343, 556.

8. See R. Sacks, supra note 5, at 51-52 (commentary on Genesis 2: 10-14).


13. J. Hertz, supra note 10, at 196.


15. J. Newman, Apologia Pro Vita Sua 241 (Modern Library ed. 1950); see also id. at 247-48. Newman can speak of "the great evil" against which the infallible Christ is marshalled.


17. Sayings of the Jewish Fathers 49 n.22 (1897).

18. Deuteronomy 4:5-6; see also infra text accompanying notes 308, 438, 629.

19. Consider Maimonides's effort, in his Guide of the Perplexed, infra note 24, to suggest the rationale for some of the rules laid down by God. See also Greenberg, Some
become aware of their nakedness. The sin of Adam and Eve evidently had its effect "automatically." This suggests that a sense of how one should respond to right and virtue? Socrates refers again and again to the erotic element in the philosopher.

Consider, for example, what made both Oedipus and Socrates vulnerable. See infra Parts 4, 6; see also M. MAIMONIDES, THE GUIDE OF THE PERPLEXED 635-36 (1963) (on the ultimate perfection of man: "through it man is man"); infra notes 81, 82 & text accompanying note 218.

See J. HERTZ, supra note 10, at 8 (commentary on Genesis 2:9).
See Strauss, supra note 23, at 50.
Cain, it seems, could distinguish right from wrong enough to be held accountable for what he did. See R. SACKS, supra note 5, at 69-73 (commentary on Genesis 4:6, 8, 14). But then Cain did come after mankind had partaken of the fruit from the tree of the knowledge of good and bad. See Flaumenhaft, supra note 3, at 104. On how one begins to learn anything, see Plato's Meno and Phaedo.
See R. SACKS, supra note 5, at 68 (commentary on Genesis 4:1).
See M. MAIMONIDES, supra note 24, at 23 (pt. I, ch. 2, para. 1); R. SACKS, supra note 5, at 59-60, 70-71 (commentary on Genesis 3:5, 16, 4:8).
On the good and the bad, see R. SACKS, supra note 5, at 59-60 (commentary on Genesis 3:5).
See Deuteronomy 30:15 ("therefore choose life"); see also infra text accompanying note 524.
See, e.g., Plato, Republic 494a sq.; Plato, Apology 39c-d; G. ANASTAPLO, supra note 6, at 19-20, 206-13.
See Genesis, ARTSCROLL TANACH SERIES I, 101n (1977) [hereinafter GENESIS].
See Deuteronomy 1:39; J. Hertz, supra note 10, at 742.
See, e.g., Genesis 18:7; cf. 2 Samuel 12:4.
See J. Hertz, supra note 10, at 8; R. SACKS, supra note 5, at 57 (commentary on Genesis 2:25).
See Genesis, supra note 33, at I, 110.
See Strauss, supra note 23, at 50.
See G. ANASTAPLO, On Death: One by One, Yet Altogether, in HUMAN BEING AND CITIZEN, supra note 6, at 214-21; see also infra notes 45, 57.
See Strauss, supra note 23, at 53.
See, e.g., Genesis 2:9).
See, e.g., Genesis 3:5, 16, 4:8).
See Strauss, supra note 23, at 49.
Did death come for the animals only through human beings? Animals have no sense of time and hence know neither life nor death? See ARISTOTLE, DE ANIMA 433b5 sq.; see also G. ANASTAPLO, THE ARTIST AS THINKER: FROM SHAKESPEARE TO JOYCE 357-63 (1983) (commenting on Edwin Muir's The Animals); supra note 41.
See R. SACKS, supra note 5, at 42-43 (commentary on Genesis 2:21-23).
See id. at 45-46 (commentary on Genesis 1:26-7); see also infra text accompanying note 232.
Is it to be free from passion also to be free from understanding as well as from vice and virtue? Socrates refers again and again to the erotic element in the philosopher. Consider UPANISHADS II, 24. Cf: id. II, 63; infra note 270. But see id. n.3.
God, it seems, did not need to say anything to Adam and Eve in order for them to become aware of their nakedness. The sin of Adam and Eve evidently had its effect "automatically." This suggests that a sense of how one should respond to right and
wrong (whether or not stimulated by the proscribed fruit?) is innate in mankind. See infra Part 12-A; see also infra notes 75, 899.

49. See R. Sacks, supra note 5, at 57 (commentary on Genesis 2:25); see also S. Kierkegaard, The Concept of Dread (on sexuality as a critical element in the concept of original sin); infra note 270. References to Adam are frequent in the works of Kierkegaard.

Is such sexuality, or sensuality, "romanticized" in the Song of Songs? See Song of Songs, in Interpreter's Bible 98 (1951): "It began in the Garden of Eden . . . ." Does it continue, but under a cloud, into the New Testament, even to the Book of Revelation? See id. at 141n; see also id. at 100.

50. See M. Maimonides, supra note 24, at 23-25. Central to the inquiry in this talk is this caution from Maimonides:

O you who engage in theoretical speculation using the first notions that may occur to you and come to your mind and who consider withal that you understand a book that is the guide of the first and the last men while glancing through it as you would glance through a historical work or a piece of poetry . . . .: collect yourself and reflect, for things are not as you thought following the first notion that occurred to you, but rather as is made clear through reflection upon the following speech.

Id. at 24; see also infra notes 52, 450, 564.


52. Id. at 49. This problem, it is suggested, is at the "heart of being." Certain ineluctable necessities thus assert themselves? See also R. Sacks, supra note 5, at 44-45, 65-66 (commentary on Genesis 1:25, 3:17-19).

53. Law is avoided in the early chapters of Genesis. See R. Sacks, supra note 5, at 47 (commentary on Genesis 2:1-2).


55. Consider the discussion of piety to this effect in Plato's Euthyphro. See infra Part 6.

56. See Genesis, supra note 33, at I, 13.

57. Is not the keeping of man from immortality less of a problem for the nature of man? That is, would an indefinite extension of life have added anything essential to what human nature is capable of (especially since human beings sometimes do have the sense that they are not mortal)? How would the virtue of courage be affected? On the other hand, why does God take care that Adam and Eve not eat of the tree of life? See supra note 41; infra text accompanying note 100; see also Plato, 7 Letters 334e.

58. M. Maimonides, supra note 24, at 26 (emphasis added).

59. Cf. 1 Encyclopedia of Religion and Ethics 85 (1908); cf. also Strauss, supra note 23, at 49. Did Eve, having already eaten of the tree, know more than Adam did when she offered him fruit of that tree?

60. See, e.g., W. Shakespeare, Two Gentlemen of Verona act III, sc. i, l. 327; R. Sacks, supra note 5, at 60-61 (commentary on Genesis 3:6).

61. See R. Sacks, supra note 5, at 63 (commentary on Genesis 3:12).


64. Consider the use of Pandora, in the Greek story, to account for miseries having been let loose upon the world. But there no human male ratifies what the enterprising woman does, it seems.

65. See J. Hertz, supra note 10, at 684.


67. Cf. id. at 49-50 (on the placement of the tree).

68. J. Hertz, supra note 10, at 10.

69. On not adding to the commandments and prohibitions, see Leviticus 10:1-3; Deuteronomy 13:1; M. Maimonides, The Book of Knowledge 17a-b (M. Hyamson ed.
Would being able to add sensibly to God's directives imply the primacy of reason over revelation? Cf. supra note 19; infra notes 337, 900; cf. also infra note 501.

Does Eve first encounter God when being judged by Him? This is not unrelated to the Annunciation story in the New Testament. Mary, the mother of Jesus, can be known by Christians as the second Eve. See infra text accompanying note 131.

R. Sacks, supra note 5, at 57 (commentary on Genesis 3:1).

Cf. id. at 37-39 (commentary on Genesis 1:11) (on the earth as the first sinner); see also infra note 179.

See infra Part 12-A. There is no “trial” for the serpent: the other two involved in this disobedience were given an opportunity to say something. Had any divine prohibition been provided to the serpent? See supra note 48; infra note 77.

Has reason been good for man? See Cicero, On the Gods 221f; see also supra note 24.

See, e.g., Mark 7:19.

See the genealogy in I Chronicles 1. See also 1 Encyclopedia of Religion and Ethics 84 (on a misreading of Deuteronomy 32:8).

See I Corinthians 15:22, 45; see also Luke 3:38; Romans 5:14 (twice); I Corinthians 15:22, 45 (twice); I Timothy 2:13, 14; Jude 14. On Eve, see 2 Corinthians 11:3; I Timothy 2:13. On the serpent, see Revelation 12:9, 20:2.

Romans 5:12.


J. Hertz, supra note 10, at 196. In Christianity, however, there is but one hero. See supra text accompanying note 22.

See R. Sacks, supra note 5, passim; see especially id. at 76 (commentary on Genesis 5:1). Are the first two accounts of the Creation “hypothetical,” with the true beginning to be seen in Genesis 5:1? Have there been at least three attempts to “settle” human beings upon the earth: in the Garden of Eden, in the pre-Flood dispensation, and in the post-Flood dispensation? Then there is, according to Christians, the dispensation since the career of Jesus? Still another dispensation awaits mankind upon the Second Coming (or, for the Jews, upon the coming of the Messiah)? (The distinctive secular “prophets” in the western World of the first three stages can be said to have been Rousseau, Hobbes, and Plato, respectively.).

See Genesis, supra note 33, at I, 102.

See Aristotle, Politics 1452b1 sq.

W. Shakespeare, King Lear act IV, sc. ii, l. 11.


On what “the pursuit of happiness” does and does not mean, see Anastaplo, The

We return to the differences between Jews and Christians with respect to "the way" (whether a way back or a way out) by noticing that way is used some 1700 times in the Hebrew Bible (which we know as the Old Testament), whereas it is used only about 80 times in the Greek Bible (which we know as the New Testament). Is way more apt to suggest a way of life, a continuing existence on earth, something which Jews are more apt to make much of than are Christians? See infra notes 110, 178 & text accompanying notes 168, 524; see also infra note 256.

Notice also that nature is not used at all in the Old Testament or in the Gospels; but it is used 13 times by Paul and five times elsewhere in the New Testament. Are Christians more apt than Jews to speak today of nature as a problem and of the nature of man as having been somehow changed by The Fall? On nature, see G. Anastaplo, Psychiatry and the Law § III, in The American Moralist, supra note 22, at 410-11; infra note 899.

The Old Testament use of way can remind one of what is to be found in Chinese thought. See, e.g., Anastaplo, An Introduction to Confucian Thought, 1984 Great Ideas Today 124; see also Anastaplo, The Constitution at Two Hundred, supra, at 990-91.

96. This talk was given in the University of Chicago's First Friday Lecture Series at the Chicago Public Library, Chicago, Illinois, March 3, 1989. The original title of this talk was Negation and Affirmation: Some Perhaps Salutary Lessons from Christopher Marlowe's Doctor Faustus.

The parenthetical citations in the text and notes are to C. Marlowe, Doctor Faustus, in The Complete Plays of Christopher Marlowe (I. Ribner ed. 1963).

97. The introductory sentence of the play, recited by the Chorus, reads, Not marching in the fields of Trasimene Where Mars did mate the warlike Carthagens, Nor sporting in the dalliance of love In courts of kings where state is overturned, Nor in the pomp of proud audacious deeds Intends our muse to vaunt his heavenly verse. Id. at 357.

98. Roger Bacon, who is mentioned in the Marlowe play, see id., at 362, and others are called to mind as leaders in this great adventure. Is not the Ulysses in the twenty-sixth canto of Dante's Inferno another such adventurer? On Marlowe and Machiavelli, see L. Strauss, supra note 7, at 177.


100. See C. Marlowe, supra note 96, at 359, 362, 380, 388, 390, 411; see also id. at 405 ("make me immortal with a kiss"); supra note 57.

101. See Plato, Republic 359c sq., 612b.

102. One can be reminded by Faustus's civic-mindedness of Raskolnikov in Dostoyevski's Crime and Punishment. Faustus is a German patriot: that lends some meaning to his life; it cannot be all desire and voluptuousness. On the relation of Faustus to Adam and Eve, see infra note 899.

103. Compare Shakespeare's Prospero and his giving up of his potent books when his compassion-guided project on behalf of justice in The Tempest is completed. See infra note 525.

104. Does each artist create a "world" and people it with his fancies? Is there something divine in this? See infra text accompanying note 177. I have argued, in The Artist As Thinker, cited supra note 45, that it is critical, in order to understand the typical story, to determine how the character one is interested in should have acted. See infra note 189. Still, one should consider the implications of a comment by Serusier (quoted by Scribner Ames in her unpublished autobiography), "One says of an apple painted by the
ordinary painter, 'It looks good enough to eat.' Of an apple painted by Cézanne, one says, 'It's beautiful.'"

105. This is the inquiry that the Bible deals with at its outset, thereby legitimating the authority of the Creator who directs thereafter the people of Israel. That basis for authority is invoked in other places, such as in the Book of Job. See infra note 173; see also infra note 900.

106. How seriously can one take the notion that misery loves company? What makes Lucifer in Dante's *Inferno* "want" to chew—for he does most vigorously chew—Judas, Brutus, and Cassius in his three massive jaws?

107. These five encounters with the angels are in C. Marlowe, *supra* note 96, at 360, 368-69, 372, 374, 408-09.

108. Its principal, if not only significant, consequences are after one's life on this earth. See supra note 95.

109. Consider the equivocations with respect to such matters by Thrasy machus in the first book of Plato's *Republic*. See also infra note 881.

110. See Augustine, *The City of God* 247 (Penguin Books ed. 1972) ("it is, strictly speaking, for the sake of eternal life alone that we are Christians"); supra note 95; see also Augustine, supra, at 252-53, 287, 293, 415, 498, 589-90, 891, 991, 995, 1005; cf. id. at 567.


112. See id. at 374-75, 394, 395, 405, 407, 408, 409.

113. See, e.g., id. at 394-95, 403; cf. id. at 404-05.

114. Cunning, although it had a broader meaning then than now, could be somewhat questionable in character. Cf. 13 Dictionary of National Biography 891 (L. Stephen & S. Lee eds. 1917). For various uses, see C. Marlowe, *supra* note 96, at 358, 362, 380, 386, 392, 398, 407. This may not be unrelated to Faustus's low origins. See id. at 358, 393; cf. id. at 395. These observations apply as well to another notorious German, Martin Heidegger. See G. Anastaplo, *supra* note 2, at 815; G. Anastaplo, *Heidegger and the Need for Tyranny*, in The American Moralist, *supra* note 22, at 144-60; V. Farias, Heidegger and Nazism (1989); infra note 739. Heidegger has been identified as "the only major thinker to opt for Nazism, the main example of absolute evil in our time, possibly of any time." V. Farias, *supra*, at ix.


117. For uses of *nature*, see id. at 360, 363 (twice), 374, 403, 404, 409 (twice). See also supra note 95.

118. Augustine, *supra* note 110, at 387; see also id. at 1027-28, 1068.

119. For uses of *resoluteness* in the play, see C. Marlowe, *supra* note 96, at 362, 364, 366, 368, 373, 393, 406. Related to this is *fortitude*. See id. at 366. *Despair* is what has to be counteracted. See, e.g., id. at 393, 397, 401, 403, 404, 408; see also infra text accompanying note 631.

120. Is resoluteness somehow derivative from the Kantian emphasis upon doing one's duty, in the formal sense, regardless of consequences? See G. Anastaplo, *Kant on Metaphysics and Morality*, in The American Moralist, *supra* note 22, at 27-36; see also infra note 538. The Heideggerian emphasis on the importance of strife is significant here. See V. Farias, *supra* note 114, at 91-92, 99, 103; infra note 743; see also Plato, Laws 625d sq.; cf. infra note 634.

121. Faustus's final terror should be compared with the fortitude displayed by several of the men in Dante's *Inferno*. His dramatic dismemberment is anticipated by that of Penteus in Euripides' *The Bacchae*: both victims suffered because of an unbridled curiosity.
122. This talk was given at a Staff Seminar of the Basic Program of Liberal Education for Adults, The University of Chicago, Chicago, Illinois, February 13, 1982.

The Richmond Lattimore translation of the *Oresteia* is used here and *infra* Parts 2-B, 2-C, and 2-D. The parenthetical citations in the text (except when Greek terms are commented upon) are to *Oresteia*, in *Aeschylus I* (R. Lattimore trans. 1953). A recent translation for the theater by David Grene and Wendy Doniger O'Flaherty has also been published by the University of Chicago Press. *See infra* note 238. For useful introductions to the trilogy, see Nichols, *Aeschylus' Oresteia and the Origin of Political Life*, Interpretation, Autumn 1980, at 83; Flaumenhaft, *supra* note 3. Summaries of the three plays are provided *infra* Part 2-C (§ II). *See also infra* note 146.

123. G. Murray, *Aeschylus: The Creator of Tragedy* 179 (1940); *see also infra* text accompanying note 146.

124. If Orestes is considered dead by Clytemnestra, he can then be for her, naturally enough, someone to be mourned, however much she had feared (if not even hated) him earlier. *See Sophocles, Oedipus Tyrannus* II. 707-25, 849-57; *see also infra* text accompanying note 191.

125. On the proper spheres of men and woman respectively, see Plato, *Meno* 71c. *See also infra* text accompanying note 232; cf. Plato, *Republic* 455d sq., 458c sq., 466c sq., 540c.

126. The frenzied Dionysian cult, in which women figured prominently, was also from the East. *See, e.g.*, Euripides, *The Bacchae*; *see also supra* note 121. On the femaleness of the Furies, as well as of Clytemnestra, see Flaumenhaft, *supra* note 3, at 88. On Apollo's preference for the paternal, see *id. at* 96.

127. Much is made in the *Oresteia* of family relations. We hear in *The Libation Bearers* from no citizens of Argos aside from Clytemnestra and her children. The choral place occupied in the *Agamemnon* by elders of the city is taken in *The Libation Bearers* by foreign slave women. Is there any sign visible to everyone that something is wrong in Argos because of the usurpation by Clytemnestra and Aegisthus? Compare the effects of a most palpable plague in the Thebes of Sophocles' *Oedipus Tyrannus*. *See infra* Part 4. Apollo is concerned in both instances, but his displeasure is indicated in quite different ways in Thebes and in Argos.

128. Here, in the final lines of *The Libation Bearers*, is the Chorus's account of the House of Atreus:

> Here on this house of the kings the third storm has broken, with wind from the inward race, and gone its course. The children were eaten: there was the first affliction, the curse of Thyestes. Next came the royal death, when a man and lord of Achaean armies [Agamemnon] went down killed in the bath. Third is for the savior. He [Orestes] came. Shall I call it that, or death? Where is the end? Where shall the fury of fate be stilled to sleep, be done with?

*Aeschylus, The Libation Bearers* II. 1065-76.

129. This talk was given at a Staff Seminar of the Basic Program of Liberal Education for Adults, The University of Chicago, Chicago, Illinois, December 6, 1975. On the translation of the *Oresteia* used here, and on the parenthetical citations in the text, see *supra* note 122. Summaries of the three plays are provided *infra* Part 2-C (§ II). *See also supra* note 128.

130. Does not a poet do so, but in a different sense, in describing what the gods order? *See supra* text accompanying note 72; *infra* text accompanying *infra* note 131; *see also supra* notes 19, 69; *infra* note 237.

131. I am reminded, by the use of the mother-nurse relation here, of how the incestuous relationship is made somewhat palatable in the Louis Malle movie, *Murmur of the Heart*. *See also infra* text accompanying note 205. On the poet's knowing how the gods act, see *supra* note 130. On the rule of the truly wise being superior to the rule of law, see Plato, *Republic* 294a. *See also Plutarch, Pelopidas; G. Murray, supra* note 123, at 202; *cf. infra* note 857.
132. This talk was given at a Staff Seminar of the Basic Program of Liberal Education for Adults, The University of Chicago, Chicago, Illinois, December 8, 1979.

On the translation of the Oresteia used here, and on the parenthetical citations in the text, see supra note 122. Summaries of the three plays are provided infra Part II. See also supra note 128.

133. Introduction to The Euminides, in Aeschylus, Oresteia 270-71 (Loeb Classical Library ed. 1926). The archaic-sounding language used in this summary is appropriate for Aeschylus. Nothing is ever said (or has to be said?) in the trilogy as to why Agamemnon is not pursued by the Furies for his sacrifice of his daughter, Iphigenia. See Aeschylus, The Libation Bearers I. 242.


135. Aristotle, 2 Rhetoric; see also Plato, Greater Hippias 291e-292a.

136. See G. Thomson, 2 The Oresteia of Aeschylus, ll. 106-09n (1938).

137. See 2 id., l. 117n; see also Aeschylus, Eumenides ll. 131-32, 147, 327.

138. The "fourpenny" came from the fact that this lady charged men four pence for admission to her presence. Comment, in Basic Works of Cicero 295 (Modern Library ed. 1951).

139. Clytemnestra, we have noticed, cannot be personally rehabilitated. What she is continues: she cannot be reasoned with, even to the extent that the Furies can be, encouraged as they are by Athena's reminders that she has access to Zeus' thunderbolts. See infra note 155; see also infra note 900.

140. The critical female-male conflict was anticipated, on the Areopagus, by the battle of the Amazons and Theseus. See Aeschylus, Eumenides ll. 628, 685-89.

141. See infra Part 2-D (§ VII).


143. See 2 G. Thomson, supra note 136, ll. 130-39n, 155-58n; see also Aeschylus, Eumenides l. 155; supra note 141.

144. See 2 G. Thomson, supra note 136, ll. 95-102n. Does the hunting motif here go back to the sacrifice of Iphigenia to the offended goddess, Artemis, the huntress? If so, the story of the House of Agamemnon comes full circle, with Apollo (the twin brother of Artemis) checking the hunting of Iphigenia's brother, Orestes.

145. This talk, sponsored by the Department of Government, was given at the University of Texas, Austin, Texas, March 26, 1991. The original title of this talk was Queries About the Oresteia and the Pursuit of Justice.

On the translation of the Oresteia used here, and on the parenthetical citations in the text, see supra note 122. Summaries of the three plays are provided supra Part 2-C (§ II); see also supra note 128.

146. R. Warner, Comment, in Aeschylus, The Oresteia at ix (E. Morshhead trans. 1961); see also supra text accompanying note 123.

147. See Aeschylus, Eumenides ll. 625-26. Apollo's enmity toward Cassandra is different. See Aeschylus, Agamemnon ll. 1072-87. Apollo had been cheated of love by Cassandra. On the relation of prophecy to character, see infra text accompanying note 160. Had she avoided giving him the love she had promised, in exchange for the gift of prophetic powers, because she divined that that would be even worse than what did happen to her? Is it not instructive to assume, that is, that Cassandra already had the gift of prophecy from Apollo at the time she refused him? On the other hand, did Apollo (as god of prophecy) anticipate what Cassandra would do to him? See infra test accompanying note 174. Does not Apollo conduct himself with respect to Cassandra somewhat as Clytemnestra conducts herself with respect to Orestes? He uses Clytemnestra as his agent just as Clytemnestra uses the Furies as her agents? These are side queries as we pursue our principal line of inquiry on this occasion.
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149. See supra Part 2-A (§ VII), Part 2-B (§ I). Electra is dealt with differently, it should again be noticed, in versions of this story by other poets.

150. On rhetoric, see supra note 134. See also infra note 150.

151. See, e.g., supra notes 7, 48, 69 & text accompanying note 150; see also Plato, Republic 473c-d; Plato, 8 Letters 336a-b; cf. supra Part 1-B (§ VI).

152. On the universal desire for the good, see the opening sentences of Aristotle's Nicomachean Ethics and Politics. Cf. infra text accompanying note 298; cf. also infra text accompanying note 313. For an incident in which this proposition about the perversiveness of the good is put to a severe test, see infra note 714. For even a Clarence Darrow's apprehension of the divine, see infra note 661. See also infra note 900.

153. See Aeschylus, Agamemnon II. 1035-38, 1481-85; Aeschylus, Eumenides II. 614-21, 794-99, 972-73, 1045-46; see also Aeschylus, Agamemnon II. 1577-79.

154. This is anticipated by Apollo in Aeschylus, Eumenides II. 657-66.

155. See infra text accompanying note 235. Clytemnestra gets all that she gets, such as it is, through her surrogates, the Furies. She cannot be personally rehabilitated because she remains unchanged. Death does not make her (or anyone else?) more thoughtful than they were in life, it seems; death may only make one's character more apparent.

156. Consider the alternative versions of this story, as in Euripides, that have Orestes getting together with a still-living Iphigenia (who was not sacrificed by her father after all). But then there are also versions of the Trojan War story that have only an image of Helen taken to Troy by Paris. This is, in one sense, true of Homer's account also. That is, to whom is the divine Helen truly available? See infra note 337.

157. See supra text accompanying note 141; see also Aeschylus, Eumenides II. 696-706, 824-36.

158. This talk, sponsored by the Office of Continuing Legal Education, was given at the Loyola University School of Law, October 28, 1984. The original title of this talk was The Book of Jonah and the Rule of Law.

The parenthetical citations in the text are to the Book of Jonah. A general familiarity with the story is assumed.


160. See supra note 147; infra text accompanying note 175.

161. There was a lively exchange about these matters, and about the nature of miracles, between Clarence Darrow and William Jennings Bryan in the course of the Scopes Trial in 1925. Is not this sort of public speculation something which Maimonides would avoid, using Jonah instead primarily as a moral tale? See infra note 177.

162. See supra Part 1-A.

163. The Old Testament does not use the term natural in describing this state of affairs. See supra note 95; see also Judges 21:25; Romans 2:14 supra notes 27, 48, 75; infra notes 165, 178, 899.

164. See Genesis chs. 18, 19.

165. The natural understanding sometimes may even be taken to suggest that there really is no meaning to the cosmos. See infra note 178; cf. infra note 900.


168. See supra note 95.

169. See supra note 159.

170. Lots also were used to fill the place of Judas Iscariot among Jesus' twelve apos-
ties. Acts 1:24-26; cf. Machiavelli, The Prince ch. 25 (on the conquest of fortuna); cf. also infra text accompanying note 220.

171. Are they somewhat like the Abraham of the Sodom and Gomorrah story in this respect? See supra text accompanying notes 164, 167.

172. Consider how Abraham responds to what God said about the sacrifice of Isaac. See infra Part 5.

173. One is reminded of the Book of Job as well. See supra note 105.

174. See supra note 147.

175. See M. Maimonides, supra note 24, at 369-73; see also supra text accompanying notes 147, 160.

176. Some scholars consider Jonah's prayer a much later interpolation in the text. But is it not useful and hence integral to the story in that it shows us the hopeful way in which Jonah could see his own dire circumstances especially if he had genuine prophetic powers? In any event, if the prayer is interpolated, it was done by someone of talent who evidently believed that this kind of prayer followed from the character of Jonah and from the story.

177. See supra note 104. Consider, as bearing on how we might approach the story about Jonah, the following exchange between Socrates and Euthyphro:

Socrates: Should we assent that these things [about the gods] are true, Euthyphro?

Euthyphro: Not only these, Socrates, but as I said just now, I will also explain many other things to you, if you will, about the divine things; and when you hear then, I know well that you will be astonished.

See Plato, Euthyphro 6c; supra note 161; see also infra Part 6.

178. Consider what is said about God in that He acts only through such instruments as Jonah, storms, fishes, gourds, and worms, rather than "directly." Is this all, or almost all, that is ever clearly observed by human beings? Does this, too, point up the importance of the natural, and of the natural-seeming, in human affairs? Thus, natural developments may be seen in supernatural terms by the particularly intuitive. See supra note 95; infra notes 899, 900.

179. With the possible exception of St. Francis, human preaching to animals—that is, to non-rational beings—is not likely to be effective, at least in the Western world. Cf. supra note 74.

180. See infra Part 4-A.

181. It is a nice question, however, what the status of "repentance" is in the Nicomachean Ethics of Aristotle.

182. See M. Maimonides, supra note 24, at liv-lvi, 407f.

183. It is said that Nineveh gained a respite of two hundred years from the time of Jonah. The city is believed to have been destroyed in 612 (or 606) B.C. See Zondervan Pictorial Bible Dictionary 588-89 (1963).

Could the Ninevites ever have been "certain" about the workings of God from only such episodes as those described in the Book of Jonah? That is, could they have ever been certain that they had in fact been saved from anything? Compare, on the other hand, the Israelites who had (among other things) a spectacular deliverance from Egypt to build upon. See also infra Part 4-A.

184. This talk was given in the Works of the Mind Lecture Series of the University of Chicago, May 9, 1982 (Mother's Day).

The parenthetical citations in the text are to Sophocles, Oedipus Tyrannus, in The Complete Greek Tragedies Collection (D. Grene trans. 1959). On translations of Greek plays generally, see infra note 238. The use here of tyrannus is the technical one: it refers to whether the ruler is regarded as the legitimate successor, not to the quality of his rule. One of the critical revelations in this play is that Oedipus is indeed the legitimate successor to Laius, not the outsider (and hence "tyrant") he had been regarded. See Plato, 8 Letters 352c-e, 354a-57d.

185. I have touched upon Oedipus Tyrannus on other occasions. See, e.g., G. Ana-
TAPLO, supra note 2, at 642 n.77, 783 n.9, 798-99 n.33; G. ANASTAPLO, Who Am I?, in § III THE AMERICAN MORALIST, supra note 22, at 6-8; see also infra notes 197, 325.

186. HOMER, THE ODYSSEY II. 271-80 (A. Cook trans. 1974); see also infra note 215.


189. I draw here on the approach developed in my book, The Artist as Thinker, cited supra note 45. That book has been described as "establishing a genre of literary interpretation, in which the critic judges what happens primarily in the light of what the actors should have done." OHIO UNIVERSITY PRESS & SWALLOW PRESS, CATALOGUE (1982); see also supra note 104.

190. Oedipus in Oedipus at Colonus, written by Sophocles many years after his Oedipus Tyrannus, says to Creon:

And tell me this: if there were prophecies Repeated by the oracles of the gods, That father's death should come through his own son, How could you justly blame it upon me? On me who was yet unborn, yet unconceived, Not yet existent for my father and mother?

SOPHOCLES, OEDIPUS AT COLONUS II. 968-73, in THE COMPLETE GREEK TRAGEDIES COLLECTION, supra note 184; see also infra note 225.

191. See supra note 124.

192. We learn in Oedipus at Colonus that there was more than this in the oracles available to Oedipus—more about his last days and the consequences of his burial. See, e.g., SOPHOCLES, OEDIPUS AT COLONUS II. 624-29.

193. See PLATO, THE REPUBLIC 20e-23c; see also authorities cited supra note 6.

194. An Oedipus enlightened about his adoptive status might have been curious to seek out his parents and thus might still have made his way to Thebes and to encounters with Laius (if Laius had not already been killed by him) and with Jocasta. Or, perhaps, Laius would have gone to Corinth on a state visit. Besides, one's adoptive parents might serve as parents for the purpose of the prophecy.

195. See G. ANASTAPLO, Of Counsel—and the Limits of Politics, in THE AMERICAN MORALIST, supra note 22, at 484-500; see also infra note 200.

196. This inventory, to which more could be added, points up the need for Oedipus to have thought, at the outset, both about what the prophecy could mean and about which forms of fulfillment were particularly to be avoided.

197. The complexities here are suggested by a comment I had occasion to make in The Constitutionalist:

[Seth] Benardete says of the Oedipus ("Sophocles' Oedipus Tyrannus," in ANCIENTS AND MODERNS 2-3 (J. Cropsey ed. 1964)): ... The play therefore moves from the question of who killed Laius to that of who generated Oedipus. It moves from a political to a family crime, which is, paradoxically, from the less comprehensive to the more comprehensive theme (cf. 635 ff.). Oedipus' discovery of his parents silently discloses his murder of Laius, but to discover himself as the murderer of Laius would not have disclosed his origins. Sophocles indicates this shift from one theme to the other by the absence of the word polis after its twenty-fifth occurrence at 880, the context of which is the denunciation of tyranny. Tyranny links the political and family crime. [Italics in quotation added]" Consider the shifting back and forth in the play between "one" and "many" murderers of Laius. See Benardete, ibid., pp. 5, 7, 14, n. 13. It is useful to notice that, although both Oedipus and the audience are convinced he did kill Laius, the evidence is not brought forth to support this conclusion; that inquiry is abandoned when Oedipus gets on the track of who he is. Sophocles leaves this vital question technically (legally?) open. (An identification of Oedipus as the murderer at the crossroads could easily have been brought in to round out the case if the author had so desired.) May not this be because the question remains essentially open? Who did kill Laius? One or...
many? Oedipus, alone, at the crossroads? Or Oedipus as an instrument of the gods, of the “fates,” perhaps even of Laius and Jocasta, to say nothing of the city itself? The audience cannot help moving (without perhaps being conscious of it) from one assessment to the other (as does Oedipus himself in Oedipus at Colonus?). Does not this contribute to the timeless fascination, and even terror, of the play? One is responsible—and yet again one is not?

See G. ANASTAPLO, supra note 2, at 798 n.32; see also infra text accompanying note 445.

198. The Delphic oracle about the Theban plague, as reported by Creon to Oedipus, did not refer at all to the incest.

199. See supra text accompanying note 151.

200. Consider here the advice given by Machiavelli:

A prince therefore ought always to take counsel; but only when he wants to and not when others want to: rather, he ought to discourage everyone from counseling him on anything he has not asked for; but he ought to be a great asker, and also a patient listener of the truth about the things asked; in fact, if he learns that anyone because of some consideration has not told him the truth, he should be perturbed.

MACHIAVELLI, THE PRINCE, in A. PANSINI, NICCOLO MACHIAVELLI AND THE UNITED STATES OF AMERICA 282 (1969); see also supra note 195, infra note 632; cf. infra note 567.

201. Consider, on what the world is like, the problem of “one murderer or many,” supra note 197. Consider also, on patricide and being, infra note 203.

202. Did Sophocles know that Oedipus was, both at the fatal crossroads and in Thebes, actually closer to Corinth than he had been in Delphi, whatever his frantic intention may have been (upon leaving Delphi) to get as far away from Corinth as possible?

203. On the significance of patricide (as distinguished from fratricide), consider the following:

The theme of brother killing brother is a common beginning for many peoples. The most famous is the story of Romulus and Remus. It is by no accident that in this case we are more familiar with the Roman myth than with any corresponding Greek myth. The political, in the most common usage of the word, played a higher role in Rome than it did in Athens. In the Bible, too, the fratricide is committed by [Cain] the founder of the first city. The myth or account is an essentially political account, though the fratricide itself is an essentially prepolitical act. The founding of a city requires a leader, and yet there is a natural equality among brothers. The awareness of this difficulty seems to lie behind both accounts. Greek myth, on the other hand, deals more with patricide, which ultimately means the attempt to become one’s own father by replacing him. Motivations for erasing one’s own origins, or rather becoming one’s own origins, lie in the attempt to assert one’s own complete independence of being. In that sense patricide is essentially an apolitical act.

R. SACKS, supra note 5, at 71 (commentary on Genesis 4:8); see also infra note 206.

204. See supra text accompanying note 1.

205. See supra note 131.

206. Why does this regicide lead to these consequences? Is it because it is also a patricide? Is patricide a repudiation of fertility itself, something that incest is not by its very nature? See supra notes 127, 203.

207. See infra Part 4-B.

208. The traditional answer, it will be remembered, is man.

209. Cane or no cane, Oedipus is physically powerful in his encounter with Laius and his party at the crossroads.

210. See Benardete, Oedipus, in ANCIENTS AND MODERNS 5-6 (J. Cropsey ed. 1964).

211. See SOPHOCLES, OEDIPUS AT COLONUS II. 988-99.

212. One can be reminded here of King Hamlet in Shakespeare’s Hamlet: he is so
bent on revenge that he is not concerned about the welfare either of Denmark or of his son Prince Hamlet. See infra note 529.


214. See id. ll. 1642-44.

215. It does not seem that the Homeric Oedipus blinded himself. Rather, he continued to rule in Thebes. See supra text accompanying notes 186, 187. Is the blinding something "sentimental" as well as "symbolic" added later?

216. This also points up a tendency to knowing patricide that may be in Oedipus when he is provoked. Did the Delphine oracle simply "read" what Oedipus might be like in his passion? Jocasta's hanging herself did spare her son/husband from doing still another dreadful thing. Did she hang herself, that is, partly for his sake?

217. See Sophocles, Oedipus at Colonus ll. 576f, 647, 760-67.

218. See supra text accompanying note 81; see also supra note 24.

219. See, e.g., Plato, Republic 414b sq.; Plato, 8 Letters 332d-e, 341c-e, 344c-e. See also infra note 416 and text accompanying note 346; cf. infra text accompanying note 383.

220. See supra note 170.

221. Homer, 12 Odyssey ll. 36-54, 153-200.

222. 9 id. ll. 116-566.

223. This talk was given at a Staff Seminar of the Basic Program of Liberal Education for Adults, The University of Chicago, Chicago, Illinois, October 3, 1964.

The Elizabeth Wychoff translation of the Antigone (with an occasional correction by me) is used here and infra Part 4-C. The parenthetical citations in the text are to Sophocles, Antigone, in Sophocles I (E. Wychoff trans. 1954).

A recapitulation of the plot of the Sophoclean play is provided infra, Part 4-C (§ III). See also infra note 590.

224. Wychoff, Comment, in Sophocles I, supra note 223, at 206; see also infra note 483; infra Part 10 (§ II).

225. Antigone's name represents a negation of generation. It is said that her family's "original crime consists in generation itself." What does that mean? It is also said, "Laius was held to be the first homosexual." Benardete, A Reading of Sophocles' Antigone: II, Interpretation, Summer 1975, at 28 n.84; see also supra text accompanying note 190; infra text accompanying note 234.

226. In fact, some scholars have tried to cut these lines from the text, but unfortunately for them (and fortunately for us) they are in all of the manuscripts and were known to Aristotle as Antigone's. Our translator observes,

For those, like myself, who are sure the lines are Antigone's, there is drama in her abandoning her moralities and clinging to her irrational profundity of feeling for her lost and irreplaceable brother, devising legalistic arguments for her intellectual justification.

Wychoff, Comment, in Sophocles I, supra note 223, at 206. I hardly believe Antigone "abandon[ed] her moralities" on this occasion, whatever tension may be exhibited, in her awareness of things, between the just and the noble. See G. Anastaplo, supra note 2, at 651 n.91. Consider the "irrationality" of Athena supra text accompanying note 154. See also infra note 227.


228. See Plato, Crito 50d.

229. See G. Anastaplo, supra note 2, at 798 n.32:

Thus, the lines which scholars dismiss as distracted, perhaps even as spurious, point not (as some say) merely to irrationality on her part but rather to her awareness of both her strength and her vulnerability. But awareness is not the same as understanding: and so she challenges a new convention (Creon's decree) in the name of an older one (which some mistakenly see as either natural
or divine in its origin). And yet the city does depend on the very family that it legitimates: it is appropriate that Creon is destroyed through his family.

Cf. PLATO, REPUBLIC 457c sq., 469c-e.

230. See infra note 231.

231. See G. ANASTAPLO, supra note 2, at 798 n.32:

Creon, invoking the claim of the city against the family, fails to discern that his authority comes to him through his family; Antigone, invoking the claim of the family against the city, fails to discern that her pride of family has been nurtured by the political role of her family in the city. Agamemnon is greeted on his return home as "king, sacker of Troy's citadel, and issue of Atreus." Agamemnon 783-84. But what he had to do to become the sacker of Troy (as well as to remain king?) corrupted his family relations and led to his destruction. (This juxtaposition is seen as well in the conflict in The Eumenides between the family-linked old divinities and the city-linked new ones.)

See also infra note 233.

232. See supra text accompanying notes 46, 47; see also supra note 125 & Part 2-D (§§ V, VI).

233. Antigone's last speech in Sophocles' play is heard as she is led to her entombment (937-43):

O town of my fathers in Thebe's land,
O gods of our house.
I am led away at last.
Look, leaders of Thebes,
I am last of your royal line.
Look what I suffer, at whose command,
Because I respected the right.

SOPHOCLES, supra note 223, ll. 937-43. She can proclaim herself the last of the Theban royal line even though she knows that her sister survives her. See supra note 231; see also SOPHOCLES, supra note 223, l. 38.

234. See supra note 225.

235. See supra Part 2-D (§§ VI, VIII).

236. This talk was given for the Basic Program of Liberal Education for Adults, The University of Chicago, Chicago, Illinois, March 4, 1979.

The parenthetical citations in the text are to J. ANOUIH, ANTIGONE (L. Galantière trans. 1958). The parenthetical citations in the text to Sophocles' Antigone are to the Wychoff translation. See SOPHOCLES I, supra note 223.

237. Benardete, supra note 225, at 32. May the same be said about Orestes? See, e.g., supra Part 2-B (§ II) & text accompanying notes 130, 150.

238. See Benardete, supra note 225, at 33. It should be evident, upon a careful reading of the Benardete analysis, how much one's grasp of the Greek plays can be enhanced by that knowledge of the language which permits the most precise translations, however tempting it may sometimes be in such circumstances to over-interpret. I have been using here, and in my discussions of the Oresteia, the English translations that are generally available. See infra note 373.

239. This talk was given at Rockford College, Rockford, Illinois, April 11, 1977. The original title of this talk was Kierkegaard, Abraham, and Socrates: Illusions of the Absurd. An epigraph was provided from a speech by Don Quixote: "If I were to show [Dulcinea] to you, what merit would there be in your confessing a truth so self-evident? The important thing is for you, without seeing her, to believe, confess, affirm, swear, and defend the truth." M. DE CERVANTES SAAVEDRA, DON QUIXOTE 45 (Viking Press ed. 1949); see also infra note 487. Consider also St. Augustine's statement: "We cannot understand what happened as it is presented to us [in the Genesis creation story]; and yet we must believe it without hesitation." AUGUSTINE, supra note 110, at 436; see also id. at 1027f.

I have found very useful the comments on my original manuscript made by Christo-
pher A. Colmo of Rosary College. His influence is particularly to be noticed infra notes 262, 265, 286, 300, 305. See G. ANASTAPLO, Some Questions About “Existentialism”, in THE AMERICAN MORALIST, supra note 22, at 139-44.

240. The translation of Genesis used here may be found in R. SACKS, supra note 5, Commentary on Genesis chs. 21-24, originally published in INTERPRETATION, Jan. 1982, at 67. Citations herein are to the INTERPRETATION version.

241. M. MAIMONIDES, supra note 24, at 500-01. The “absurdity” argument of Kierkegaard can be said to have been anticipated by Maimonides’s observation, “In truth it is the most extraordinary thing that could happen in the world, such a thing that one would not imagine that human nature was capable of it.” On Maimonides, see G. ANASTAPLO, Maimonides on Revelation and Reason in THE AMERICAN MORALIST, supra note 22, at 58-82; supra notes 19, 24, 50, 69, 81; text accompanying note 58.

242. R. SACKS, supra note 240, at 75 (commentary on Genesis 22:2). On placing “human reason itself . . . on the altar,” see the discussion of absurdity in Chapter 5 of Hobbes’s Leviathan. See also infra note 407 & text accompanying note 338.


244. Id. at 578.


246. L. STRAUSS, supra note 7, at 320-21; see also L. STRAUSS, WHAT IS POLITICAL PHILOSOPHY? 241-42, 268-69 (1959). On Edmund Burke, see infra note 382.

247. On Kant, see G. ANASTAPLO, THE AMERICAN MORALIST, supra note 22, at 27-36. On Nietzsche, see id. at 125-34. On existentialism, see id. at 139-50. On Heidegger, see id. at 144-60.


249. Id. at 562 n.2.

250. Kierkegaard’s reading of Platonic texts includes his book, The Concept of Irony—with Constant Reference to Socrates. See also infra notes 262, 295.

251. Consider, for example, the complicated fashion in which the account in Plato’s Symposium is presented.


253. Id. at 21.

254. R. SACKS, supra note 240, at 75 (commentary on Genesis 22:2).

255. Id. at 76.

256. Matthew 27:46. To speak, as I do in this talk, of the Old and New Testaments is to speak out of the Christian tradition. See infra text accompanying note 342; see also supra note 95.

257. See infra Part 7-A. On the original language of Matthew, see infra note 362.

258. Various incidents in Matthew’s account of the Crucifixion seem to be keyed to this psalm. See also Psalms 10, 13, 74.


261. R. SACKS, supra note 240, at 76 (commentary on Genesis 22:2). One might well wonder what the relations between Abraham and Sarah were after she learned what “almost” happened to her (not his!) only child. Do they ever “speak with each other again” after that?

It is asked by Sacks, “Could God have nullified the Covenant? Perhaps, but then God’s word would be meaningless, and what man could ever trust Him again?” But would there have even been any account (whether disturbing or reassuring) of God’s dealings with Abraham if the Covenant had not been kept? See G. ANASTAPLO, “Who Am I?” §§ II, VI, in THE AMERICAN MORALIST, supra note 22, at 5-6, 10-11.

On the significance of please, compare infra notes 268, 287.

262. Did Kierkegaard bring to the Abraham story (as perhaps Robert Sacks has) questions that he learned from Plato, such as may be seen in the discussion in the
Euthyphro of whether the gods love a thing because it is pious or whether a thing is pious because the gods love it? See infra Part 6. Would the latter position here, but not the former, vindicate Abraham?

On using discussion of an author merely as an occasion for developing one's own thoughts, see the opening paragraph of Section III of this Part.

263. See Job 1:18-19; Judges 11:29-40; see also S. Kierkegaard, supra note 252, at 68f.

264. See Genesis chs. 16-18, 21. Maimonides spoke of Abraham, not of Sarah, as sterile. See supra text accompanying note 241. What is the significance, in this connection, of the episode described in the twentieth chapter of Genesis? See Augustine, supra note 110, at 692-93; see also infra note 353.

265. I have been told that Kierkegaard raises the principal question here in the appendix to chapter III of the Philosophical Fragments. All of his Fear and Trembling may be regarded as an explication of the difficulties (absurdities?) which arise if one tries to assume that the request with respect to Isaac came from God or that Abraham could “know” this.

266. M. Maimonides, supra note 24, at 500 (emphasis added).

267. Id.; see also supra text accompanying note 241.


269. On the relation between prophecy and philosophy, see Augustine, supra note 110, at 811-12 (“[H]e prophetic authority antedates the beginnings of pagan philosophy”). See also infra notes 501, 900 & text accompanying note 432; cf. S. Kierkegaard, Philosophical Fragments 53 (H. Hong & E. Hong, trans. 1985) (“is not that what philosophers are for—to make supernatural things ordinary and trivial?”); infra note 309; cf. also infra Part 6 (§ V). On the relation between prophecy and poetry, see supra notes 104, 130, 131, 178; infra note 277 & text accompanying note 274. See also infra notes 450, 564.

270. “Faith is a miracle, and yet no man is excluded from it; for that in which all human life is unified is passion, and faith is a passion.” S. Kierkegaard, supra note 252, at 77; see also supra notes 48, 49; infra note 305, text accompanying notes 323, 345, 382. On miracles, see supra notes 161, 239, 241, infra notes 279, 501, 504, 510.

271. I say in appearance because the desire for “commitment,” as well as the forms commitment is likely to take, suggests something natural at work, including perhaps a natural awareness of being. On being, see, for example, supra notes 52, 201; infra notes 590, 899.

272. See Plato, Apology 20e sq.

273. Or are we meant to see that any great trust in God is an instance of an absurdity being accepted?

274. See, e.g., Augustine, supra note 110, at 642-43, 1023-25.

275. Id. at 642-43. The same is said by Augustine about reports of God seeing or descending or otherwise acting. See, e.g., id. at 658-59; see also M. Maimonides, supra note 24 (opening chapters). Things do seem somewhat different for Augustine when there is an instance of an incarnation of God. See, e.g., Augustine, supra note 110, at 691-92. But would not Maimonides have asked Augustine, albeit prudently, whether he really wanted to make an exception of The Incarnation? See Acts 14:11-18; see also infra note 333 & text accompanying note 354; cf. T. Aquinas, Summa Theologiae 3a. 39, 7; cf. also infra note 392.

276. See, e.g., Genesis 18:17 (“Shall I hide from Abraham that which I am doing . . .?”).

277. What knowing means in the case of Abraham may be at the heart of our inquiry here. See infra note 515. In a sense, perhaps, Abraham in his relations with God (or in his responses to and dependence on God) knows “how things will turn out” much as does the dreamer who is ultimately in control of his dream. Or, put another way, Abraham is
the poet (the maker-discoverer) of his most critical relations with God. See infra note 900.

278. See, e.g., PLATO, Republic bks. II, III; see also infra note 333.


281. J. Hertz, supra note 10, at 74.


283. J. Hertz, supra note 10, at 74.


285. Id. 22:11-12, 15-18.

286. But see supra note 239. Kierkegaard was not the first to notice the element of irrationality (or, at least, that which is not susceptible to reason) at the core of religion. In pointing this out, he appears as a son of the Enlightenment. On the other hand, he does present himself as an advocate of religion, if not even as an informed enemy of the Enlightenment. Did he see in the Enlightenment a “religion of reason” which posed a greater threat to philosophy than any posed by the established revealed religions of the West? See supra note 226; infra note 305 & text accompanying notes 328, 338, 405; see also infra note 590.

287. AUGUSTINE, supra note 110, at 694. On “the thunder of a divine command,” see supra text accompanying note 261; cf. supra note 268.

288. AUGUSTINE, supra note 110, at 694; see also Hebrews 11:17-19. Augustine provides a Christian symbolic interpretation of the ram, the thicket, etc. Were not Augustine and Paul more inclined to rely on resurrection than most Jews (including Abraham?) have been inclined to do? See infra note 392.

289. See Matthew 3:9; see also infra text accompanying note 370.

290. See J. Hertz, supra note 10, at 74.


292. See L. Strauss, supra note 72, at 13-14.

293. See supra text accompanying note 246.

294. Does all this lead, in Nietzsche, to the will to power? See W. Dannhauser, Nietzsche’s View of Socrates 271-72 (1974).

295. See Weiss, Kierkegaard’s “Return” to Socrates, 45 New Scholasticism 573 (1971).

296. See S. Kierkegaard, supra note 252, at 110. The translator, Walter Lowrie, says, in a note to this passage, “[Kierkegaard] uses here the word ‘emotion,’ but it is clear that he has in mind what a modern psychology has called libido.” Id. at 269 n.78.

297. See id. at 110n.

298. See supra note 152.

299. Such are the variations on the legend of Agnes and the Merman and the comments on the story of Sarah and Tobias. See S. Kierkegaard, supra note 252, at 103f, 111f.

300. See G. Anastaplo, Psychiatry and the Law § VI, in The American Moralist, supra note 22, at 412-15. Is the emphasis upon the role of the will ultimately subverted (or is it merely disguised) by the definition of faith as a passion? See supra note 270; infra text accompanying note 391; see also infra note 590.

301. See S. Kierkegaard, supra note 252, at 85, 90.

302. Consider, for example, the difficulties Cephalus faces in Book I of Plato’s Republic. On the status of prudence for Kierkegaard, see Weiss, supra note 295, at 578-79, 582.

303. See S. Kierkegaard, supra note 252, at 122.

304. See id. at 84, 103; see also G. Anastaplo, Kant on Metaphysics and Morality, in The American Moralist, supra note 22, at 27-32.

305. Is such an awareness of things, and the capacity thus to become aware, reflected in the recollection story of Plato’s Meno? Does a serious examination of the principle of contradiction oblige us to raise the questions that Kierkegaard does? Was the restoration by Kierkegaard of the difference between revealed religion and philosophy ultimately a
defense of the principle of contradiction and hence also of nature? See infra note 407. A thorough study of Kierkegaard would have to address such questions. One purpose of Fear and Trembling may be to encourage thoughtful men to see the passions for what they are. See G. Anastaplo, Some Questions About Nietzsche, in The American Moralist, supra note 22, at 125-34; see also infra notes 270, 286, 306 & text accompanying note 395.

306. On Hegel, see the essay by Pierre Hassner in History of Political Philosophy, supra note 142, at 732.


308. Deuteronomy 4:5-6; see also supra text accompanying note 18; infra text accompanying note 438.

309. Philippians 2:12; cf. L. Strauss, supra note 115, at 206 ("For the beginning of philosophy as the philosophers understood it is not the fear of the Lord, but wonder."); cf. also infra notes 344, 625, 900; supra note 269 & text accompanying note 79.

310. See Weiss, supra note 295, at 575.

311. See S. Kierkegaard, supra note 252, at 27.


313. Id. at 220-21 (the ellipsis is Kierkegaard's); cf. supra note 152. Does not Kierkegaard deliberately say "sin" where the Greeks would have said "vice"?

314. See infra note 305. Consider also the ancient Greek saying that one's character is one's fate.

315. M. Maimonides, supra note 24, at 499; see also G. Anastaplo, supra note 45, at 13; infra note 344.

316. A. Heschel, supra note 245, at 191.

317. This talk was given at the Crossroads International Student Center, The University of Chicago, November 23, 1985. The original title of this talk was An Introduction to Plato's Euthyphro. See infra notes 389, 398; cf infra note 483.

318. See Plato, Apology 23d; see also supra note 6.


320. The popular Herodotus, for example, was something of an anthropologist himself. His History is available in a recent translation into English by David Grene published by the University of Chicago Press.

321. See supra note 177.


323. See, e.g., supra notes 270, 286. These are the gods that citizens are obliged to acknowledge. On the Christian form of this issue, see infra Parts 8, 10.

324. The name "Euthyphro" is composed of elements that mean "straight" (euthy) and "thought" (phron). See Introduction, to Plato, supra note 317, at 41 n.2.

325. Euthyphro can be usefully compared to the much more notorious Oedipus. See supra Part 4-A. The two men are diametrically opposed in their opinions as to how one should regard one's parents. Most people, then as well as now, would side with Oedipus, whatever reservations they might have about the intensity of Oedipus' passions and actions upon learning who he was and what he had done to his parents. But does not philosophy sometimes seem to counsel treating one's parents the way one would treat other men and women? On the teaching with respect to this question in Aristophanes' Clouds, see L. Strauss, Socrates and Aristophanes 9 (1966); see also Matthew 10:35; Luke 14:26; cf. Exodus 20:12; cf. also infra text accompanying note 369.
326. See, e.g., Plato, Apology 32a-c; G. Anastaplo, supra note 6, at 15, 239 n.28; see also infra note 397.


328. See supra notes 269, 286, 305, 328.

329. For an instructive use of another Heracles oath, see Plato, Greater Hippias 290e, 293a-b; see also infra note 331.

330. Euthyphro, without using any names, does refer to Kronos as having acted in his day against his father Ouranos. See Plato, Euthyphro 6a, 8b. That is, Kronos is looked to for authority when he acts like Zeus and Euthyphro, but not when he is the victim of Zeus, his own son. Could not Zeus' binding of the destructive Kronos have served equally well to justify what Euthyphro's father had done in binding the murderous laborer?

331. The power of Heracles evidently appealed to the ambitious Anytus. See Plato, Meno 91c.

332. Consider what could happen if someone should pattern himself upon Zeus the lover. In antiquity, we are told, mythographers counted one hundred and fifteen women who had been sexual partners of Zeus at one time or another. See W. Burkett, Greek Religion 128 (1985). Still, it has been noticed that "Zeus was the only god who could become an all-embracing [no pun intended?] god of the universe." Id. at 131.

333. Consider how the stories about the gods are questioned in books II and III of Plato's Republic. See supra text accompanying note 278; see also F. Bacon, The Wisdom of the Ancients; L. Strauss, supra note 325, at 160 (discussing Aristophanes' The Birds); supra notes 269, 275; infra note 349 & text accompanying note 355.

334. See supra note 226.

335. Plato no doubt learned from his own career as well. That career is usefully indicated in the seventh and eighth Letters (whether or not those writings are Plato's).

336. Consider how this question is put in the central passage of the dialogue (measured by number of speeches). Plato, Euthyphro 10a-c; see also T. Aquinas, Of Truth ques. 23, ans. VI, reply; supra note 262; infra note 341.

337. And so the God of the Old Testament can name Himself, "I am what I am" or "I shall be what I shall be." Exodus 3:14. Piety can there consist of doing what God has decreed for whatever reason. Still, it can be added that one ought to obey the divine decrees in the right spirit, which does suggest some understanding of God's purposes? See supra text accompanying note 323; see also supra notes 19, 69; infra note 900.

Consider Enobarbus' description of Cleopatra:

I saw her once
Hop forty paces through the public street;
And having lost her breath, she spoke and panted
That she did make defect perfection
And, breathless, pow'r breathe forth. . . .
Age cannot wither her, nor custom stale
Her infinite variety; other women cloy
The appetite they feed, but she makes hungry
Where most she satisfies; for vilest things
Become themselves in her, that the holy priests
Bless her when she is ruggish.

W. Shakespeare, Antony and Cleopatra act II, sc. ii, 230-41. There do sometimes seem to be special beings, somehow reflections of perfection, to whom the ordinary rules cannot be expected to apply. And so the divine can be spoken of by human beings as mysterious and incomprehensible. Does not this mean that it is risky for ordinary people to attempt to imitate the apparent doings of the divine? See supra note 156; infra note 510.

338. See, e.g., supra notes 242, 286.
339. What if the gods say, or seem to say, different things? See, e.g., EURIPIDES, HIPPOLYTUS; see also infra note 341.

340. See supra note 333.

341. Consider the following commentary:

In Plato's Euthyphro, Socrates forced Euthyphro to choose between saying that the holy is holy because the gods love it, with the consequence that the holy loses its unity in the gods' contradictory affections, or that the gods love the holy because it is holy, with the consequence that the gods are dispensable guides for understanding what [the holy] is.

Benardete, A Reading of Sophocles' Antigone: I, INTERPRETATION, Spring 1975, at 160; see also supra note 336; infra note 349.

342. Compare, for example, Aristotle's Nicomachean Ethics, where piety is barely touched upon. Compare the uses made of piety in his Politics and his Rhetoric. Are the gods ever understood to be pious in dealings with one another? Should they be?

343. I do not believe that either virtue or nature is ever used in the Euthyphro. Must not the gods be just, if anyone is? See supra note 7.

344. See the story of the philosopher in a graveyard. G. ANASTAPLO, supra note 45, at 13; see also supra notes 269, 309 & text accompanying note 315; infra notes 501, 900 & text accompanying note 378.

345. See supra note 270; see also J. HALEVI, THE KUZARI (opening pages).

346. See supra text accompanying note 219.

347. See PLATO, APOLOGY 34d; see also PLATO, supra note 317, at 88 n.62.

348. Socrates does seem to call into question many of the prayers, sacrifices, and rituals dictated by conventional piety, except perhaps as aids in disciplining men. See PLATO, EUTHYPHRO 13c-d, 14d-16a; see also infra notes 590, 630. He does resort to Delphi in both Plato's Republic and Plato's Laws. See also G. ANASTAPLO, supra note 6, at 18, 23, 25-26.

349. For a deeper discussion of the Euthyphro and piety, see L. STRAUSS, supra note 115, at 187f. On Leo Strauss and the gods of one's city, infra note 398, Part 13 (§ VI).

350. This talk was given at the Hillel Foundation Jewish Student Center, The University of Chicago, Chicago, Illinois, November 19, 1976.

The parenthetical citations in the text are to the Gospel of Matthew. For a comparison of this Gospel with the Gospel of Mark, see infra Part 7-B (§ X).

351. I was invited to give this talk at Hillel House after it became known that a talk on the trial of Jesus which I had given earlier that year at Rosary College (in a Chicago suburb) drew so large an audience as to require moving everyone into a much bigger auditorium on the Rosary College campus. The Rosary College talk is set forth infra Part 7-B.


354. See supra note 275.

355. See supra note 333.

356. Useful introductions to the relevant literature and history are provided by S. SANDMEL, WE JEWS AND JESUS 154-58 (1965); Grant, The Trial of Jesus in the Light of History, 20 JUDAICA 37 (1971).

357. Jesus, in 10 ENCYCLOPEDIA JUDAICA 10-12 (1971). "C.E." refers to "Common Era" or "A.D." "The three Gospels of Matthew, Mark, and Luke are called synoptic from the Greek word synoptikos, which means 'to see the whole together, to take a comprehensive view.' They present similar views of the career and teaching of Christ, and resemble each other closely in content and in phraseology." ZONDERVAN PICTORIAL BIBLE DICTIONARY, supra note 183, at 320.

358. See Jesus, supra note 357, at 12-13. "No trial in the long and tragic annals of
mankind has had more momentous consequences than that of an obscure Jewish religious leader who came into Jerusalem with a small band of followers and was arrested, convicted, and executed over nineteen hundred years ago." Gordis, Foreword, 20 Judaica 6 (1971).

360. Id. at 14.
361. Id. at 12.
362. "It takes but a moment's thought to glimpse some of the inferences which would follow from the [traditional] view that Matthew and Luke utilized Mark as a source. For one thing, if Matthew used Mark, and in passage after passage copied or rewrote what is in Mark, the great coincidences in the Greek rule out the opinion of Papias that Matthew was originally written in Hebrew, for this is scarcely possible in the case of a Greek writing based on an earlier Hebrew writing." S. Sandmel, supra note 356, at 59. Compare the ancient story about the miraculous translations that produced the Septuagint. See Zondervan Pictorial Bible Dictionary, supra note 183, at 770.

364. J. Murray, We Hold These Truths 175-76 (1960).
367. But, of course, not all who are persecuted are prophets. See Plato, Crito 44d.
368. This "gospel of the kingdom" may be spelled out in the long Sermon on the Mount which follows, see Matthew 5:3-48, but it is not clear that that is what was meant.
369. Is not Jesus "un-Jewish" in this respect. See Matthew ch. 4; see also supra note 325.
370. See supra text accompanying note 289.
371. Thomas Aquinas suggests that the three temptations of Jesus in the wilderness have parallels in the temptations of Adam. See T. Aquinas, Summa Theologiae 3. 42. 4. Origen is quoted as saying that Satan showed Jesus "how, by means of the various vices, he may be the lord of the world." Id.; see also infra Part 7-B (§ X).
373. In these matters it is useful to be aware of the form in which critical texts in one's tradition are usually available. A salutary moderation, useful for pedagogical purposes, is likely to be encouraged thereby. See supra note 238.
375. Compare the detail provided in various other stories in the Gospels. Is the killing of John the Baptist, for example, told more clearly?
376. See supra Part 5.
377. Due process respects what has come to be expected in the community. But we know from our own experiences that unprecedented, if not even bizarre, things can be done by respectable officials in times of great passion. See, e.g., infra notes 802, 810, 811.
378. See supra notes 241, 275, 344.
379. See S. Freud, Moses and Monotheism; see also infra note 403. Was Isaac, in a sense, a sacrificed leader? See supra Part 5.
380. Blasphemy, in English law, has been defined as "the offense of speaking matter relating to God, Jesus Christ, the Bible, or the Book of Common Prayer, intended to wound the feelings of mankind or to excite contempt and hatred against the church by law established, or to promote immorality." Black's Law Dictionary 171 (6th ed. 1990). It has been defined, in American law, as "any oral or written reproach maliciously cast upon God, His name, attributes, or religion." Id. Blasphemy can at times be re-
garded as treason in the spiritual realm. For the Roman law of sedition, see infra note 423. See also infra text accompanying note 813.

381. See G. Sloyan, Jesus on Trial: The Development of the Passion Narratives and Their Historical and Ecumenical Implications 61 (1973); see also Cohn, Reflections on the Trial of Jesus, 20 Judaica 15 (1971); Enslin, The Temple and the Cross, id. at 28-29; infra text accompanying note 422. In his article, Judge Cohn, of the Supreme Court of Israel, presented "the novel and striking thesis that at the hearings—not the trial—of Jesus before the High Priest and his court, the Jewish authorities were seeking to find a way to save [Jesus] from execution at the hands of the Romans. It was Jesus' insistence upon proclaiming his views that rendered their attempt of no avail and led to his death." Gordis, supra note 358; see also infra note 423.

382. See supra notes 270, 305. One can be reminded here of the impassioned rhetoric of Edmund Burke during the French Revolution. Cf. supra text accompanying note 246.


384. See Plato, Gorgias 467c-76a.

385. See Plato, Laws 829a.

386. See Plato, Apology 30a-b, 31c-32a; Plato, Laws 829a.

387. See infra text accompanying note 437.


389. It is reported, in Acts 6:7, that later on, "a great company of the priests" in Jerusalem did become Christians. It is known that almost all of the earliest Christians were Jews. But is it known what proportion of the Jews in Palestine allied themselves with the Christian movement within Judaism? See infra note 415. For a Jew to become a Christian in the first quarter-century after Jesus' death was probably regarded as a far less (if at all) traumatic break with his heritage and family than it often is today. Such a move today, except perhaps when marriage and children are anticipated, can be regarded as akin to treason, or at least as suicidal in its implications, by those who are thus "betrayed" or "abandoned." It can also seem in some instances to be "provocative" or otherwise childish and hence a temporary aberration. See supra note 380; infra note 398. Is it akin to the betrayal that Euthyphro practiced, which we can sometimes see fearful children resort to? See supra Part 6; see also infra note 398; cf. infra note 483.

390. See Exodus ch. 32; see also supra note 374.

391. See supra text accompanying note 300.

392. In what ways, if at all, does Judaism depend for its significance (if not even for its survival) in the modern world on the influence of Christianity? What has Judaism learned about the divine and about religion (not a Hebrew term) from the massive intellectual, political, and artistic efforts devoted to Christianity? In any event, the American support of Israel, which has been so critical to the very existence of that country, does seem to be nourished by Christian sentiments in the United States. See infra note 794.

393. Lucretius, for instance, can show us the decay of the pagan gods. So can Augustine in The City of God. Perhaps this can also be seen in the career of Socrates. See e.g., G. Anastaplo, supra note 6, at 15.

394. Is not this reflected in the fact that there is (in the Torah) only one authoritative version of the founding of the Jewish people, whereas there are (in the Gospels) at least four more or less authoritative accounts of the founding of the Christian faith? See infra text accompanying note 882.

395. See J. Locke, The Reasonableness of Christianity; see also supra note 305.

396. See supra note 392.

397. See, e.g., Plato, Meno 76e.

398. Is there not much to be said for sticking, even as a "non-believer," with one's people's own civilized way of doing things? See supra note 389; infra note 493. Consider
how Leo Strauss, in a still unpublished (and obviously uncorrected) transcript of a lecture recorded at the University of Chicago Hillel House in 1962, addressed this question:

But here we are up against a difficulty which underlies the very title of this lecture and everything I said before. What shall those Jews do who cannot believe as our ancestors believed? So while religious Zionism is the only clear solution, it is not feasible, humanly speaking, for all Jews. I repeat, it is impossible to get rid of one's past. It is necessary to accept one's past. That means that out of this undeniable necessity one must make a virtue. The virtue in question is fidelity, loyalty, piety in the old Latin sense of the word *pietas*. The necessity of taking this step appears from the disgraceful character of the only alternative, that of denying one's origin, past or heritage. A solution of a man's problem which can be achieved only through a disgraceful act is a disgraceful solution. But let us be detached, let us be objective, scientific. Is this universally true? We must bust the case wide open in order to understand the difficulty. I am not interested in preaching up any solution. I try to help myself and, if I can, some of you, in understanding our difficulty. Let us take a man by nature very gifted for all excellences of man, of the mind and of the soul, who stems from the gutter. Is he not entitled to run away from the gutter? Surely, one could even say that by being silent about his gutter origins he acts more decently than by displaying them, and thus annoying others with a bad smell. However this may be, that interesting case which deserves all our compassion is, I think, surely not our case. Our worst enemies admit this in one way or another.

Lecture by Leo Strauss entitled *Why We Remain Jews* (1962) (transcript on file with author) [hereinafter Strauss, *Why We Remain Jews*]. In the course of the discussion that followed this very instructive lecture, Mr. Strauss was asked,

Well, if I were to try to draw a general principle from what you have said—I don't know if this is right—but I would say something like this: a man is being dishonorable if he chooses to disagree with, to break away from, his origins, what his family believes.

*Id.* Mr. Strauss's response was,

I qualified that. I said that I could visualize a man stemming from absolute degradation and simply having a nobler thing in himself tending away, as it were, from that way. And I could only say he acts wisely. . . . But what I also said is that this is not the case of the Jews. However degraded we had to live for centuries in various countries, we were not degraded. Surely we were maltreated; all kinds of things were inflicted upon us. But for the average Jew it was perfectly clear that we did not deserve it at the hands of those people. Perhaps we deserved it at the hand of God, that is another matter, but not at the hands of those people as such. I could give you some childhood stories, and older or people of my age here could also give examples, of what the traditional posture was. I remind you of only one essay which is still worthy to be read by everyone who is interested in this. That is an essay by Achad Ha'am—you know who he was? Asher Ginsberg—an essay by Achad Ha'am which he called "In External Freedom and Internal Slavery," and he compared the situation of the Jews in the Russian ghetto to the Chief Rabbi of France, the head of the Sanhedrin, you know, an institution founded by Napoleon himself, and highly respectable with badges and all. Then he showed on the basis of what this man said, this Chief Rabbi, that he was a slave, not a free man. Externally he was free, he could vote, acquire whatever kind of property he liked, and many other things. But in his heart he was a slave. Whereas the poorest Polish Jew, if he did not happen to be an individual with a particularly lousy character, which can happen in any community, was externally a man without rights and in this sense a slave, but not in his heart. And that is of crucial importance in this matter.
What the Jewish heritage can be taken to mean may be seen by considering still another comment by Mr. Strauss in the course of his lecture:

I draw a conclusion. It is impossible not to remain a Jew. It is impossible to run away from one's origins. It is impossible to get rid of one's past by wishing it away. There is nothing better than the uneasy solution offered by liberal society, which means legal equality plus private discrimination. We must simply recognize the fact, which we all know, that the Jewish minority is not universally popular, and the consequences which follow from that. We all know that there is in this country an entirely extra-legal but not illegal (what we can call) racial hierarchy coming from the Anglo-Saxons down to the Negroes, and we are just above the Negroes. We must face that. And we must see that there is a similarity between the Jewish and the Negro question. There are quite a few Jewish organizations which are very well aware of this, but also, in order to keep the record straight, we must not forget the difference. When we Jews fight for something which we may fairly call justice, we appeal to principles which were ultimately, if I may say so, originally our own. When the Negroes fight for justice, they have to appeal to principles which were not their own, their ancestors' in Africa, but which they learned from their oppressors. This is not an altogether negligible difference, which should be stated by someone who doesn't want to beat around the bush.

Is there a historicist cast to Mr. Strauss's principal argument in this lecture? For further indications of what Judaism meant to Mr. Strauss, see supra note 349; infra notes 518, 519, 556, 625, 746. Perhaps it should be added that as African-Americans have fought for justice in their country they could appeal not only (1) to the principles that came to them ultimately from Judaism by way of Christianity, but also (2) to the principles of the American regime that they learned as Americans just as most other immigrants here have learned them, and (3) to the principles of natural right which, we must believe, various of their ancestors were also naturally aware of here and there in Africa. See G. Anastaplo, supra note 45, at 254, 255, 269-71, 275; see also G. Anastaplo, Natural Right and the American Lawyer, in Human Being and Citizen, supra note 6, at 46-60; G. Anastaplo, Law and Morality, in id. at 74-86; supra notes 152, 389; infra notes 450, 564, 714, 900 & Part 6 (§ V).

This talk was given in the Law Lecture Series at Rosary College, River Forest, Illinois, April 1, 1976.

The parenthetical citations in the text are to the Gospel of Mark. On the King James translation, see supra text accompanying note 373.

400. See, e.g., H. Cohn, The Trial and Death of Jesus at xi (1971).

401. It has been said that some sixty thousand books on Jesus were published in the nineteenth century alone.

402. A note of caution is in order for any endeavor at biblical exegesis among us. My wife was once the principal research "authenticator" for the questions used on the College Bowl television-quiz program. There were, she learned, certain subjects about which one had to be particularly careful in framing questions and validating answers, lest the National Broadcasting Company switchboard in New York City light up immediately with corrections from indignant viewers all over the United States. Those sensitive subjects included the Irish, the Hungarians, the American Civil War, and, of course, the Bible.

403. "This must be distinctly understood, or nothing wonderful can come of the story I am going to relate." C. Dickens, A Christmas Carol stave 1. Or, as Leopold Bloom put it, "Christ was a jew like me." J. Joyce, Ulysses 336 (1942). Compare the following observation: "Toynbee goes so far [in A Study Of History] as to show no less than seventy-eight points of similarity between the life of Christ and the lives of a number of pagan heroes." W. S. Gilbert: A Century of Scholarship and Commentary 233 (J. Jones ed. 1970); see also supra note 379.

404. See also Jesus, supra note 357.
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405. See supra note 286.

406. On the synoptic Gospels, see supra note 357.

407. I am, in these explorations of the Gospel stories, reconsidering issues I first examined in a systematic fashion in a play I wrote more than thirty years ago. That play, in which the always troublesome character of Jesus' betrayer was critical, was originally entitled The First Christian. Upon further reflection, however, I changed its title to The Last Christian. This shift in titles suggests how elusive this subject can be. See supra notes 242, 305.

408. Compare, for example, an angel's deliverance of apostles from prison. Acts 5:17-20; see also id. 16:25-40.


410. See, e.g., G. Sloyan, supra note 381, at 44 n.12.

411. A Greek Orthodox monk, at the Church of the Nativity in Bethlehem in 1989, was kind enough to show us a collection of bones ascribed to the infants killed pursuant to Herod's order. Are comparable (Christian?) collections available for viewing in Egypt from the effects of the tenth plague in Moses' time?

412. Jesus' gentleness toward inferiors (such as little children and the ill) and harshness toward "equals" and "superiors" can remind one of the proud man in Aristotle's Nicomachean Ethics. Consider, also, the superba of Joan of Arc. See infra text accompanying note 493.

413. Is it the same Sabbath? We are not told, but this does follow immediately in the text.


415. See id. 24:1-53.

416. "Behold, I send you forth as sheep in the midst of wolves: be ye therefore wise as serpents, and harmless as doves." Mark 10:16; see also supra note 219; cf. T. Aquinas, Summa Theologiae 3a. 42, 3.

417. "The small band of those faithful to Jesus' memory who awaited his return in power to complete his messianic (i.e., kingly) role was virtually wiped out when the Jerusalem church perished in the catastrophe of the year 70." Sloyan, The Last Days of Jesus, 20 Judaism 58 (1971); see also supra note 389.

418. See supra text accompanying note 246 (on prudence as "the god of this lower world"); see also G. Anastaplo, supra note 2, at 783.

419. None of Jesus' more spectacular miracles, I have noticed, had been performed in Jerusalem.


421. Id. 11:50.

422. See supra note 381.

423. The relevant Roman law is said to have been, "Persons who cause sedition or upheaval or who incite the mobs are, depending upon their civic status, liable to crucifixion, or to be thrown to the wild beasts, or to be banished to an island." Enslin, supra note 381, at 29.


425. See supra Part 7-A (§ IV).


428. See id. 26:36-44; cf. infra text accompanying note 436. On temptation, see Genesis 3:6; Matthew 6:13.


431. Id. at 158.

432. Id.; see also supra notes 95, 152, 269; infra text accompanying note 446.

433. See G. Anastaplo, supra note 6, at 13-14.

434. See Plato, Apology 40b-e.

435. See Plato, Crito 44d; see also G. Anastaplo, Citizen and Human Being;
Thoreau, Socrates, and Civil Disobedience, in Human Being and Citizen, supra note 6, at 203-13.

436. See Plato, Crito 43b-c; cf. supra text accompanying note 428.

437. See supra text accompanying note 387. Abraham, we are told, was (and evidently remained) "very rich in cattle, in silver, and in gold." Genesis 13:2.

438. Deuteronomy 4:6; see also supra text accompanying notes 18, 308.

439. Consider, by way of contrast, Athena's pleasure in Odysseus' deviousness, Apollo's endorsement of Socrates' wisdom, or even God's praise of Job.


441. See, e.g., Brandon, supra note 374, at 44-45.

442. See, e.g., 1 Corinthians 15:12-22.

443. Consider, by way of contrast, Athena's pleasure in Odysseus' deviousness, Apollo's endorsement of Socrates' wisdom, or even God's praise of Job.

444. Compare the way the trial of Joan of Arc was handled. See infra Part 12-B (§ VII).

445. See supra note 197.

446. Cf. supra notes 95, 152.


450. Micah 6:8; see also supra note 392. Central to most of the controversies reviewed in this collection should be the ability to sense when one knows enough in each set of circumstances to be entitled to be confident in the judgment one makes. The justice, mercy, and humility required in each situation may depend on a reliable thoughtfulness, including an awareness of what the truly divine is and calls for—or at least an awareness, grounded in nature, of what the divine surely does not call for or permit. See, e.g., supra notes 50, 269; infra notes 564, 900.

451. This talk was given in the Law Lecture Series at Rosary College, River Forest, Illinois, February 3, 1977.

452. See Jeremiah 28:1-17; see also M. Maimonides, supra note 24, bk. II, chs. 32-48.

453. See W. Shakespeare, Henry VI, Part 2 act II, sc. i; see also Plutarch, Life of Numa.

454. See Hellenic Chronicle, Jan. 6, 1977, at 10 (taken, it seems, from the Saturday Evening Post).

455. See Sophocles, Ajax II. 14-17, in The Complete Greek Tragedies (J. Moore trans. 1957):

Voice of Athena, dearest utterance of all the gods' to me—I cannot see you, and yet how clearly I can catch your words, that speak as from a trumpet's throat of bronze!

See also supra Part 7-B (§ XIII).

456. See The Trial of Jeanne d'Arc 131, 197-98 (Notable Trials Library ed. 1991); Joan of Arc: Fact, Legend, and Literature 6-9 (W. Jewkes & J. Landfield eds. 1964). Consider the following comparable experience of St. Augustine: "Suddenly a voice reaches my ears from a nearby house. It is the voice of a boy or a girl (I don't know which) and in a kind of songsong the words are constantly repeated: 'Take it and read it. Take it and read it.' " Augustine, supra note 430, at 456. Consider also the following contemporary account:

Margaret Court, one of the world's winningest professional tennis players,
claims to have seen visions from heaven. . . . Court, a [34-year-old] Roman Catholic, wasn't pushing her religious beliefs. They just came out during questioning at the luncheon gathering.

"I had visions on and off for about three months," she said. She said about 14 months ago "I saw Our Lady on the wall. The next day I was praying about it. I had a tremendous urge in the middle of the day to pray. I put my hands up to my face and I heard this voice say: 'Open the gate and you shall see on the other side.' And then I saw a child going to church. I was still confused and thought I might be seeing things. Then I went to prayer again. I put my hands up to my face and saw like a big window and I was looking down at earth. It was in a turmoil. I'll never forget it. And then I saw a cross on top of a hill. . . . Behind this cross there were brilliant flashing lights with all colors. And then an archway. It took me three days to really believe what I was seeing." . . . Her visions began shortly after her return home [to Australia in 1975], she said, soon after she read a book about the Holy Spirit.


Joan of Arc evidently did not usually expect any of her companions to hear the voices she did, even if they were present when the voices spoke to her. See infra note 497.

457. See Sophocles, Ajax l. 18-20.
458. Id. l. 51-52; see also infra note 515.
459. Sophocles, Ajax l. 22.
460. Id. l. 69-82.
461. S. Freud, New Introductory Lectures on Psychoanalysis 59 (1965); see also 1 Collected Works of Abraham Lincoln 384-86 (R. Basler 1953) (Lincoln's poem on the madness of Matthew Gentry).
463. See V. Sackville-West, Saint Joan of Arc 286 (1936).
464. See G. Bernanos, Sanctity Will Win Out: An Essay on St. Joan 11 (1947);

There was the illustrious University of Paris, and more especially the Theological Faculty. The Popes themselves feared this Faculty; it was the sovereign arbiter of kings, made up as it was of almost all of the eminent theologians . . . of whom the Christendom of that day could boast.

I am reminded here of the eminent University of Chicago faculty and how they could be led in the 1960s by their "Bishop of Beauvais" to put down the presumptuous young of their own day. See, e.g., G. Anastaplo, Liberty and Equality, in Human Being and Citizen, supra note 6, at 263 n.9; G. Anastaplo, What's Really Wrong with George Anastaplo?, in id. at 286 n.10; see also Anastaplo, In re Allan Bloom: A Respectful Dissent, in Essays on the Closing of the American Mind 267 (R. Stone ed. 1989).

465. See Joan of Arc, 22 Encyclopedia Britannica 379-80 (1988). Compare the following remark on the trial of St. Joan by Alan Dershowitz:

It is in the nature of formal legal proceedings to often disguise substantive injustices. In reading through transcripts of trials which we now know were fixed, it is often difficult to spot the smoking guns. The fixing generally takes place outside of the glare of the official record. Judges know how—and knew how in the fifteenth century—to "due process a defendant to death." The writer of the essay which closes this volume tells us that we are reading not only the trial of Joan of Arc, but also the trial of her judges. Surely that is true, but as twentieth century readers, we are not privy to the worst crimes of the judges—the secret crimes, the unspoken crimes, the covered up crimes.

Dershowitz, Introduction, in The Trial of Jeanne D'Arc, supra note 456, at ii-iii. For a summary of the changes against Joan, see infra note 478.

466. Joan of Arc, supra note 462, at 993.
467. See Joan of Arc, supra note 465, at 380.
468. See id. at 379. She did manage to avoid being tortured. See also infra text accompanying note 485.
469. See Joan of Arc, supra note 465, at 378-80.
470. See id. at 380.
471. A. PAINE, 1 JOAN OF ARC, M AID OF FRANCE at vi (1925).
473. Id.
474. The lively Churchill account is marred by several errors of fact.
475. W. CHURCHILL, 1 A HISTORY OF THE ENGLISH-SPEAKING PEOPLES 305, 308-09 (1963); see also infra note 642. Both Churchill (in his History) and George Bernard Shaw (in his play, Saint Joan) make up, as stalwarts in the English language, for the somewhat unfriendly treatment of Joan of Arc by Shakespeare in his Henry VI, Part I. To some extent, Shakespeare was a victim of his political and social circumstances. See infra Part 9. But in some ways his treatment of Joan is more respectful than it seems on the surface.
476. See Joan of Arc, supra note 465, at 378.
477. Id.
478. Id.

When the trial proper began [about March 26], it took two days for Joan to answer the 70 charges that had been drawn up against her. These were based mainly on the contention that her whole attitude and behaviour showed blasphemous presumption: in particular, that she claimed for her pronouncements the authority of divine revelation; prophesied the future; endorsed her letters with the names of Jesus and Mary, thereby identifying herself with the novel and suspect cult of the Name of Jesus; professed to be assured of salvation; and wore men's clothing. Perhaps the most serious charge was of preferring what she believed to be the direct commands of God to those of the church.

479. See Joan of Arc, supra note 465, at 378.
480. See, e.g., supra note 465; see also W. SCOTT, JEANNE D'ARC (1974).
481. See, for example, the report of an observer: "And Joan said [to the Bishop of Beauvais], 'Oh, you write down everything that is against me all right, but you will not record anything in my favor.' And I do not believe that remark was written down, either, though it aroused a great uproar in the court." JOAN OF ARC: FACT, LEGEND, AND LITERATURE, supra note 456, at 71.
482. The 1945-1946 Nuremberg Trial was similar in key respects, but that did not necessarily prevent a fair judgment. See infra Part 12-A.
483. Cf supra note 275; infra note 501. It is helpful, in thinking about Joan, to consider not only the dreadful centuries-long European experience with witch trials, but also the spectacular career of Antigone of Thebes. See supra note 99, Part 4-B; see also infra note 494. Don Quixote, with his canny idealism, should also be instructive here. See supra note 239.

Central to the challenge by Joan of Arc was her willingness to be guided by her voices in disregarding conventional authority: "Asked [during her trial] whether she thought she had committed a sin when she left her father and mother, she answered that since God commanded, it was right to do so. She added that since God commanded, if she had had a hundred parents, or had been the king's daughter, she would have gone nevertheless." THE TRIAL OF JEANNE D'ARC, supra note 456, at 98; see also infra notes 494, 515, text accompanying notes 540, 562; cf supra note 389.
484. See Joan of Arc, supra note 465, at 379-80.
485. See supra note 468.
486. THE TRIAL OF JEANNE D'ARC, supra note 456, at 343; see also supra note 478.
487. See THE TRIAL OF JEANNE D'ARC, supra note 456, at 343-45.
488. Id. at 350-51.
489. Joan was "introduced" to St. Catherine and St. Margaret by St. Michael. See id. at 60; see also Joan of Arc, supra note 465, at 377.

490. A bishop's horse is brought up from time to time. See, e.g., The Trial of Jeanne d'Arc, supra note 456, at 116; see also A. Jones, The Trial of Joan of Arc 97 (1980).

491. See, e.g., Heresy, 6 New Catholic Encyclopedia 1063 (1967).

492. It was ultimately on the issue of submission that the great proto-Protestant leader John Hus had been burned in 1415. See supra note 478.

493. "To her judges [Joan] was guilty of what they called 'superbity,' by which they meant the enormity of knowing that she was right when they told her she was wrong." W. Scott, supra note 480, at 145; see also supra notes 415, 450, 483; infra notes 515, 630. The condemnation of Joan included these observations by her judges: "We, having Christ and the honor of the orthodox faith before our eyes, so that our judgment may seem to emanate from the face of Our Lord, have said and decreed that in the simulation of your revelations and apparitions you have been pernicious, seductive, presumptuous, of light belief, rash, superstitious, a witch, a blasphemer of God and His saints, a despiser of Him in His sacraments, a prevaricator of the divine teaching and the ecclesiastical sanctions, seditious, cruel, apostate, schismatic, erring gravely in our faith, and that by these means you have rashly trespassed against God and the Holy Church." The Trial of Jeanne d'Arc, supra note 456, at 364-65 (emphasis added); see also supra notes 478, 483; infra note 494. On religious allegiances and honor, see supra notes 398.

494. Compare Antigone's opinions about the proper relation of politics to religion. See supra note 483. The European context of Joan's early fifteenth century challenge to the established way is suggested by this account of intellectual developments:

In the eleventh and twelfth centuries a trickle of Greek learning, mostly Arabic redactions of Aristotle and Hippocrates, had touched off a remarkable but still ecclesiastically controlled burst of creativity by the much-maligned Schoolmen. By the fifteenth and sixteenth centuries, however, the trickle was a flood, and common life was being desacralized.

Morris, The Three Ages of the Catholic Church, Atlantic, July 1991, at 108. Joan of Arc, with her apparent independence of mind, anticipated in certain ways the "Americanism" heresy condemned by Roman Catholic churchmen in the nineteenth century. See id. at 110. She refused to say that she would submit in all things to the authority of the Church: "What Our Lord told her and shall tell her to do she will not cease from doing for any man alive. It would be impossible for her to deny them [that is, the things she has said and done with respect to the visions and revelations she claimed to have from God], and in the event of the Church commanding her to do anything contrary to God's bidding, she would by no means undertake it." The Trial of Jeanne d'Arc, supra note 456, at 240-41; see also supra note 483; infra notes 515, 630.

495. On Henry VIII, see infra Part 10 (§ III).

496. See Joan of Arc, supra note 465, at 380.

497. See The Trial of Jeanne d'Arc, supra note 456, at 123-24; supra text accompanying note 488. Was not Joan's abjuration essentially hypothetical? See supra text accompanying note 487. It must have been evident to some of the men who dealt with Joan that she continued to believe that she had heard the voices of saints, etc. See The Trial of Jeanne d'Arc, supra note 456, at 349-51.

Why did not Joan expect her voices (1) to appear to her judges and tell them to leave her alone and (2) to do other things on her behalf? (Would she not have been insane if she had believed that the voices had appeared to them when they had not?) What did Joan finally believe her voices "wanted" to happen to her? See infra note 515; see also infra note 673.

498. See, e.g., infra Part 10 (§ VIII); infra note 639 and accompanying text & note 642; see also G. Anastaplo, On Speaking to and for Mankind, in The American Moralist, supra note 22, at 345-48; G. Anastaplo, Natural Right and the American Lawyer, in Human Being and Citizen, supra note 6, at 46-60.
499. See, e.g., G. ANASTAPLO, Natural Right and the American Lawyer, in HUMAN BEING AND CITIZEN, supra note 6, at 46-60.

500. The devilish connection would be regarded by some to be evident not only in the second of these possibilities (the visions sent by the devil), but in the third and fourth as well (the hallucinations and the deliberate deceptions). It is instructive, in considering Joan's accounts of the coming of the visions and her initial responses to them, to consult M. MAIMONIDES, supra note 24, at 385-86, 388, 390, 394, 402, 406, 409. See also supra note 452.

501. Maimonides cautions his reader that, in interpreting accounts of prophecies, one should not confuse “the possible things with the impossible ones.” M. MAIMONIDES, supra note 24, at 406; see also supra notes 161, 344; infra note 590.


503. This we can assert even though she was denounced as being presumptuous herself. See supra note 493.

504. Consider, for example, the career of Charles de Gaulle. Henri Bernstein, a French dramatist, wrote in 1943:

Now that De Gaulle's powerful speeches and the consistency and dignity of his leadership have invalidated the suspicion of political commitments, mockery has become the chosen weapon. A titter circulates among smart and critical groups: “The man believes he is Joan of Arc!” This reminds me somehow of a famous squib on Victor Hugo: “The poor devil actually thinks he is Victor Hugo!”

Perhaps some of De Gaulle's aides have used this historical parallel too freely as an argument in discussion. I am pretty sure, though, that the partisans of the Maid were not all cautious diplomats when it came to expressing their faith. But if those who liken the miracle of De Gaulle to that of Joan of Arc are fools, I am one of those fools.

Bernstein, Charles de Gaulle and Joan of Arc, N.Y. Herald Tribune, May 7, 1943. Thereafter he wrote,

De Gaulle is difficult. He is stubborn. He is grave. So was the Maid. Like the Maid, he has a mystic view of France's destiny and sacred rights.

Id. May 8, 1943. De Gaulle did identify himself as fighting under the Cross of Lorraine. (The d'Arc family was from Lorraine.)

505. See W. SCOTT, supra note 480, at 133. I have long found it intriguing that those people afflicted with the Tourette disorder do not (cannot?) simply disguise their embarrassing outbursts by putting them in a foreign language (however else they do try to conceal those outbursts). That is, are not their circumstances determining the form their "inspired" manifestations take?

506. There is a problem with mental aberrations: they all too often do reflect underlying moral attitudes—and those who deal with such aberrations can sometimes sense those moral attitudes to be dubious.

507. This is what had been done with the Duke of Orleans. See JOAN OF ARC: FACT, LEGEND, AND LITERATURE, supra note 456, at 12.

508. See Anastaplo, supra note 99, at 80-82; see also infra Part 12-B.

509. Abraham Lincoln stated in his Second Inaugural Address: "The Almighty has His own purposes. 'Woe unto the world because of offences! for it must needs be that offences come but woe to that man by whom the offence cometh!'" See G. ANASTAPLO, THE CONSTITUTION OF 1787: A COMMENTARY 301 (1989).

510. Professor Chandrasekhar has observed:

[Consider] the following statement of Einstein: “The most incomprehensible fact about Nature is that it is comprehensible.” This expresses a profound truth and it is echoed in the writings of other great men of science. Thus, Eugene Wigner has written of the two miracles: “the miracle of the existence of laws of
Nature and the miracle of the capacity of the human mind to divine them”; and he has also written about “the unreasonable effectiveness of mathematics in the understanding of Nature.” And Schrödinger considers that this latter capacity of the human mind to divine nature’s laws may well be beyond human understanding.

Commenting on the discovery of Kepler [with respect to the orbits of the planets], Einstein has written: “Our admiration for Kepler is transcended only by our admiration and reverence for the mysterious harmony of Nature in which we find ourselves. Already in antiquity, man had devised curves exhibiting the simplest forms of regularity. Among these, next to the straight line and the circle, the most important were the ellipse and the hyperbola. We see that the last two are embodied—at least very nearly so—in the orbits of heavenly bodies.”

Einstein continues: “It seems that the human mind has first to construct forms, independently, before we can find them in things. Kepler’s marvellous achievement is a particularly fine example of the fact that knowledge cannot spring from experience alone but only from a comparison of the inventions of the intellect with the facts of observation.” Let me repeat the crucial part of this remarkable statement: “The human mind has first to construct forms, independently, before we can find them in things”.

Chandrasekhar, Science and Scientific Attitudes, 334 Nature 285 (1990); see also Plato, Gorgias 507e-08a; G. Anastaplo, Natural Right and the American Lawyer, in Human Being and Citizen, supra note 6, at 252 n.30; supra notes 7, 95, 151, 152, 337; infra note 900.

On the perennial problem of “the stability of excellence,” see L. Strauss, supra note 72, at 295.

511. See, e.g., infra Parts 12-D, -E. Still another excessive response has been to the unjustified Iraqi invasion of Kuwait. See, e.g., Tyler, Disease Spreads in Iraq as Embargo Takes Its Toll, N.Y. Times, June 24, 1991, at 1; see also infra notes 674, 696, 716, 724, 773.

512. See G. Anastaplo, The Case for Supporting Israel, in Human Being and Citizen, supra note 6, at 305 n.3 (quoting Lord Cockburn).

513. See Sophocles, Ajax II. 118-33.

514. See id. II. 1315-1402. Ajax had killed himself when he discovered how deluded and hence ridiculous he had been in his slaughter of the helpless animals. See supra text accompanying note 457.

515. Sophocles, Ajax II. 121-26. I have suggested that Antigone of Thebes anticipates Joan of Lorraine in certain ways. But does not the deluded Ajax, with his private “revelations” about the animals he slaughters, also anticipate Joan? See supra text accompanying note 458. If one believes, as Joan evidently did, that “Our Lord Jesus Christ, when he ascended into Heaven, committed the government of His Church to the apostle St. Peter and his successors,” was not the Church prudent to insist upon more credentials than Joan offered? Did not Joan depend on the Church for most of what she believed about spiritual matters, including about the very saints she relied upon in opposing the authority of the Church? See The Trial of Jeanne d’Arc, supra note 456, at 336-40; see also supra notes 493, 497; infra note 590. And yet was it not simply wrong to execute her? Her canonization, too, raises complicated questions—and perhaps helps explain why it took five centuries to do it? (Did the Church finally come around to recognizing what the people of France had already done with Joan? Similarly, in 1950, did the Church formally recognize what her people at large had long believed about the bodily assumption of Mary? See Anastaplo, Liberation Pedagogy, 39 Cross Currents 463, 467 n.6. (1989-90); supra notes 483, 494; see also infra text accompanying note 642.

Still, we can recognize that we hear her voice: She has captured our imagination, just as Something had captured hers? However self-regarding one’s piety may routinely be in critical respects, Joan’s piety was in the service of her patria. It is significantly (and
cheerfully!) different from the emphasis upon self-expression (or self-indulgence) that we have become accustomed to. See supra text accompanying note 342; infra Part 13.

Consider also this exchange between Anne Hutchinson and her Massachusetts inquisitors in the middle of the seventeenth century:

Q. How do you know that was the spirit [of God]?
A. How did Abraham know that it was God that bid him offer his son, being a breach of the sixth commandment?
Q. By an immediate voice.
A. So to me by an immediate revelation.

THE ANTIMONIAN CONTROVERSY, 1636-1638 (D. Hall ed. 1968); cf supra note 277.

516. This talk was given at the Chicago Public Library Cultural Center, Chicago, Illinois, October 3, 1983. The original title of this talk was *Shylock's Missing Speech: Shakespeare, the Jews, and The Merchant of Venice*. An epigraph was provided from Exodus 25:8: “And let them make Me a sanctuary, that I may dwell among them.”

The parenthetical citations in the text are to *The Merchant of Venice* as it appears in *The Complete Pelican Shakespeare* published by Penguin Books. An instructive introduction to the play is provided by David Bevington in his collection, *The Complete Works of Shakespeare* (D. Bevington ed. 1980).

517. Another quite ugly play, but by a much younger Shakespeare, is *Titus Andronicus*. On this instructive play, see G. Anastaplo, supra note 45, at 29-61.


Our worst enemies are called, since I don’t know how many years, anti-semites, a word which I shall never use, which I regard as almost obscene. I think that if we are sensible we abolish it from our usage. I said in a former speech here that it was coined by some German or French pedant: I smelled them. I learned, a few weeks ago, it was coined by a German pedant, a fellow called Marr. The reason was very simple. Anti-semitism means hatred of Jews. Why not call it as we Jews call it: *Rishus*, “viciousness”? “Hatred of Jews” is perfectly intelligible. “Anti-Semitism” was coined in a situation in which people could no longer justify their hatred of Jews by the fact that Jews are not Christians. They had to find another reason and since the 19th Century was almost as proud of science as the 20th Century, the reason had to be scientific. Science proves that the Western world consists of two races, the Aryan and the Semitic races, and therefore by speaking of anti-semitism our enemies could claim that they acted on a spiritual principle, not mere hatred. The difficulty is that the Arabs are also Semites.

Strass, *Why We Remain Jews*, supra note 398; see also infra notes 746, 747.

519. On Jews in a liberal society, I again draw upon Leo Strauss’s lecture, *Why We Remain Jews*:

Assimilation now does not mean conversion to Christianity, as we know, because assimilation now is assimilation to a secular society, a society which is not legally a Christian society, a society beyond the difference between Judaism and Christianity, and—if every religion is always a particular religion (Judaism, Christianit)—an a-religious society, a liberal society. In such a society there are no longer any legal disabilities of Jews as Jews. But a liberal society stands or falls by the distinction between the political, or the state, and society, or by the distinction between the public and the private. In the liberal society there is necessarily a private sphere with which the state’s legislation must not interfere. It is an essential element of this liberal society with its essential distinction between the public and private, that religion as a particular religion, not as a general religion, is private. Every citizen is free to adhere to any religion he sees fit. Now given this, the necessary existence of such a private sphere, the liberal society necessarily makes possible, permits, and even fosters what is called by many people *discrimination*. And here, in this well-known fact, the Jewish
problem, if I may call it that, reappears. There are restricted areas and in various ways—I do not have to belabor this point, any glance at the Journal of Sociology or at Jewish journals would convince you of the fact if you have any doubt about its existence. Therefore the practical problem for the individual Jew on the low and solid ground is this: How can I escape "discrimination"? [This is a] term which I beg you to understand as used always with quotation marks. I would not use it of my own free will. The answer is simple. By ceasing to be recognizable as a Jew. . . . [But] this solution is possible at most only for individuals here or there, not for large groups.


520. Ancient Rome and ancient Judaism shared one vital opinion: morality was largely citizen morality. See infra notes 551, 629.

521. William T. Braithwaite of the Loyola University of Chicago School of Law, said this in a talk he gave earlier in 1983 in a Shakespeare series at the Chicago Public Library Cultural Center.


523. N.Y. Times, May 6, 1983, at 4 (Midwest ed.).

524. Haim itself means life. See supra note 95; see also supra text accompanying note 31.

525. It is highly unlikely, of course, that any sane Jew, in any Christian city in Europe, would ever have tried what Shylock tried—or that, if indeed demented, he would have gotten as far as Shylock did: his fellow Jews would surely have stopped him, perhaps even confirming him as insane. But in this play Shylock seems to be in good standing in his synagogue even though at least two other male Jews knew what he intended to do to Antonio. He had this intention before his daughter fled his household with his money, if she is to be believed. W. SHAKESPEARE, THE MERCHANT OF VENICE act III, sc. ii, ll. 282-90. These observation point up the anomalous character of the 1983 London production by the Royal Shakespeare Company of The Tempest in which the Shakespeare-like Prospero is presented as a Jewish Cabbalist. See supra note 103.

526. This is aside from the question of what it is that entitled Shylock to have any money at all in Venice, to regard it as truly his own, and to trade for profit.

527. Why was not the blood that would be spilled taken into account by Shylock? Was he thinking of a proper, that is Jewish, killing of animals for consumption, which routinely has the blood drained from the flesh? On the implication of the means necessary for the execution of a valid contract, see T. Hobbes, Leviathan ch. 14.

528. It is no worse, some would argue, than laws and contracts with respect to slavery, which Shylock reminds the Venetians they permit. Is there not a contract here which is, if it is taken seriously, easily held to be against public policy in any well-ordered state?

529. It is odd that Shylock's forced conversion to Christianity (first suggested by Antonio) should be seen by Christians as a punishment. See W. SHAKESPEARE, THE MERCHANT OF VENICE act IV, sc. i, l. 385; see also infra note 550. Compare Prince Hamlet, who is reluctant to kill King Claudius at prayers lest he immediately send his soul to heaven. See W. SHAKESPEARE, HAMLET act III, sc. iii, ll. 73-95; see also supra note 212.

530. Is Iago, in Shakespeare's Othello, presented as a distinctively Christian monster (also associated with Venice)? But he is not presented as the Christian; if anything, he is Satanic. See infra note 552.
531. Consider the following comment:

The character of Shylock fascinates critics and has lured them into endless mazes of debate. One thing is clear, however: The Merchant of Venice is no anti-Semitic document; Shakespeare was not attacking the Jewish people when he gave Shylock the villain's role. If so, he was attacking the Moors in Titus Andronicus, the Spaniards in Much Ado, the Italians in Cymbeline, the Viennese in Measure for Measure, the Danes in Hamlet, the Britons in King Lear, the Scots in Macbeth, and the English in Richard the Third.

Introduction to The Merchant of Venice, in The Complete Works of Shakespeare 258 (G. Kittredge ed. 1936). This is a rather forced argument, to say the least. Compare the following:

Facts, however, do not always speak clearly. What these tell us is that our ancestors could find entertainment in Jew-baiting; the question they do not answer is whether Shakespeare catered to that taste fully or with interesting modifications. If the question has an answer, only Shakespeare's play can give it. Shylock's self-styled "Christian" course of revenge condemns him as it would condemn any Christian. Even so, there is much in the play and its age which condemns and ridicules him simply because he is a Jew, and we should not try to explain it away. But Shakespeare, like Marlowe before him, makes it very plain that Jews can learn bad habits from the large family of Christian hypocrites. An Elizabethan dramatist could not have gone much further in clear, unsentimental fair dealing without becoming, for his time, a prophetic visionary.

Stirling, Introduction to The Merchant of Venice, in The Complete Pelican Shakespeare 211-12 (rev. ed. 1969). Would it be going even further to add that since Shylock was acting like the worst of the Christians, he might as well become "officially" a Christian? In any event, we do know that Shakespeare would have personally known few if any Jews: "Jews had been banished from England in 1290 and were not readmitted until 1655." The Reader's Encyclopedia of Shakespeare 797 (1966); see also infra note 557.

532. This is like having the Nazi commandant of a concentration camp playing Beethoven and Bach in his quarters all the time that men, women, and children are being routinely massacred.

533. Others have been bloodthirsty before him. Consider, for example, Achilles' vehemence in Homer's Iliad: "I could eat his heart." But he is indeed monstrous in this passion—and he becomes more gracious in his mourning. Consider, however, the human sacrifices he insists upon for Patrocles' funeral.

534. The scenes in which Shylock appears in The Merchant of Venice are: act I, sc. iii; act II, sc. v; act III, scs. i and iii; & act IV, sc. i.

535. See, e.g., Genesis 25:20; Exodus 16:35; Numbers 32:13; Deuteronomy 8:2; 2 Samuel 5:4; 1 Kings 11:42; Psalms 95:10.

536. See Anastaplo, supra note 45, at 15-28; see also infra note 564.

537. On how Abraham bound Isaac and thereby ever after the people of Israel, see supra Part 5.

538. On the primacy of the will, see supra notes 119, 300, 538; infra text accompanying note 631. See also supra Part 8.

539. Are Jews generally suspected by Gentiles as unreliable converts, so deeply are they shaped by their faith? I again draw on Leo Strauss's lecture, Why We Remain Jews:

I was still brought up in the belief in a very old-fashioned country that no Jew who ever converted to Christianity was sincere. That was what I learned and which I believed until I met, as a student, a professor (a son of a rabbi) who told me of his conversion to Christianity. I must say I was not impressed by his story. . . . But I would have to admit that he was subjectively sincere and no calculation entered into it. I can't say anything more about that. I know there is a real disproportion between my primitive feelings which I learned from my
wet nurse, as a much greater man put it, and my rational judgment. But I said [at the beginning of this lecture] that conversion was always possible.

Strauss, Why We Remain Jews, supra note 398; cf. G. Anastaplo, supra note 45, at 269.

540. This is reflected in Jessica’s recourse to a boy’s clothing when she flees her father’s house, something which makes her ashamed. W. Shakespeare, The Merchant of Venice act II, sc. vi, ll. 33-39. Portia, too, dons male clothing for the trial scene, id. act IV, sc. i, but she does not seem to be ashamed in doing so. On setting aside one’s duty to one’s parents in the name of something higher, see supra note 483. See also supra Part 2; cf. supra Part 6.

541. See supra note 95; infra note 900.

542. On the need for appropriate credentials, see infra 515.

543. Compare Jesus’ “un-Jewish” command that one’s family and one’s dead should be abandoned. See supra text accompanying note 369.

544. One consequence of an emphasis upon love as decisive is that when a couple’s love goes (as it all too often “naturally” does) the family ties that presuppose love are likely to be loosened.

545. Consider Kenneth Myrick’s introduction to The Merchant of Venice:

The Elizabethan hatred of usury was sanctioned by Aristotle’s theory that money cannot breed money; but far more important were the enormous interest rates and fraudulent contracts of clever scoundrels. Recognizing Shylock as a usurer, the Elizabethans must have been hostile to him, especially when they saw him plotting against Antonio’s life.


546. See infra note 556. For a useful summary of several of these points, see A. Bloom, Shakespeare’s Politics 18 (1964). On Jewish materialism, see id. at 22. On Professor Bloom’s best-known work, see supra note 464.

547. Compare in this respect the shrewdness of Odysseus in Homer’s Odyssey. See, e.g., supra Part 8 (§§ II, IX). And yet Odysseus can exact a revenge of the Suitors that Shylock cannot exact of Antonio and his colleagues.

548. A. Bloom, supra note 546, at 17.

549. See, for example, a letter from Leo Strauss in London to Alexandre Kojève in Paris (in the early 1930s):

I am very thirsty in this moment and I have not the good and cheap French wine. But instead of it we have the wonderful English breakfast—the hams taste too good as to consist of pork, and therefore they are allowed by the Mosaic law according to atheistic interpretation.


550. Perhaps it is to this subject that Shylock’s “eightieth speech” should be devoted. Among the things to be considered by him is why the suggestion for Shylock’s conversion came not from Portia (whom he knows as Balthasar) but from Antonio (who is evidently more hostile to Jews as such). See W. Shakespeare, The Merchant of Venice act I, sc. iii, l. 44 (“He hates our sacred nation . . . ‘’); id. act IV, sc. i, l. 385. Should Portia’s judgment be subject to review if it is discovered how she was connected with Antonio? On Portia, see G. Anastaplo, Women and the Law §§ IV, IX, in The American Moralist, supra note 22, at 352-54, 361-63.

551. Does the ancient virtue make more of what we call “personal responsibility”? On the personal responsibility of even Oedipus, see supra Part 4-A. Cf. Taylor, Don’t Blame Me: The New Culture of Victimization, New York, June 3, 1991, at 27; cf. also letters to the editor in subsequent issues; supra note 520.

552. A. Bloom, supra note 546, at 14; see also L. Strauss, supra note 549, at 301; supra note 530.

553. A. Bloom, supra note 546, at 31.

554. Id. at 19-20.

555. Id. at 31.
556. Should not Shakespeare have recognized what a long-established people had probably required or had become? I return to Leo Strauss's lecture, Why We Remain Jews:

Judaism is no misfortune (I am back to my beginning) but, let us say, a “heroic delusion.” In what does this delusion consist? The one thing needful is righteousness or charity; in Judaism these are the same. This notion of the one thing needful is not defensible if the world is not the creation of the just and loving God, the holy God. The root of injustice and uncharitableness which abounds is not in God but in the free acts of his creatures; in sin. The Jewish people and their fate are the living witness for the absence of redemption. This, one could say, is the meaning of the chosen people: the Jews are chosen to prove the absence of redemption. An expression surpassing everything that any present-day man could write is that great Jewish prayer which will be known to some of you and which is a stumbling block to many, olenu leshabeach. It would be absolutely improper for me to read it now.

Strauss, Why We Remain Jews, supra note 398. The prayer referred to by Mr. Strauss is this:

It is our duty to praise the Lord of all things, to ascribe greatness to him who formed the world in the beginning, since he hath not make us like the nations of other lands, and hath not placed us like other families of the earth, since he hath not assigned unto us a portion as unto them, nor a lot as unto all their multitude. For we bend the knee and offer worship and thanks before the supreme King of kings, the Holy One, blessed be he, who stretched forth the heavens and laid the foundations of the earth, the seat of whose glory is in the heavens above, and the abode of whose might is in the loftiest heights. He is our God; there is none else; in truth he is our King; there is none besides him; as it is written in this Law, And thou shalt know this day, and lay it to thine heart, that the Lord he is God in heaven above and upon the earth beneath: there is none else.

See supra text accompanying note 546; see also supra note 7.

557. Consider the following comment:

In writing or rewriting The Merchant of Venice Shakespeare had before him a recent and most successful play which also told of a Jew who hated all Christians. This was Marlowe's tragedy The Jew of Malta . . . . Barabas, the Jew of Malta, like Shylock had an only daughter and many ducats, but he was altogether a more monstrous and far less credible character than Shylock. In a few passages Shakespeare owed something to Marlowe in portraying Shylock as remorseless and vindictive; but Barabas was a monster of hate who did not hesitate to poison a whole nunnery because it contained the daughter who offended him. In comparison Shylock is a mild-mannered simpleton.

Harrison, Introduction to The Merchant of Venice, in THE COMPLETE WORKS OF SHAKESPEARE 581 (1968); see also supra note 531. On Marlowe, see supra Part 1-B.

558. Is not this critical to the virtue of prudence? See, e.g., supra Parts 4-A, 6, 8; infra Parts 10, 12-B; see also supra note 418; infra note 564.

559. I visited with this actor, Morris Carnovsky, in his dressing room after that performance. (Rabbi Maurice Pekarsky, of the Hillel Foundation at the University of Chicago, had provided the link between us.) Mr. Carnovsky was quite distressed by the considerable laughter that the Trial Scene had provoked—but it was evident to me on that occasion that that laughter had been consistent with what the playwright had done, especially when Shylock is presented as someone quite capable of slaughtering Antonio in a more or less ritualistic manner.

560. See supra text accompanying note 524.

561. HISTORY OF POLITICAL PHILOSOPHY, supra note 142, at 294; see also L. STRAUSS, supra note 7, at 24, 31-32, 146, 163-64.

562. See TALMUD, AVODAH ZARAH 17b sq. For a not-unrelated story, see H. PER-

563. Hananiah's daughter can be usefully distinguished from Shylock's Jessica.

564. But we cannot deal properly with our awareness of what we do not know if we do not have a reliable sense of what we can and perhaps do know. See Anastaplo, Knowledge and Ignorance in Plato's Apology of Socrates, in Freedom of Speech and the First Amendment: Explorations, 21 TEX. TECH L. REV. 1941, 1943 (1990) [hereinafter Freedom of Speech: Explorations]; see also supra notes 50, 450; infra text accompanying note 569.

565. This lecture was given in the Law Lecture Series at Rosary College, River Forest, Illinois, March 6, 1975. The original title of this talk was Politics and Piety: The Trial of Sir Thomas More.


567. See id. at 886; The Trial of Sir Thomas More Knight, Lord Chancellor of England, for High-Treason in Denying the King's Supremacy, in 1 A COMPLETE COLLECTION OF STATE-TRIALS AND PROCEEDINGS FOR HIGH-TREASON, AND OTHER CRIMES AND MISDEMEANORS 59, 63-64 (F. Hargrave ed. 1776) [hereinafter Trial of More]. One of More's more solemn jests was in response to the Duke of Norfolk who had warned him, "By the Mass, Master More, it is perilous striving with Princes. And therefore I would wish you somewhat to incline to the King's pleasure, for, by God's body, Master More, 'Indignatio principis mors est' ['The wrath of the prince is death']." "Is that all, my Lord?" More asked. "Then in good faith is there no more difference between your Grace and me, but that I shall die today and you tomorrow." W. ROPER, THE LIFE OF SIR THOMAS MORE, KNIGHT, in LIVES OF SAINT THOMAS MORE 35 (E. Reynolds ed. 1963); see also infra note 625. Upon resigning from the office of Lord Chancellor, More offered the following advice to Thomas Cromwell on dealing with princes:

Master Cromwell, you are now entered into the service of a most noble, wise and liberal Prince. If you will follow my poor advice, you shall, in your counsel giving unto His Grace, ever tell him what he ought to do, but never what he is able to do. So shall you show yourself a true faithful servant and a right worthy Councillor. For if a lion knew his own strength, hard were it for any man to rule him.

W. ROPER, supra, at 28; see also infra note 632; cf. supra note 200.

568. On this criminologist, Hans W. Mattick, see G. ANASTAPLO, supra note 45, at 437 n.183.

569. See, e.g., supra text accompanying note 558; see also supra note 564.

570. See supra Part 4-B.


572. See, e.g., G. ANASTAPLO, Natural Right and the American Lawyer, in HUMAN BEING AND CITIZEN, supra note 6, at 46-60; see also infra notes 876, 882.

573. SOPHOCLES, ANTIGONE II. 449-59.

574. On Athens as proper judge in Aeschylus' The Eumenides, see supra Part 2-D (§ V).

575. See supra Part 4-B (§ II).

576. See supra text accompanying note 233; see also supra notes 483, 518.

577. See Anastaplo, supra note 564, at 1980.

578. See L. STRAUSS, supra note 549, at 10-11; see also id. at 238-39, 255-56, 290.

579. See supra text accompanying note 495.

580. For a lively account of the reign of Henry VIII, see 2 W. CHURCHILL, supra note 475, at 22-67; see also J. SCARISBRICK, HENRY VIII 236, 305f, 498-99 (1968).

581. See, e.g., J. AUBREY, BRIEF LIVES.

582. See supra note 566.

583. Another great lawyer, Francis Bacon (1561-1626), also published a "utopian"
classic, *New Atlantis*. He too, should have been treated more considerately that he was by the legal system of his country when he stepped out of line.

584. “For a generation and more the English monarchy had been tossed on the rough waters of a disputed succession. On August 22, 1485, Henry Tudor, Earl of Richmond, had won a decisive victory near the small Midland town of Market Bosworth, and his rival, the usurper Richard III, was slain in the battle. In the person of Henry VII a new dynasty now mounted the throne, and during the twenty-four years of careful stewardship that lay before him a new era in English history begins.” 2 W. CHURCHILL, *supra* note 475, at 13. For a dramatic account of the Wars of the Roses, see Shakespeare's *History Plays*. On some of the constitutional implications of that development, see G. ANASTAPOLO, *supra* note 509, at 74-88.

585. The following account from Churchill's *History* is instructive:

It was still doubtful if a woman could succeed to the throne by English law. Would England tolerate being ruled by a woman? Might Mary [Henry's first daughter] not turn out very like her Spanish mother, narrow and bigoted, a possible queen perhaps in Spain, or France, or Austria, countries full of soldiers, but not acceptable to the free English, who had obeyed Henry VII and Henry VIII because they wished to obey, and although there was no central army except the Beefeaters in the Tower? Would Mary be able to rule in the Tudor manner, by favour and not by force? The long clash of the Wars of the Roses had been a nightmare to the nation which a disputed succession might revive. To the monarch these great questions of State were also questions of conscience, in which his sensual passions and his care for the stability of the realm were all fused together.

2 W. CHURCHILL, *supra* note 475, at 36.

586. Quoting once again from Churchill's *History*:

Then there was Queen Catherine. In 1525 she was aged forty . . . . A typical Spanish princess, she had matured and aged rapidly; it was clear that she would bear Henry no male heir. Either the King's illegitimate son, the Duke of Richmond, now aged six, would have to be appointed by Act of Parliament, or perhaps England might accept Catherine's child, Mary, now aged nine, as the first Queen of England in her own right since Matilda.

Id. at 36.

587. The Beefeaters at the Tower of London are not purists in these matters. They provide curious visitors with a handy guide, in the form of doggerel, to the fate of the six wives of Henry VIII: “Divorced, beheaded, died; divorced, beheaded, survived.” (Should *annulled* be substituted for *divorced* in this formula?) Both Henry's second wife, Anne Boleyn, and his fourth, Katherine Howard, were executed for adultery. *See id.* at 52-54, 63. Henry VIII was succeeded by his children in this order: Edward VI, the son of his third wife, Jane Seymour; Mary, the daughter of Catherine of Aragon; and Elizabeth I, the daughter of Anne Boleyn. *See id.* at 67.


589. See the exchange between Thomas More and Richard Rich reported in *Trial of More, supra* note 567, at 59. Although Parliament could have appointed as a successor Henry's illegitimate son, *see supra* note 586, Henry evidently considered it politically sounder to rely upon a legitimate son—and this required a new marriage, but a marriage that the accepted religion of his people would sanction.

590. Thomas More, after he was convicted for high treason, did say:

For as much as, my Lords, this Indictment is grounded upon an Act of Parliament, directly repugnant to the Laws of God and his Holy Church, the Supreme Government of which, or of any part thereof, no Temporal Person
may by any Law presume to take upon him, being what of right belongs to the See of Rome, which by special Prerogative was granted by the Mouth of our Saviour Christ himself to St. Peter, and the Bishops of Rome his Successors only, whilst he lived, and was personally present here on Earth: it is therefore, amongst Catholic Christians, insufficient in Law, to charge any Christian to obey it.

_Trial of More, supra_ note 567, at 61-62; _see also id._ at 59; _Sir Thomas More, supra_ note 566, at 882; _infra_ note 630.

This kind of argument probably does not sound as persuasive today to most pious Christians as it must have seemed to Thomas More and his supporters. How would Socrates have dealt with it? Perhaps in the spirit of the inquiry he might have made of a headstrong Antigone about the grounds of the confidence of her judgment as to the precise burial services required by the gods for her brother's corpse and about the basis of her opinion as to what would happen to her or to her brother if the prescribed burial services could not be safely provided in the circumstances confronting Antigone. _See infra_ note 622; _see also supra_ Part 6 & note 515. On Socrates' opinion about the proper disposition of his own corpse, see Plato's _Phaedo_. Did both Antigone and Thomas More happen to consider long-established conventions to have been decreed by the divine and perhaps ratified by nature? _Cf. infra_ text accompanying note 605. What, indeed, is the proper relation between _prudence_ and _piety_? _See supra_ Part 5.

Leo Strauss observed that "every Platonic dialogue is based on the deliberate disregard of something crucially important." L. STRAUSS, _supra_ note 549, at 292. May not the same be said (except perhaps for the deliberateness) about the "dialogue" that Thomas More fashioned in his fatal encounter with Henry VIII? _See supra_ note 501; _infra_ note 632.

591. References were made to "a two-edged Sword." _See Trial of More, supra_ note 567, at 59, 60.

592. But, it seems, the citizen as citizen did not yet have a duty to take such a "loyalty oath"—or any need to do so if he was content to forego public office and to mind only his own business. _See W. ROPER, supra_ note 567, at 28-29.

593. _See id._ at 32-37; _Sir Thomas More, supra_ note 566, at 884-85. Similarly, More had been the first layman to be made Lord Chancellor. _See infra_ note 602.

594. _See Sir Thomas More, supra_ note 566, at 885; Derrett, _The Trial of Sir Thomas More, 312 ENG. HIST. REV. 449, 453f._

595. Consider the following argument made by More at his trial:

Here the Lord Chancellor [Audley] took [More] up, and said, That seeing all the Bishops, Universities, and the most learned Men in the Kingdom had agreed to that Act, it was much wondered that he alone should so stiffly stickle, and so vehemently argue there against it.

[More's] Answer was, That if the Number of Bishops and Universities were so material as his Lordship seem'd to make it, then, my Lord, I see no reason why that thing should make any Change in my Conscience: for I doubt not, but of the learned and virtuous Men now alive, I do not speak only of this Realm, but of all the learned Doctors and virtuous Fathers that are already dead, many of whom are Saints in Heaven, I am sure there are far more, who all the while they lived thought in this Case as I do now. And therefore, my Lord, I do not think my self bound to conform my Conscience to the Counsel of one Kingdom, against the general Consent of all Christendom.

_See Trial of More, supra_ note 567, at 62. This was said by More after he had been found guilty of high treason. _See also infra_ note 630. On conscience, _see infra_ Section VI of this part. On the condition of those "that are already dead," _see infra_ text accompanying note 609.

596. It must be rare that a vital witness has been so soundly attacked as to credibility as Richard Rich was attacked by Thomas More on this occasion. Thus, More could ask,
“Can it therefore seem likely to your Lordships, that I should in so weighty an Affair as this, act so unadvisedly, as to trust Mr. Rich, a Man I had always so mean an Opinion of, in reference to his Truth and Honesty, so very much before my Sovereign Lord the King, to whom I am so deeply indebted for his manifold Favours, or any of his noble and grave Counsellors, that I should only impart to Mr. Rich the Secrets of my Conscience in respect to the King’s Supremacy, the particular Subject, and only point about which I have been so long pressed to explain myself?” Trial of More, supra note 567, at 61 (emphasis added); see also Derrett, supra note 594, at 463-68.

597. See supra note 590; see also infra note 630. Is not More conducting himself as a patriot here in that he concedes the basis in fact upon which his King’s action rests? That is, King Henry is allowed to seem less unjust than he might otherwise be taken to be by his subjects?

598. See supra note 592; see also infra note 786. Thomas More had this to say about the proper significance of silence: “[T]his Statute, nor no other Law in the World can punish any Man for his Silence, seeing they can do no more than punish Words or Deeds; ’tis God only that is the Judge of the Secrets of our Hearts.” Trial of More, supra note 567, at 60; see also infra note 600.

599. Still, More suggests that silence can be regarded as a form of consent, not a form of opposition. See infra note 600. But does not this depend on the circumstances, something which a court is bound to take into account?

600. Trial of More, supra note 567, at 60. This follows immediately after the speech quoted supra note 598. The prosecutor’s rebuke here is followed by this suggestion by More:

Sir, my Silence is no sign of any Malice in my Heart, which the King himself must own by my Conduct upon divers Occasions; neither doth it convince any Man of the Breach of the Law: for it is a Maxim amongst the Civilians and Canonists, Qui tacet consentire videtur, he that holds his peace, seems to give his Consent.

Id. (emphasis added); see also supra note 599; Derrett, supra note 594, at 459.

601. See G. ANASTAPLO, supra note 6, at 12-14, 26, 238 n.26.

602. Thomas More may have been the only layman to suffer as he did on this issue. All of the other martyrs in England at that time were priests and friars, including a bishop whose imprudent public elevation by the Pope to the College of Cardinals, while he was held in the Tower of London, sealed his fate with Henry. See N. HARPSFIELD, THE LIFE AND DEATH OF SIR THOMAS MORE, supra note 567, at 152-53; see also supra note 593; infra note 642.

603. See, e.g., supra Part 8 (§§ VII, IX).

604. SHAKESPEARE’S HOLONSHED 310 (R. Hosley ed. 1968).


607. Xenophon is instructive here. Leo Strauss is quoted as having said about Xenophon, “‘But Xenophon, Xenophon is a pure joy to read.’ (Raising his eyes to heaven.) ‘It is not like reading authors like Thucydides and Plato. These are incomparably great and always formidable, but with Xenophon you are with an equal—a pure joy to read!’” Clay, A Forgotten Kind of Reading, in LEO STRAUSS’S THOUGHT 264 n.7 (A. Udoff ed. 1991); see also L. STRAUSS, supra note 549, passim.

608. See PLATO, Apology 40c sq.; see also L. STRAUSS, supra note 549, at 264.

609. See, e.g., PLATO, Meno 81c sq.; PLATO, Republic 614b sq.

610. One must wonder, as well, what it was that had prompted Socrates to do what he had been doing before someone was moved to go to the considerable trouble of travel-
ing to Delphi to ask whether any man was wiser than Socrates. See G. Anastaplo, supra note 6, at 23.

611. See supra note 564.

612. See, e.g., Plato, Meno 100b-c; Plato, Apology 21b sq.

613. See Plato, Apology 32a.

614. See, e.g., J. Roche, Burying the Hatchet on Sir Thomas More, Chicago Tribune, Oct. 26, 1974, § 1, at 13:

[More] was not canonized for his labors as Lord Chancellor of England, where he succeeded his patron Thomas Cardinal Wolsey as the top “royal hatch-etman.” He was personally honest—the first Chancellor to refuse “gifts” from litigants—but when King Henry was out getting the papal designation “De-fender of the Faith,” his Chancellor was sending Lutheran heretics to their execu-tion. While I believe in an historical statute of limitations, the execution of heretics does not in my book qualify one for sainthood. See also infra text accompanying note 813.

615. See Sir Thomas More, supra note 566, at 882-83; McGee, Thomas More and Henry VIII Delineated Too Narrowly, CENTER MAG., Jan.-Feb. 1979, at 38; see also supra note 99. Even so, More's Utopia is ahead of its time with respect to the religious toleration espoused therein. See W. Roper, supra note 567, at 18-19; cf. infra Part 12-C.

616. See Plato, Gorgias 425e-53a, 455a, 468c, 469b-c, 473e-74b, 480a-c, 485b sq., 516c-d, 521d, 522d-e, 523a sq; see also L. Strauss, supra note 549, at 275; infra note 626.

617. See Plato, Apology 32b-d.

618. See supra text following note 487; see also supra note 398.


620. See e.g., Plato, Symposium 219e-20b.

621. See, e.g., W. Roper, supra note 567, at 24-25; see also 2 W. Churchill, supra note 475, at 40 (on the self-indulgent Cardinal Wolsey's hairshirt). There was even, we have been told, probably a hairshirt beneath the fine robes depicted in Holbein's famous portrait of More.

622. See, e.g., W. Roper, supra note 567, at 25. This fits in with More's repeated references to "this miserable World." See, e.g., Trial of More, supra note 567, at 60; see also infra note 625; cf., e.g., Plato, Protagoras 534 sq; L. Strauss, supra note 7, at 250. Thomas More's spirit with respect to these matters seems to have been inherited by his daughter:

[More's] head was taken off at one Blow, and was placed upon London-Bridge, where having continued for some Months, and being about to be thrown into the Thames to make room for others, his Daughter Margaret bought it, inclos'd it in a Leaden Box, and kept it for a Relique.

Trial of More, supra note 567, at 64; see also supra note 590.

623. See Plato, Apology 37c-e. It was not inevitable that Socrates be condemned and executed, but "only" that he always live under a cloud.

624. Catherine did die in 1536, less than a year after Thomas More was executed. By that time Henry had broken with Anne Boleyn and was interested in Jane Seymour. See 2 W. Churchill, supra note 475, at 52; see also infra text accompanying note 798.

625. W. Roper, supra note 567, at 50. Compare the comment made by Thomas More about Henry at a time when the King was displaying great affection for him: "I find his Grace my very good lord indeed, and I believe he doth as singularly favour me as any subject within this Realm. However, son Roper, I may tell thee I have no cause to be proud thereof, for if my head could win him a castle in France (for then was there war between us) it should not fail to go." Id. at 12; see also supra note 567.

Underlying the differences between Socrates and Thomas More are those between Reason and Revelation:

Both the traditional and the current interpretations of Plato may be said to bring out the tragic element in Plato's thought, but they neglect the comic element except where it hits one in the face. Many reasons can be given for this
failure. I mention only one. Modern research on Plato originated in Germany, the country without comedy. To indicate why the element of comedy is of crucial importance in Plato I read to you a few lines from the only Platonist I know of who had an appreciation of this element, Sir Thomas More. I quote: "For to prove that this life is no laughing time, but rather the time of weeping we find that our saviour himself wept twice or thrice, but never find we that he laughed as much as once. I will not swear that he never did, but at the leastwise he left us no example of it. But on the other side, he left us example of weeping" If we compare what More said about Jesus with what Plato tells us about Socrates, we find that "Socrates laughed twice or thrice, but never find we that he wept as much as once." A slight bias in favor of laughing and against weeping seems to be essential to philosophy. For the beginning of philosophy as the philosophers understood it is not the fear of the Lord, but wonder. Its spirit is not hope and fear and trembling, but serenity on the basis of resignation. To that serenity, laughing is a little bit more akin than weeping. Whether the Bible or philosophy is right is of course the only question which ultimately matters. But in order to understand that question one must first see philosophy as it is. One must not see it from the outset through Biblical glasses. Wherever each of us may stand, no respectable purpose is served by trying to prove that we eat the cake and have it. Socrates used all his powers to awaken those who can think out of the slumber of thoughtlessness. We ill follow his example if we use his authority for putting ourselves to sleep.

See L. STRAUSS, supra note 115, at 206 (citations omitted).

626. Leo Strauss said in a letter to Alexandre Kojève:

[T]here is no "conscience" in Plato; anamnesis is not conscience. Indeed, misology is the worst, as you say; therefore, there is ultimately no superiority of the merely honorable man to the sophist (contrary to Kant) or for that matter to Alcibiades. I do not believe in the possibility of a conversation of Socrates with the people (it is not clear to me what you think about this); the relation of the philosopher to the people is mediated by a certain kind of rhetoricians who arouse fear of punishment after death; the philosopher can guide these rhetoricians but can not do their work (this is the meaning of the Gorgias).

L. STRAUSS, supra note 549, at 275 (citations omitted); see also supra note 616. Are the people at large much more impressed by the prospect of death than is the philosopher? See supra note 567. Is the relation of conscience to understanding somewhat like the relation of the people to the philosopher? For samples of Thomas More’s use of conscience, see supra notes 595, 596; infra note 630. See also supra note 598.

627. See, e.g., R. BULTMANN, 1 THEOLOGY OF THE NEW TESTAMENT 71-72 (1951); 2 id. at 226 (1955).

628. The Hebrew Scriptures also prefer shame to conscience. In a standard translation of the Bible into English, I count some thirty uses of conscience in the New Testament and none in the Old Testament, and some ninety uses of shame in the Old Testament to a dozen or so in the New Testament. For an instructive use of sense of shame where others today would probably use conscience, see G. ANASTAPLO, supra note 45, at 475 n.282.

629. See supra note 520; see also supra text accompanying notes 19, 308, 438.

630. On the shift in status for parresia from Classical to New Testament Greek, see G. ANASTAPLO, supra note 2, at 275, 781-82 nn.8, 9. The emphasis shifts from a questionable “license of tongue” to a praiseworthy “frankness of speech” (or even intrepid testimony to the Lord). On the relation between praiseworthy frankness of speech and a properly informed conscience, consider this exchange between Thomas More and his judges:

When [More] had receiv’d Sentence of Death, he spake thus with a resolute and sedate Aspect: Well, seeing I am condemn’d, God knows how justly, I will freely speak for the disburdening my Conscience, what I think of this Law.
When I perceiv'd it was the King's Pleasure to sift out from whence the Pope's Authority was deriv'd; I confess I study'd seven years together to find out the truth of it, and I could not meet with the Works of any one Doctor, approv'd by the Church, that avouch a Layman was, or ever could be the Head of the Church.

Chancellor. Would you be esteem'd wiser, or to have a sincerer Conscience than all the Bishops, learned Doctors, Nobility and Commons of this Realm?

More. I am able to produce against one Bishop which you can produce on your side, a hundred Holy and Catholic Bishops for my Opinion; and against one Realm, the Consent of Christendom for a thousand years.

Norfolk. Sir Thomas, you show your obstinate and malicious mind.

More. Noble Sir, 'tis no Malice or Obstinacy that makes me say this, but the just Necessity of the Cause obliges me to it for the Discharge of my Conscience; and I call God to witness, that nothing but this has excited me to it.

Trial of More, supra note 567, at 62; see also supra notes 493, 494. Does this approach lead eventually to what we know as an emphasis upon individuality? See supra notes 595, 597. On the usefulness of studying certain matters “seven years together,” see supra note 177 & Part 6. See also supra note 590.

631. On resoluteness and the will, see supra notes 119, 120, 139, 300, 538. Notice the use of resolute with respect to Thomas More supra note 630.

632. Thomas More was informed, the morning of his execution, that it was “the King's Pleasure he shou'd not use many Words at the Place of Execution.” Trial of More, supra note 567, at 63. Was this a grim jest on the part of a king who had been exasperated so long by More's silence with respect to the Act of Supremacy? See supra note 567; infra note 642; see also supra notes 200, 590.

633. On the self, see G. ANASTAPLO, In Search of the Soulless “Self”, in HUMAN BEING AND CITIZEN, supra note 6, at 87-96.

634. A parody of steadfastness may be seen in the testimony by Hermann Goering during the Nuremberg Trial about how he maintained his loyalty to the Fuehrer in bad times as in good. See infra note 717.

635. See ARISTOTLE, 3 NICOMACHEAN ETHICS, chs. 6-9.

636. See, e.g., supra notes 95, 152, 899; see also L. STRAUSS, supra note 549, at 229-30.

637. On existentialism, see G. ANASTAPLO, Some Questions About “Existentialism”, in THE AMERICAN MORALIST, supra note 22, at 139-43; G. ANASTAPLO, Heidegger and the Need for Tyranny, in id. at 144-60.

638. That is, what was the controversy with respect to “the King's Marriage” truly about? See infra note 642.

639. See supra text accompanying note 498. The significance of Delphi in the ancient Greek world is not generally appreciated. See, e.g., supra notes 198, 348, 610; Part 6; infra note 642; see also G. ANASTAPLO, supra note 6, at 18-19, 23-25, 245 n.47.

640. See G. ANASTAPLO, Human Right and the American Lawyer, in HUMAN BEING AND CITIZEN, supra note 6, at 46-60. Consider also the 1953 observation by M. Kojeve to Mr. Strauss upon receiving a Strauss discussion of “natural law” (probably Natural Right and History, cited supra note 7):

Regarding the issue, I can only keep repeating the same thing. If there is something like “human nature,” then you are surely right in everything. But to deduce from premisses is not the same as to prove these premisses. And to infer premisses from (anyway questionable) consequences is always dangerous.

L. STRAUSS, supra note 549, at 261; see also id. at 261-62, 266. What does M. Kojeve's implicit (and natural?) condemnation of “a Chinese peasant's animal-like starvation existence (before Mao-Tse Tung)” concede about the existence of a human nature that has ethical implications around the world in a variety of circumstances? See id. at 262; see also supra note 95; infra note 899.

641. See G. ANASTAPLO, Orwell and the Limits of Tyranny, in THE AMERICAN
Thomas More's case is made, in a politically robust way, in 2 W. Churchill, supra note 475, at 50:

Bishop John] Fisher and Sir Thomas More, who both refused the oath, were confined in the Tower for many months. At his trial More offered a brilliant defence, but the King's former trust in him had now turned into vengeful dislike. Under royal pressure the judges pronounced him guilty of treason. While Fisher was in the Tower the Pope created seven cardinals, of whom one was "John, Bishop of Rochester, kept in prison by the King of England." Directly Henry heard the news he declared in anger several times that he would send Fisher's head to Rome for the Cardinal's hat. Fisher was executed in June 1535 and More in July. For their fate the King must bear the chief responsibility; it is a black stain on his record. Shortly afterwards Henry was excommunicated and in theory deprived of his throne by the Pope.

The resistance of More and Fisher to the royal supremacy in Church government was a noble and heroic stand. They realized the defects of the existing Catholic system, but they hated and feared the aggressive nationalism which was destroying the unity of Christendom. They saw that the break with Rome carried with it the threat of a despotism freed from every fetter. More stood forth as the defender of all that was finest in the medieval outlook. He represents to history its universality, its belief in spiritual values, and its instinctive sense of other-worldliness. Henry VIII with cruel axe decapitated not only a wise and gifted counsellor, but a system which, though it had failed to live up to its ideals in practice, had for long furnished mankind with its brightest dreams.

See also supra text accompanying note 475; infra note 857. Some of the issues raised by the career and trial of Thomas More are touched upon in Shakespeare's King John. See supra text accompanying notes 498, 639.

643. This talk was given at the annual Clarence Darrow Memorial Meeting, Museum of Science and Industry, Chicago, Illinois, March 13, 1987. This meeting, on the Haymarket controversy, was organized by Arthur Weinberg.


Governor Altgeld's pardon message was issued the day after the unveiling of a Haymarket monument, on the site of the bomb-throwing. See P. Avrich, supra note 645, at 421. A memorial statue also put up in the area for the police killed in 1886 had to be moved in 1972 into the lobby of police headquarters at Eleventh and State Streets in Chicago: it had, over the years, repeatedly been the target of politically-motivated vandals. Id. at 430-31.

646. But, then, photos of hobos in the 1930s, a half-century later, show them riding freight-train cars with hats on. In addition, one notices, in the anarchists' materials re-produced in the 1887 Illinois Supreme Court opinion, a number of classical allusions, something that one would not expect to find in the works of radicals today. See, e.g., Spies, 122 Ill. at 15, 18, 48, 188, 189; see also infra note 661.

647. See, e.g., Spies, 122 Ill. at 57, 58, 125, 126, 184; cf. id. at 133. The Illinois Supreme Court observed, Law and government can not be abolished without revolution, bloodshed and murder. The socialist or communist, if he attempted to put into practical operation his doctrine of a community of property, would destroy individual rights in property. Practically considered the idea of taking a man's property from
him without his consent, for the purpose of putting it into a common fund for the benefit of the community at large, involves the commission of theft and robbery. Therefore, the prejudice, which the ordinary citizen [who serves on juries], who looks at things from a practical standpoint, would have against anarchism and communism, would be nothing more than a prejudice against crime.

Id. at 263.

On "sedition," see J. ALTGELD, supra note 645, at 11; supra text accompanying note 645. See also J. ALTGELD, supra note 645, at 36:

[T]he talk of a gigantic anarchistic conspiracy is not believed by the then Chief of Police . . . and is not entitled to serious notice, in view of the fact that, while Chicago had nearly a million inhabitants, the meetings held on the lake front on Sundays during the summer, by these agitators, rarely had fifty people present, and most of these went from mere curiosity, while the meetings held indoors during the winter, were still smaller. The meetings held from time to time by the masses of the laboring people, must not be confounded with the meetings above named, although in times of excitement and trouble much violent talk was indulged in by irresponsible parties, which was forgotten when the excitement was over.

Similar observations should have been made by our political leaders in the late 1940s, the 1950s, and the 1960s about the dangers posed in the United States by the minuscule American Communist Party. See infra note 657; see also infra Parts 12-C, 12-D.

Whatever the seditious implications of the language indulged in by the defendants, there was no question but that much of the troublesome language the Illinois Supreme Court was concerned about was foreign (mostly German). See, e.g., J. ALTGELD, supra note 645, at 30, 34, 55, 126. One suspects that some of the rhetorical excesses to which the defendants may have been accustomed did not translate safely into English. See G. ANASTAPLO, supra note 509, at 1.

There is something wonderfully American in the prospect of "buy[ing] arms on installments." A lyrical passage in the anarchists' literature about dynamite is used twice by the Illinois Supreme Court:

Dynamite! Of all the good stuff, this is the stuff. Stuff several pounds of this sublime stuff into an inch pipe, (gas or water pipe,) plug up both ends, insert a cap with a fuse attached, place this in the immediate neighborhood of a lot of rich loafers who live by the sweat of other people's brows, and light the fuse. A most cheerful and gratifying result will follow.

Id. at 40, 123; see also infra note 664.

Some of these issues, related to jury selection, supra note 647, to the fairness of the trial judge, infra note 657, and to the law of conspiracy, would no doubt be decided differently today either by the Illinois Supreme Court or by the United States Supreme Court. One could even say that these defendants were decidedly unlucky, especially in their timing. Cf., e.g., People v. Coughlin, 144 Ill. 140, 33 N.E. 1 (1893). The same can be said of Julius and Ethel Rosenberg. See infra Part 12-B.

Lord Jeffreys (1645-1689) is remembered as an "English judge notorious for his
cruelty and corruption. He presided over the 'Bloody Assizes' of 1685 following the failure of the Duke of Monmouth's rebellion and was in charge of executing the unpopular religious policy of the Roman Catholic King James II." Jeffreys (of Wem), George, in 6 ENCYCLOPAEDIA BRITANNICA 524 (15th ed. 1986). Governor Altgeld, in the closing pages of his pardon message, includes these remarks:

It is further charged, with much bitterness, by those who speak for the prisoners, that the record of this case shows that the judge conducted the trial with malicious ferocity . . . [and] that the judge's magazine article recently published, although written nearly six years after the trial, is yet full of venom. . . . It is urged that such ferocity or subserviency [toward the prosecution] is without a parallel in all history; that even Jeffries [sic] in England, contented himself with hanging his victims, and did not stoop to berate them after they were dead.

J. ALTGELD, supra note 645, at 57-58; cf. infra note 661.

657. See Dennis v. United States, 341 U.S. 494 (1951). This case is discussed in G. ANASTAPLO, supra note 2, at 824. See also supra note 648; infra Parts 12-C, 13 (§ VII).

658. See infra Part 12-B.

659. See infra Part 12-D. In all three of these twentieth century cases, the defendants were not without fault—but bad judging made matters far worse than they need have been.

660. "The historian Allan Nevins has called it 'one of the best state papers ever written in America.'" P. AVRICH, supra note 645, at 422; see also infra notes 661, 668. For a summary of the pardon message, see P. AVRICH, supra note 645, at 422-23.

661. Jane Addams, for example, said of the pardon message that it was "a magnanimous action [which] was marred by personal rancor, betraying for the moment the infirmity of a noble mind." P. AVRICH, supra note 645, at 511 n.29; see also, e.g., supra note 656. Benjamin Tucker described the Pardon Message "as probably the most merciless message of mercy ever penned." P. AVRICH, supra note 645, at 422. Clarence Darrow, who had once been dismayed by the language in which the pardon message was couched, see id. at 425, still included these sentences in his eulogy during the Altgeld funeral in 1902:

In the days now past, John P. Altgeld, our loving, peerless chief, in scorn and derision was called John Pardon Altgeld by those who would destroy his power. We who stand to-day around his bier and mourn the brave and loving friend are glad to adopt this name. If, in the infinite economy of nature, there shall be another land where crooked paths shall be made straight, where heaven's justice shall review the judgments of the earth—if there shall be a great, wise, humane judge, before whom the sons of men shall come, we can hope for nothing better for ourselves than to pass into that infinite presence as the comrades and friends of John Pardon Altgeld, who opened the prison doors and set the captive free.

Id. at 62 app.; see also infra note 900.

Altgeld himself, it seems, looked for guidance to the classics, observing that "experience has taught that the reading and digesting each day of a half page or a page of some classic author, so as to imbibe his spirit and assimilate his words, will by degree give elegance of diction and purity of strength of expression." J. ALTGELD, ORATORY 5 (1915). Pericles, "the greatest man of antiquity, and in some respects the greatest orator," supplied Altgeld "one mighty model." Id. at 39. See supra note 646.

663. Spies v. People, 122 Ill. 1, 234, cert. denied, 123 U.S. 131 (1887).

664. "To you, Sir," wrote one lifelong Republican to [Governor Richard J. Oglesby in 1887], "in free and civilized America belongs the distinction of having first used the halter as a mode of punishment for political offenders." P. AVRICH, supra note 645, at 7, 378-79; see also infra Part 12-B.

The bomb-thrower himself should be singled out here as a major contributor to a series of injustices, beginning with the deaths of seven policemen and an unknown number of civilians from the bomb itself and then the police gunfire at the Haymarket, setting off what has been called "the first major 'Red Scare' in American history." P. AVRICH, supra note 645, at 208, 215. On the identity of this bomb-thrower, see id. at 437-45. "Contrary to the general impression, most of the injuries had been caused by bullets rather than by bomb fragments. In fact, of the seven policemen who died before the trial, only [one] can be accounted an indisputable victim of the bomb.... All or nearly all of the policemen who had suffered bullet wounds had been shot by their fellow officers and not by civilians in the crowd." Id. at 208.

Also deserving of severe censure are those who spoke so cavalierly about the virtues of dynamite. See supra note 650.

665. Spies, 122 Ill. at 227. The weakness of the case against Neebe seems to have been recognized all around, including by the state's attorney. See J. ALTGELD, supra note 645, at 11-12, 54-57; see also infra text accompanying note 727.

666. One wishes that Justice Oliver Wendell Holmes, Jr. had exhibited the same instructive courtesy in the unfortunate case of Schenck v. United States, 249 U.S. 47 (1919). The innocuous circular upon which Holmes's devilishly mischievous opinion for the Court depends may be found in G. ANASTAPLO, supra note 2, at 294-305. See also infra text accompanying note 895.

667. Also available in the Illinois Supreme Court Reports are detailed instructions for the making of explosives. See, e.g., Spies, 122 Ill. at 43-44, 60-69, 72-74, 124.

668. J. ALTGELD, supra note 645, at 58. It had become apparent by that time to thoughtful men and women that the police themselves were very much in need of a reliance upon the rule of law. Police officers who had been critical in the Haymarket events, including Captain Bonfield, had been exposed as "receiving payments from saloon-keepers, prostitutes, and thieves, and had been trafficking in stolen goods." P. AVRICH, supra note 645, at 415. Thus, Altgeld's action liberated many more than the three men still in prison because of the Haymarket affair. Leon M. Despres, a Chicago lawyer long dedicated to the cause of civil liberties in the United States, reminds us of the shining Altgeld legacy:

The 1893 Altgeld pardon message is a stirring document in the history of American freedom. It is also an impressive testimonial to a strong man's courage and social concern. The pardon of the three living Haymarket defendants... restored the innocence of all the defendants, laid bare the pretentious cruelty of the Haymarket judicial proceedings, and redirected Illinois government toward justice and fairness. When Altgeld pardoned the defendants, he knew that his pardon message would prevent his 1896 re-election as Governor. The message is one of the great documents in the annals of American legal justice. It stamped John Peter Altgeld with greatness.

Despres, Introduction, in J. ALTGELD, supra note 645, at 5; see also infra note 811.

669. This talk was given in the University of Chicago's First Friday Lecture Series at the Chicago Public Library, Chicago, Illinois, April 5, 1991. The original title of this talk was Natural Right and the Nuremberg Trial.

I have found very helpful the suggestions that have been made by Laurence Berns of St. John's College, Annapolis, Maryland, by William T. Braithwaite of the Loyola University of Chicago School of Law, and by Bernard D. Meltzer of the University of Chicago Law School. Professor Meltzer was formerly Trial Counsel, Office of the United States Chief of Counsel for Prosecution for Axis War Criminality. See infra note 686.
have also found helpful Meltzer, A Note on Some Aspects of the Nuremberg Debate, 14 U. CHI. L. REV. 455 (1947).

670. The record of this tribunal is found in TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (Nuremberg, Germany 1947) [hereinafter TRIAL RECORD]. This record includes almost three dozen volumes of trial transcript and documents. I have drawn upon a dozen of these volumes. See infra note 759. Also useful are the reports by the most articulate survivor of the Nuremberg Trial defendants. See, e.g., A. Speer, SPANDAU: THE SECRET DIARIES (1976).

Twelve trials were conducted between 1946 and 1949 in Nuremberg before American military tribunals after the conclusion of the great trial in Nuremberg of the Major German War Criminals. See Rheinstein, Preface, in A. VON KNIERIEM, THE NUREMBERG TRIALS at ix, xii, xv (1959). My references in this talk to “the Nuremberg Trial” are, therefore, to the major trial of 1945-1946, the only international military tribunal that sat in Germany after the Second World War. The judges for that trial were supplied by the United States, France, Great Britain, and the Soviet Union. See infra note 680.

671. R. Jackson, THE NUREMBERG CASE at xii (1971). On the disposition of the defendants, see infra text accompanying notes 691-94. See also infra note 713.


673. Skillful dramatization makes a difference in these matters. See E. Gibbon, I THE DECLINE AND FALL OF THE ROMAN EMPIRE 390-91 (Modern Library ed. 1932): “The mind of Clovis was susceptible of transient fervor: he was exasperated by the pathetic tale of the passion and death of Christ; and instead of weighing the salutary consequences of that mysterious sacrifice, he exclaimed with indiscreet fury, ‘Had I been present at the head of my valiant Franks, I would have revenged his injuries.’” See also supra note 497; infra note 714.


675. See 22 TRIAL RECORD, supra note 670, at 366-410.

676. See 9 id. at 612: “Goering said, ‘. . . I do want to object to your reference to my “friend Himmler.”’ The British Prosecutor, Sir David Maxwell-Fyfe then said, ‘Well, I will say, “your enemy Himmler,” or simply “Himmler” whichever you like. You know whom I meant, don’t you?’ To this Goering replied, ‘Yes, indeed.’” On Himmler, see Kater, The Fuehrer’s Disciple, N.Y. TIMES BOOK REV., May 5, 1991, at 7. See also infra note 712.

Goering could be fastidious about certain matters. Thus, he preferred the translation “total solution” to that of “final solution” with respect to “the Jewish question.” 9 TRIAL RECORD, supra note 670, at 519. He had been offended by the recourse of the French to guerilla warfare: “Bombs were even thrown in places where there were women . . . .” Id. at 321. And he could describe the shooting of certain English fliers who had tried to escape as “the most serious incident of the whole war.” Id. at 593. (On the cross-examination of Goering about these murders, see infra note 686.) This “incident” was for him somehow more serious, it seems, than the deliberate slaughter of millions of civilians in the camps: what mattered to him here was his honor as a distinguished flying officer of the First World War. The loss of all sense of proportion is perhaps a symptom
of the madness that Nazism turned into, if it was not that from the beginning. For
thoughtful reflections on these matters, see THE JEWISH THOUGHT OF EMIL FACK-
HENHEIM: A READER (M. Morgan ed. 1987) [hereinafter FACKENHEIM READER]. On
Himmler, see id. at 141f, 153.

677. See, e.g., 12 TRIAL RECORD, supra note 670, at 368, 373, 375, 378, 384, 387,
390, 405.

678. Seven Nazi and military groups or organizations were charged as well. Four of
those organizations were declared to have been criminal in character. See 1 id. at 257-78.
I will not concern myself with any of them on this occasion. See A. NEAVE, ON TRIAL

679. R. JACKSON, supra note 671, at xiii; see also infra note 695.

680. See 1 TRIAL RECORD, supra note 670, at 10-16. This Charter was in pursuance
of an agreement of the same date. That Agreement was adhered to by the governments of
Greece, Denmark, Yugoslavia, The Netherlands, Czechoslovakia, Poland, Belgium, Ethio-
pia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India,
Venezuela, Uruguay, and Paraguay. 1 id. at 8n.

681. 1 id. at 11. On what "military necessity" can mean, consider President Lin-
coln's Emancipation Proclamation. See supra note 166.

682. 1 TRIAL RECORD, supra note 670, at 14. Doubts can be raised as to whether the
Indictment did include "full particulars specifying in detail the charges against the de-
fendants." On the other hand, the defendants did seem to have a fairly reliable notion,
over the months of the trial, of what each of them was being called to account for. This
may be seen in the judgment as well. See 1 id. at 171-341.

683. 1 id. at 12. The use here of justice reminds us that the tribunal, and the nations
(if not the world) on whose behalf the tribunal was understood to be acting, did have a
standard of justice to look to independent of the Charter. See infra note 700; see also infra
Conclusion.

684. The members and alternate members of the tribunal were identified as, "Lord
Justice Lawrence, Member for the United Kingdom of Great Britain and Northern Ire-
eland, President; Mr. Justice Birkett, Alternate Member; Mr. Francis Biddle, Member for
the United States of America; Judge John J. Parker, Alternate Member; M. le Professeur
Donnedieu de Vabres, Member for the French Republic; M. le Conseiller R. Falco, Alter-
nate Member; Major General I. T. Nikitchenko, Member for the Union of Soviet Social-
ist Republics; Lieutenant Colonel A. F. Volchkov, Alternate Member." 1 TRIAL
RECORD, supra note 670, at 1. On the awkward position of the Russian judges, see A.
NEAVE, supra note 678, at 308-09, 316. See also infra notes 708, 715, 716, 728, 750, 751,
753.

685. R. JACKSON, supra note 671, at xvii.

686. Robert H. Jackson was on leave for the year from his post as an Associate Jus-
tice of the United States Supreme Court. See G. ANASTAPLO, supra note 2, at 458 n.34.

Justice Jackson had as executive trial counsel: Colonel Robert G. Storey and Mr.
Thomas J. Dodd; he had as associate trial counsel: Mr. Sidney S. Alderman, Brigadier
General Telford Taylor, Colonel John Harlan Amen, and Mr. Ralph G. Albrecht. He
had as well sixteen assistant trial counsel. See 1 TRIAL RECORD, supra note 670, at 3; see
also supra note 669.

It seems to be generally agreed among observers of the Trial that Justice Jackson (as
the American prosecutor) failed in his cross-examination of Goering. See 1 TRIAL RE-
CORD, supra note 670, at 417f. The much more experienced British prosecutor put Goe-
ring on the defensive, especially with questions about the murder of English fliers. See A.
NEAVE, supra note 678, at 258f; see also supra note 676. "Cross-examination, at its best,
discomfited Goering in a way that no political duel with Jackson could ever have done." A.
NEAVE, supra note 678, at 263. "Goering repeated his denials [about the murdered
fliers], He become alarmed and blustering. He lost his self-control. He shouted that he
knew of no 'atrocity.'" Neither he nor Hitler, he cried, knew anything about the extermina-
tion of the Jews! This last assertion was so preposterous that among those who were
inclined to cheer the weak before, Goering had lost the battle. This straightforward
cross-examination saved the face of the Allied prosecution. It marked Goering down for
the death sentence as I can witness from my conversation with those judges who had been
impressed by his defence.” Id. at 264; see also infra notes 711-12, 714, 721.

687. See 1 TRIAL RECORD, supra note 670, at 102-03, 338-41.

688. See 1 id. at 118-47; see also R. CONOT, JUSTICE AT NUREMBERG 77 (1983).

689. See 1 TRIAL RECORD at 115.

690. Hitler, Himmler, and Goebbels committed suicide as the war drew to an end.

691. The three acquitted defendants were Hjalmar Schacht, Franz von Papen, and
Hans Fritzsche. See 1 TRIAL RECORD, supra note 670, at 307-10, 325-27, 336-38. They
remained subject to proceedings before other post-war tribunals in Germany and else-
where in Europe. Lynching was also a concern for them. See A. NEAVE, supra note 678,
at 311.

692. See 1 TRIAL RECORD, supra note 670, at 366-67; see also infra note 713.

693. See R. JACKSON, supra note 671, at xiii.

694. See, e.g., infra text accompanying note 730.

695. The conspiracy alleged in the indictment extended to war crimes and to crimes
against humanity as well as to crimes against peace. See, e.g., 1 TRIAL RECORD, supra
note 670, at 29, 42-43, 65. During the trial, however, conspiracy seems to have figured
most critically in the crimes against peace, which depended on the showing of the plan-
ning and execution of wars of aggression. See, e.g., supra text accompanying note 679.

696. R. JACKSON, supra note 671, at 15. The Kellogg-Briand Peace Pact of 1928 has
these critical provisions:

Article I. The High Contracting Parties solemnly declare in the names of their
respective peoples that they condemn recourse to war for the solution of inter-
national controversies, and renounce it as an instrument of national policy in
their relations with one another.

Article II. The High Contracting Parties agree that the settlement or solution
of all disputes or conflicts of whatever nature or of whatever origin they may be,
which may arise among them, shall never be sought except by pacific means.

4 TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS
BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS, 1923-1937 pt.2, at
5132 (1938). The “High Contracting Parties” surely cannot have meant to say what they
seem to have said, that there could be no recourse to war even in self-defense or to punish
or to correct a defiant aggressor. See, e.g., supra note 674; infra note 698.

697. The Treaty of Versailles, which had been emphasized in Hitler’s appeal to the
Germans, was repeatedly referred to. See, e.g., 9 TRIAL RECORD, supra note 670, at 237-
38; 17 id. at 546, 551; 22 id. at 373. Compare, for example, the remark of the chief
prosecutor for the United Kingdom, who said “The so-called injustice of Versailles, so
cunningly exploited to provide a popular rallying point under the Nazi banner, had suc-
ceded in uniting behind the Nazis many Germans who would not otherwise have sup-
ported some of the rest of the Nazi program.” 19 id. at 437. But consider what Justice
Jackson observed:

The Germans of the 1920’s were a frustrated and baffled people as a result of
defeat and the disintegration of their traditional government. The democratic
elements, which were trying to govern Germany through the new and feeble
machinery of the Weimar Republic, got inadequate support from the demo-
ocratic forces of the rest of the world, including my country. It is not to be
denied that Germany, when worldwide depression was added to her other
problems, was faced with urgent and intricate pressures in her economic and political life which necessitated bold measures.

2 id. at 109; see also W. CHURCHILL, GREAT CONTEMPORARIES 19-29, 203-10 (1947); M. MAYER, THEY THOUGHT THEY WERE FREE: THE GERMANS 1933-45 (1955); infra note 739. Even so, it should be noticed, "The Scottish-Catholic historian Malcolm Hay asks why what happened in Germany did not happen in France forty years earlier, during the Dreyfus affair. He replies that in France there were fifty righteous men." FACKENHEIM READER, supra note 676, at 136. Should intelligent Jews have sensed, long before the Nazis came to power, how deeply they were hated by many if not most Germans—and hated more for their virtues than for their vices? Friedrich Nietzsche seems to have recognized this. He may even have warned his fellow Germans against the evil of which they were capable. See M. MAYER, WHAT CAN A MAN DO? 136-45 (1964); see also infra notes 743, 747, 748.

698. The question remains, of course, whether "aggressive war" is the proper way to deal with an equitable claim. Goering complained that the four signatory powers conducting this trial "call more than three-quarters of the world their own." 9 TRIAL RECORD, supra note 670, at 263. Joachim von Ribbentrop, in his final statement, argued,

History will believe us when I say that we would have prepared a war of aggression immeasurably better if we had actually intended one. What we intended was to look after elementary necessities of life, in the same way that England looked after her own interests in order to make one-fifth of the world subject to her, and in the same way that the United States brought an entire continent and Russia brought the largest inland territory of the world under hegemony. The only difference between the policies of these countries as compared with ours is that we demanded parcels of land such as Danzig and the Corridor which were taken from us against all rights, whereas the other powers are accustomed to thinking only in terms of continents.

22 id. at 374.

699. See, e.g., L. STRAUSS, supra note 72, at 13-14.

700. Elements of the standards drawn upon in what came to be known as crimes against humanity could be seen as well in the sense of injustice, mistreatment, misery, and vulnerability of the German people themselves between the two world wars. See supra note 683; infra note 748; see also infra notes 733, 737.

701. See infra note 713.


703. Of the four defendants charged but acquitted under count two, two were convicted on count three and count four charges. See infra note 713.

704. See infra note 713.


706. Hess spent forty-six years in Berlin's Spandau Prison, until his death, at 93, in 1987. His death was deemed a suicide. See Anderson, supra note 705, at 1. He evidently
remained a very odd man to the end of his life. At times, he faked a loss of memory. See R. Conot, supra note 688, at 158-60; A. Speer, supra note 670, at 20-21. At other times, the loss of memory, or the loss of a realization of where he was, seems to have been genuine enough. “We [prisoners, in Spandau Prison] do not know what Hess is up to. Every chance he gets he asks us about things that need doing; he recently questioned [Walter] Funk about the strengths and weaknesses of each one of us [prisoners]. ‘All his remarks suggest that he is putting together a new government,’ Funk commented. ‘What craziness! Just imagine a list of cabinet members being found under his mattress!’” A. Speer, supra note 670, at 42 (diary entry from Feb. 16, 1947). “Talked with Hess. He keeps to his cell while the rest of us go walking. Like Hitler when things started to go badly, he has built up an escapist world. . . . Sometimes I have the impression that being a prisoner was always his destined role. Ascetic in appearance, his eyes sometimes wild in their deep, dark sockets, as a prisoner he can again be the total eccentric he was when he moved so strangely in the sphere of power. Now at last he can play the martyr and the buffoon, thus fulfilling the two side of his personality.” Id. at 59 (diary entry from Apr. 24, 1947); see also id. at 11, 90, 119, 121, 147, 151-52, 165-66, 167-68; infra note 726. It does seem that Hess was treated most like a political prisoner of all of the defendants at Nuremberg, with the possible exception (in some respects) of Goering. See supra note 686. One British observer of the trial, who had himself been held as a prisoner of war by the Germans, has said, “I could not help feeling that the sentences passed on Speer, Sauckel, Jodl, and Rudolf Hess were open to question.” A. Neave, supra note 678, at 312. “From the beginning, [Speer] was the most cultivated of the Nazis who made Hitler’s doctrines respectable in his own professional circle.” Id. at 313; see also infra note 739. “[Hess] was plainly mad by any but the most exacting legal standards of the time.” A. Neave, supra note 678, at 315.

707. To what extent did the tribunal, because of its concern about the breadth and seeming technical retroactivity of the crimes against humanity tend to blend them with the more traditional-seeming war crimes? All but two of the defendants who were found guilty of crimes against humanity were found guilty as well of war crimes; and all but two of the defendants who were found guilty of war crimes were found guilty as well of crimes against humanity. See infra note 713. In both cases, obvious (indeed horrendous) mistreatment of human beings is at the heart of the conduct condemned. The critical character of war crimes is suggested by an observation by Justice Jackson in his opening argument, “The fact of the war and the course of the war [is] the central theme of our case . . . .” 2 Trial Record, supra note 670, at 103.

708. It is true that the victors tend to overlook such offenses when done by their own men. Or, rather, they tend to resort to a “cover-up,” even as they may be careful not to rely upon the particular offending officers again. A “cover-up” does recognize the dubious character of the conduct dealt with. See also infra notes 712, 728, 729, 750, 751.

709. See infra note 713.


711. Consider, for example, Goering’s observation: “Repeatedly we have heard here how the worst crimes were veiled with the most secrecy. I wish to state expressly that I condemn these terrible mass murders to the utmost, and cannot understand them in the least.” 22 Trial Record, supra note 670, at 366. Goering distinguished these crimes from other questionable actions he did try to justify, such as the preventive arrests of people who had been considered enemies of the state. See supra note 686.

712. See supra note 676. Consider, also, this diary entry from Spandau Prison: The thought inevitably recurs that of course the other side committed many war crimes too. But we cannot and may not use those as justifications for the crimes on our own side—that I firmly believe. Crimes are not open to that kind of balanced bookkeeping. Moreover, the National Socialist crimes were of a nature that cannot be compared to anything the other side may have done. After Rudolf Hoess, the Auschwitz commander, had given his extensive testi-
mony, even Goering turned irritably to Raeder and Jodl, exclaiming, "If only there weren't this damned Auschwitz! Himmler got us into that mess. If it weren't for Auschwitz we could put up a proper defense. The way it is, all our chances are blocked. Whenever our names are mentioned, everybody thinks of nothing but Auschwitz and Treblinka. It's like a reflex." Once, after such an outburst, he added: "How I envy the Japanese generals." But that has since proved a wrong conclusion; the Japanese generals received as harsh a verdict as we.

A. SPEER, supra note 670, at 52-53; see also A. NEAVE, supra note 678, at 265; supra note 686. As for the Japanese leaders, did not Pearl Harbor and the Bataan Death March, and other such atrocities serve for Americans as the Japanese "Auschwitz and Treblinka"?

Cf infra note 779.

713. An instructive table can be found in R. JACKSON, supra note 671. That table, reproduced in substance below, records what each of the twenty-two defendants was charged with, whether each was convicted or acquitted on the charges he faced, and the sentences imposed. (Note that the numbers 1 through 4 represent the four counts. The rest of the key is: G—guilty; I—in innocent; *—Death Sentences carried out October 16, 1946 at Nuremberg; **—Suicide by poison; ***—Tried in absentia (probably already dead))

Hermann Goering—IG, 2G, 3G, 4G, Hanging**;
Rudolf Hess—IG, 2G, 3I, 4I, Life;
Martin Bormann—1I, 3G, 4G, Hanging***;
Joachim von Ribbentrop—IG, 2G, 3G, 4G, Hanging*;
Wilhelm Keitel—1G, 2G, 3G, 4G, Hanging*;
Ernest Kaltenbrunner—1I, 3G, 4G, Hanging*;
Alfred Rosenberg—1G, 2G, 3G, 4G, Hanging*;
Hans Frank—1I, 3G, 4G, Hanging*;
Wilhelm Frick—1I, 2G, 3G, 4G, Hanging*;
Julius Streicher—1I, 4G, Hanging*;
Walther Funk—1I, 2G, 3G, 4G, Life;
Hjalmar Schacht—1I, 2I, Acquitted;
Karl Doenitz—1I, 2G, 3G, 4G, 15 years;
Erich Raeder—1G, 2G, 3G, Life;
Baldur von Schirach—1I, 4G, 20 years;
Fritz Sauckel—1I, 2I, 3G, 4G, Hanging*;
Alfred Jodl—1G, 2G, 3G, 4G, Hanging*;
Franz von Papen—1I, 2I, Acquitted;
Artur Seyss-Inquart—1I, 2G, 3G, 4G, Hanging*;
Albert Speer—1I, 2I, 3G, 4G, 20 years;
Constantin von Neurath—1G, 2G, 3G, 4G, 15 years;
Hans Fritzsche—1I, 3I, 4I, Acquitted.

Justice Jackson adds "that generally Count One charged the common plan or conspiracy to seize power, establish a totalitarian regime, prepare and wage a war of aggression. Count Two charged the waging of wars of aggression. Count Three charged the violation of the laws of war, and Count Four charged the crimes against humanity, the persecution and extermination." Id. at xii-xiii; see also 1 TRIAL RECORD, supra note 670, at 366-67.

714. See supra note 710. Goering's counsel observed, "A cunning system of secrecy insured that the plans and aims of the Fuehrer remained unknown to his associates as long as at all possible, so that his most intimate assistants time and again were taken by surprise by the events, and, in fact, were shocked to learn some of them only at the present Trial. This system of secrecy also insured an isolation of the individual collaborator, since one person was not allowed to know what the other did." 17 TRIAL RECORD, supra note 670, at 513-14; see also 22 id. at 379, 387, 397; cf. supra note 686.

Even those who do terrible things can be said to aim at the good. See supra note 152. They are, however, often in need of authoritative guidance, such as that which the law
can provide, as to what the good is in particular circumstances. See, e.g., infra note 729. (The significant influence of the law could be seen in the successful resistance put up against the August 1991 coup in the Soviet Union.) Perhaps, it can also be said, even those defendants intimately involved in the mass murders of the Nazi regime did not see what they had been doing until it was all brought together and publicly presented the way it was during the trial. See supra note 673. That is, until the defendants were obliged to view the atrocities as organized by and through the moral consciousness of ordinary people, they may never have truly known what they had done. Consider, for example, the effects upon the defendants of the showing (early during the trial, on November 29, 1945) of a film depicting the atrocities of the concentration camps:

The screen filled with images of skeletal men and women, crematoria and gas chambers, the scarred and disfigured bodies of women who had survived medical experiments, mound upon mound of cadavers whose sticklike arms and legs gave the appearance of jumbled piles of driftwood, displays of human lampshades, Germans holding their noses as they were compelled into sightseeing tours through the camps and impressed into burying details, and tractors pushing the dead into mass graves like contaminated jetsam. The juxtapositioning of the motion picture with the levity that had preceded it heightened the effect and horror.

The accused were graphically confronted with the product of the regime whose leaders they had been. Funk, biting his knuckles, cried like a baby; Sauckel shuddered; Schirach gasped; tears welled in Ribbentrop's eyes; Hess appeared bewildered. None watched the movie in its entirety. Schacht turned his back and later exploded: "How dare they make me sit there with those criminals and watch a film on concentration camp atrocities!"

In his cell that evening Fritzscbe exclaimed: "no power in heaven or earth will erase this shame from my country—not in generations—not in centuries!" Frank, similarly emotional, burst out: "To think we lived like kings and believed in that beast! Don't let anybody tell you they had no idea! Everybody sensed that there was something horribly wrong with this system, even if we didn't know all the details. They didn't want to know! It was too comfortable to live on the system, to support our families in royal style, and to believe that it was all right. May God have mercy on our souls!"

Sauckel and Ribbentrop were still trembling and shaking hours afterward. Hess kept muttering over and over, "I don't understand, I don't understand." Goering, deflated, shook his head: "It was such a good afternoon, too—and then they showed that awful film, and it just spoiled everything!"

R. CONOT, supra note 688, at 149. Another such film, shown in the courtroom on December 11, 1945, drew these responses:

Keitel muttered, "Furchtbar! Furchtbar!" ("Frightful! Frightful!") Goering, later pacing up and down in his cell, pretended bewilderment: "I still cannot see how he [Hitler] was capable of ordering those mass murders. I keep thinking—it is such a mystery—the whole thing!" Hess had a simple, resigned explanation: "I suppose every genius has a demon in him. You can't blame him—it is just in him."

Schirach shrugged. "It's all over. I wouldn't blame the court if they just said, 'Chop off all their heads!' Even if there are a couple of innocent ones among the twenty, it wouldn't make a bit of difference among the millions who were murdered."

Id. at 199; see also infra note 735; cf. infra note 779.

After the deaths of the defendants sentenced to execution, "[Their] bodies were loaded into two lorries which left the prison under heavy guard. . . . The lorries continued to Dachau concentration camp near Munich where the death ovens were alight. The bodies were cremated and the ashes thrown in secret into a river. There are no shrines to their evil memory." A. NEAVE, supra note 678, at 318. See infra note 759.
715. Consider, for example, the complications that the Russians faced in distinguishing their foreign policy maneuvers from those of the Germans. See R. CONOT, supra note 688, at 350-52; see also supra note 684.

716. Have not similar questions been asked in recent years about the National Administration in the United States with respect to such matters as the Iran Contra scandal or the encouragement by the United States of the ill-fated uprisings by the Shiites and the Kurds against Saddam Hussein? See supra notes 511, 674. Was it cynicism or gullibility that permitted the Russian prosecutors to attempt to blame the Germans for the Katyn Forest massacre of Polish officers? See infra note 750; see also infra note 728.

717. See, e.g., 17 TRIAL RECORD, supra note 670, at 366; see also supra note 714. On Goering's proclaimed loyalty to Hitler, see 9 TRIAL RECORD, supra note 670, at 418, 428, 431, 432, 615, 651; 17 id. at 549-50; 22 id. at 368. See also supra note 634.

718. 22 TRIAL RECORD, supra note 670, at 427.

719. Even the badly disturbed Hess can speak, in his final statement, of "the hitherto inexplicable actions of the personnel in the German concentration camps, including the scientists and physicians who made these frightful and atrocious experiments on the prisoners":

But this is also of equally great significance in connection with the actions of the persons who undoubtedly gave the orders and directions for the atrocities in the concentration camps and who gave the orders for shooting prisoners of war and lynchings and other such things, up to the Fuehrer himself.

I recall that the witness Field Marshal Milch testified here that he had the impression that the Fuehrer was not normal mentally during the last years, and a number of my comrades here have told me, independently of each other and without having any knowledge of what I am saying here now, that during the last years the Fuehrer's eyes and facial expression had something cruel in them, and even had a tendency towards madness.

22 id. at 370. A few minutes later, however, Hess exposed his chronically disturbed psyche to full view by saying,

I was permitted to work for many years of my life under the greatest son whom my people has brought forth in its thousand-year history. Even if I could, I would not want to erase this period of time from my existence. I am happy to know that I have done my duty to my people, my duty as a German, as a National Socialist, as a loyal follower of my Fuehrer. I do not regret anything.

22 id. at 373. Not to "regret anything" is to reveal, in effect, that he did not fully understand what had happened. See supra notes 152, 714.

For a contrasting assessment of Hitler, see infra notes 739, 747.

720. Some students of Nazism have said that the concentration camp officials seemed to need to reduce their captives to a subhuman condition in order to make the officials feel right about exterminating them. See, e.g., 1 TRIAL RECORD, supra note 670, at 287, 302; 9 id. at 619; 19 id. at 506, 507, 543; see also FACKENHEIM READER, supra note 676, at 136-37; infra note 735 & text accompanying note 737. Consider as well "the unfortunate statement in an obscure unpublished lecture on technology in which Heidegger compares the extermination technology of the concentration camps to various forms of agricultural technology." V. FARIAS, supra note 114, at xi. On Heidegger and Nazism, see supra note 114. On proper agriculture, or cultivation, see infra note 899.

721. The British prosecutor addressed the defendants' insistence that others were responsible, not they:

When one considers the nature and the immensity of the crimes committed, the responsibility of those who held the highest positions of influence and authority in the Nazi State is manifest beyond doubt. . . . These men, with Hitler, Himmler, Goebbels, and a few other confederates, were at once the leaders and the drivers of the German people. It was when they held the highest positions of authority and of influence that these crimes were planned and perpetrated. If these men are not responsible, who are? If minions who did no more than obey
their orders, Dostler, Eck, Kramer, and a hundred others, have already paid the supreme penalty [after having been tried and convicted before other tribunals], are these men less responsible? How can it be said that they and the offices of state which they directed took no part? . . .

Let them now, accused murderers as they are, attempt to belittle the power and influence they exercised how they will, we have only to recall their ranting as they strutted across the stage of Europe dressed in their brief authority, to see the part they played. They did not then tell the German people that they were merely the ignorant, powerless puppets of their Fuehrer. . . . Had the war been won by Germany is it to be supposed that these men would have retired to the obscurity and comparative innocence of private citizenship?

19 Trial Record, supra note 670, at 435-36. Earlier that day (July 26, 1946) Justice Jackson had said,

The defendants have been unanimous, when pressed, in shifting the blame on other men, sometimes on one and sometimes on another. But the names they have repeatedly picked are Hitler, Himmler, Heydrich, Goebbels, and Bormann. All of them are dead or missing. No matter how hard we have pressed the defendants on the stand, they have never pointed the finger at a living man as guilty. It is a temptation to ponder the wondrous workings of a fate which has left only the guilty dead and only the innocent alive. It is almost too remarkable.

19 id. at 429; see also 2 id. at 142; 19 id. at 574. Were not the worst men among the leaders, however, more apt than others to resort to suicide (as did Hitler, Himmler, and Goebels) when defeat became imminent? See infra note 758.

722. See, e.g., Plato, Gorgias 480a-e; see also supra notes 626, 714; infra text accompanying note 756.

723. See supra notes 676, 719; infra notes 739, 749. If the Nazis were the worst in the twentieth century, we may well wonder, were their principal victims among the best? See infra text accompanying note 746; see also infra note 746. Compare, on the shortcomings of any perennially victimized people, Machiavelli, The Prince ch. 26. Consider, for example, the afflictions endured (if not even "asked for") by the Gypsies and by the modern Greeks. Consider, also supra note 697; infra note 748. This bears on the case for supporting Israel. See infra note 794; see also infra note 741, 747.

724. On slavery, see Anastaplo, supra note 388. Slave owners, it should be noticed, usually have a considerable interest in keeping their slaves healthy. The Native Americans, on the other hand, were often regarded as fierce enemies against whom Europeans in North America had to defend themselves. Americans can do destructive things in pursuit of what they consider their national interest. See, e.g., supra note 674.

725. See 2 Trial Record, supra note 670, at 102 (Justice Jackson's opening statement) (emphasis added):

If these men are the first war leaders of a defeated nation to be prosecuted in the name of the law, they are also the first to be given a chance to plead for their lives in the name of the law. Realistically, the Charter of this Tribunal, which gives them a hearing, is also the source of their only hope. It may be that these men of troubled conscience, whose only wish is that the world forget them, do not regard a trial as a favor. But they do have a fair opportunity to defend themselves—a favor which these men, when in power, rarely extended to their fellow countrymen. Despite the fact that public opinion already condemns their acts, we agree that here they must be given a presumption of innocence, and we accept the burden of proving criminal acts and the responsibility of these defendants for their commission.

See also 9 id. at 508; 19 id. at 570; infra notes 731, 734, & note 737 accompanying text.

726. See 22 Trial Record, supra note 670, at 342-64; R. Jackson, supra note 671, at xiv. It is to be regretted, however, that the tribunal did not permit Hess to talk as long as he wanted to when he finally decided to explain himself during his final statement,
after having declined to testify earlier. It would have been instructive to hear him out at
length, however improper that might have appeared according to the rules. Instead the
presiding judge said,

The Tribunal has made its order that the defendants shall only make short
statements. The Defendant Hess had full opportunity to go into the witness box
and give his evidence upon oath. He chose not to do so. He is now making a
statement, and he will be treated like the other defendants and will be confined
to a short statement.

22 TRIAL RECORD, supra note 670, at 372.
727. See supra Part II (§ VI).
728. The formality with which the Defendants referred to each other is from the Old
World. Consider, also, how one of the acquitted defendants spoke of the proceedings:

To the credit of the Nuremberg bench it must be said that, despite this un-
doubted defect in its construction [that is, that many points of the indictment
filed against the accused could have been brought forward against the Russians
themselves], the way in which it conducted the trial was exemplary. Admit-
tedly, both the evidence and the pleadings had to be limited to some extent. As
it was the proceedings lasted eleven months. But they were limited in practice
as reasonably and justly as possible. The whole tone of the proceedings was
deliberately kept dignified. And the accused themselves must be given credit
for behaving accordingly.

H. SCHACHT, ACCOUNT SETTLED 234 (1949); see also G. ANASTAPLO, Civil Disobedi-
ence and Statesmanship § III, in THE AMERICAN MORALIST, supra note 22, at 541-44;
infra note 750.

Another assessment of these proceedings, this time by a defendant who was sentenced
to twenty years of imprisonment, includes the observation, "Despite all the mistakes, the
Nuremberg Trial was a step in the direction of recivilization." A. SPEER, supra note 670,
at 50.

Another "step in the direction of recivilization" was the progeny left by this particular
defendant. I have recently learned that a former neighbor of ours for some years, a wo-
man of natural grace and haunting beauty, is a daughter of Albert Speer.

729. General Norman Schwarzkopf, for example, was recently quoted as saying that
he would refuse to obey an immoral order, such as the killing of the Jews. See San
Antonio Light, March 24, 1991, at L4. The influence of the Nuremberg Trial may have
been evident in his comment. "Army lawyers are holding classes with front-line units to
avoid a repeat of the My Lai massacre when ground troops are committed to battle. . . .
The lawyers' warning, and their admonition to respect the laws of war, conclude: 'You
will be angry. You will see fallen comrades. You will want to seek revenge. You've got
to control yourself.'" Evans, Lawyers Tell Troops: "Control Yourself", Chicago Trib-
une, Feb. 15, 1991, § 1, at 5; see also supra note 708.

It is fashionable, but perhaps misleading, to make much of the place of sanctions for
law. This approach may be seen in a column by George Will:

Before congeries of customs, habits, norms, and arrangements can properly be
called law, questions need answers. If international law is really law, who en-
acts, construes, adjudicates and enforces it? The phrase "international law"
often is virtually an oxymoron. Law without a sword is mere words; lacking an
enforcement mechanism, soit-disant "law" is merely admonition or aspiration.
Law must be backed by coercion legitimized by a political process. The "inter-
national community" has no such process. Indeed, the phrase "international
community" is metaphoric and misleading.

Will, The Perils of "Legality", NEWSWEEK, Sept. 10, 1990, at 66. For many people the
law provides guidance as to what is right. It often suffices, for this instructive purpose,
that people know that this is what the community, or people of common sense and good
will, believe should be done, without a concern about the sanctions that apply. If sanc-
tions are as decisive here as Mr. Will believes, then why should one obey a law that one is
confident that one can disobey (perhaps even to one's profit) without the authorities becoming aware of such disobedience? See Lehrberger, Crime Without Punishment: Thomistic Natural Law and the Problem of Sanctions, in LAW AND PHILOSOPHY (J. Murley, R. Stone & W. Braithwaite eds. 1992); see also supra note 714; infra note 857.

730. 23 TRIAL RECORD, supra note 670, at 409.

731. On the maxim, nulla poena sine lege, see 1 id. at 168-170, 731; Taft, Equal Justice Under Law: The Heritage of the English-Speaking People and Their Responsibility, THE POLITICAL PRINCIPLES OF ROBERT A. TAFT 103 (R. Kirk & J. McClellan eds. 1967); infra note 779. Cf 2 TRIAL RECORD, supra note 670, at 144f; 17 id. at 506f; 19 id. at 410, 440, 464; supra note 725; cf also G. ANASTAPLO, supra note 2, at 683 n.21, 800 n.35; Meltzer, supra note 669, at 456-59. Do not those who argue against the Nuremberg Trial on ex post facto grounds draw upon principles of justice which may not themselves be incorporated in anybody of written, or formally promulgated, law? See G. ANASTAPLO, Natural Right and the American Lawyer, in HUMAN BEING AND CITIZEN, supra note 6, at 251 n.24.

732. This is aside from what the United Nations has done in formally adopting the principles of the Nuremberg Trial.

733. Consider, also, the existence of common law crimes in the Anglo-American tradition, including the crime of murder. The concealment of the worst Nazi atrocities is revealing here. Also significant are the repeated warnings given by the Allied powers during the Second World War about the justice that would be meted out to the perpetrators of atrocities. See, e.g., 19 TRIAL RECORD, supra note 670, at 576, 609-10; see also infra note 750. Justice Jackson asked, in his opening statement, “The fourth Count of the Indictment is based on Crimes Against Humanity. Chief among these are mass killings of countless human beings in cold blood. Does it take these men by surprise that murder is treated as a crime?” 2 TRIAL RECORD, supra note 670, at 145; cf infra note 779.

734. War crimes did have such instruments dealing with them, with the results that we have seen. In fact, the invocation of an ex post facto guarantee in these circumstances is not truly serious. See infra note 779.

735. I have recently been told by a Greek-American who lives in Chicago of what happened when an American Army unit liberated Buchenwald: the monstrous things they came upon there drove some of the GIs to such a frenzy that they gunned down at once as many of the SS men who had been in charge of the camp as they could find. This too may have been a war crime, but with significant mitigating circumstances that a tribunal would have to consider in allocating punishments. The inmates, too, it seems, did some SS-killing of their own in those last days. See Moseley, Buchenwald Haunts Muses' Valley, Chicago Tribune, Jun. 23, 1991, § 1, at 14; see also FACKENHEIM READER, supra note 676, at 279, 366. Accounts of the atrocities in Auschwitz by its commandant should suffice to condemn the whole Nazi system. See, e.g., KL AUSCHWITZ SEEN BY THE SS 95-100, 134-37 (J. Bezwinska & D. Czeck eds. 1984); J. PRESSAC, AUSCHWITZ: TECHNIQUE AND OPERATION OF THE GAS CHAMBERS (1989); supra note 720.

736. See 2 TRIAL RECORD, supra note 670, at 149f. Is it not likely, however, that the worst atrocities committed by the Nazis in Germany were committed without formal legal authorization, if not even against the recognized law of the land? But the German courts had been so corrupted by the Nazis that they could not be relied upon to do what was needed to punish offenders after the war. See, e.g., Berghahn, The Judges Made Good Nazis, N.Y. TIMES BOOK REV., Apr. 26, 1991, at 3. The post-World War I experience did not encourage the Allies to believe that the Germans would effectively judge themselves if left alone. See 2 TRIAL RECORD, supra note 670, at 101; cf A. SPEER, supra note 670, at 43.

737. See A. NEAVE, supra note 678, at 24, 46, 321-23. “In August 1944, Churchill was still urging the publication of a list of fifty to a hundred Nazi leaders who were to be shot on the spot.” Id. at 322; see also R. CONOT, supra note 688, at 13-14; supra note
The British Prosecutor said, in his closing argument,

Twelve million murders! Two-thirds of the Jews in Europe exterminated, more than 6 million of them on the killers' own figures. Murder conducted like some mass production industry in the gas chambers and the ovens of Auschwitz, Dachau, Treblinka, Buchenwald, Mauthausen, Maidanek, and Oranienburg. . . .

For such crimes these men might well have been proceeded against by summary executive action and [if] the treatment, which they had been parties to meting out against so many millions of innocent people, [had] been meted out to them, they could hardly have complained. But this Tribunal is to adjudge their guilt not on any moral or ethical basis alone, but according to law—that natural justice which demands that these crimes should not go unpunished, at the same time insists that no individual should be punished unless patient and careful examination of the facts shows that he shared the guilt for what has been done.

19 TRIAL RECORD, supra note 670, at 434 (emphasis added); see also Meltzer, supra note 669, at 467-69; cf infra note 779.

Consider Speer's observation at the conclusion of the Nuremberg Trial:

[T]he Himmlers, Bormanns, Streichers, and their ilk cannot explain Hitler's success with the German people. Hitler was sustained by the idealism and devotion of people like myself. We who actually were least inclined to think selfishly were the ones who made him possible. Criminals and their accomplices are always around; they explain nothing. Throughout the trial, all the talk was only of those misdeeds that are judicially tangible. But at night in my dimly lit cell I often ask myself whether my real guilt did not lie on an entirely different plane.

A. SPEER, supra note 670, at 8. Three years later Speer asked himself, "If I remember rightly, during the past few months I have not mentioned [in my diary entries] a single engaging trait of [Hitler's], and in fact I no longer feel a trace of loyalty to him. Is that betrayal?" Id. at 133. Thirteen years later Speer recalled:

I think of my own father, and of [Thomas Mann's] father. For them there were still wholly unassailable values. They had no doubts whatsoever about right and wrong, good and evil. It is unimaginable to think of my father or grandfather with Hitler and his cronies at Obersalzberg on one of those dreary movie nights. How brittle all aesthetic and moral standards must have grown before Hitler became possible. I still recall my father's reaction after he had intensively studied, with the architect's eye, our [Hitler's and Speer's] plans for the new capital of the Reich. After some moments of silence he said merely, "You know you've all gone completely crazy." And left.

Id. at 370; see also supra notes 697, 736; infra note 747. Compare V. FARIAS, supra note 114, at 118: "[Karl] Jaspers asked Heidegger during a conversation in June 1933, 'How do you think a man as coarse as Hitler can govern Germany?' Heidegger answered, 'Culture is of no importance. Look at his marvellous hands!' " On Heidegger, see supra note 114.

740. For the Roman distinctions in civic status, see supra note 423.

741. Some have suggested that the inhuman, dehumanizing treatment before the slaughter was worse than the slaughter itself. But much of that preparatory aspect of the conduct of the Nazis was shared by the entire country, whereas the slaughter itself was reserved for the victims, whatever the corrupting effects of these deeds upon the sufferers themselves and upon their fellow countrymen. See, for the crippling effects of hatred, infra note 747. See also supra note 720.

742. Goering said, in 1933, "I would like to say again that I would not like to be a Jew in Germany." 9 TRIAL RECORD, supra note 670, at 544. The British prosecutor, in his closing argument of July 26, 1946, said, "It is a measure of the wickedness and effec-
tiveness of [their] domestic policy that, after 6 years of rule, the Nazis found little difficulty in leading a perverted nation into the greatest criminal enterprise in history.” 19 id. at 439 (emphasis added).

743. 22 id. at 383. A sympathetic resonance with Martin Heidegger’s thought is evident here. See G. ANASTAPLO, Heidegger and the Need for Tyranny, in THE AMERICAN MORALIST, supra note 22, at 144-60; see also supra notes 114, 697. On the will, see supra notes 114, 119, 120.

744. ARISTOTLE, POLITICS 1276a28-31; see also G. ANASTAPLO, The Babylonian Captivity of the Public Schools § IV, in THE AMERICAN MORALIST, supra note 22, at 459-62. We have noticed that Goering testified to his belief that even Hitler had the worst systematic atrocities concealed from him. See supra note 686.

745. See, e.g., 22 TRIAL RECORD, supra note 670, at 383.

746. Leo Strauss commented in his 1962 lecture, Why We Remain Jews:

I want to show that [our enemies] recognize that we are not from the gutter. Let us take the latest and crudest and simplest example, the Nazis. The Nazi system was based on the notion of the Aryan. I mean, it was no longer a Christian Germany, it was to be an Aryan Germany. But what does Aryan mean? The Nazis were compelled, for example, to give the Japanese the status of Aryans, and quite a few others. In a word, Aryan had no meaning but non-Jewish. The Nazi regime was the only regime of which I know which was based on no principle other than the negation of Jews. It could not define its highest objective except by putting the Jews into the center. That is a great compliment to us, if not intended as such. I take more serious cases, the anti-Judaism of late classical antiquity, when we (and incidentally also the Christians) were accused by the pagan Romans of standing convicted of hatred of the human race. I contend that it was a very high compliment, and I will try to prove it.

This accusation reflects an undeniable fact. For the human race consists of many nations or tribes or, in Hebrew, goyim. A nation is a nation by virtue of what it looks up to. In antiquity a nation was a nation by virtue of its looking up to its gods. They did not have ideologists at that time . . . At the top there were the gods. Our ancestors asserted a priori—that is to say, without looking at any of those gods—that those gods were nothings and abominations, that the highest of any nation was nothings and abominations. In the light . . . of the purity which Isaiah understood when he said of himself, “a man of unclean lips in the midst of a nation of unclean lips,” the very Parthenon is impure.

Strauss, Why We Remain Jews supra note 398 (emphasis added); see also FACKENHEIM READER, supra note 676, at 131, 274-76, 284, 360; supra notes 392, 518, 723; infra notes 747-48.

747. Speer again and again notices “how absolutely essential the figure of the Jew was for Hitler—as an object of hatred and at the same time an escape.” A. SPEER, supra note 670, at 213. “Again the central problem. Everything comes down to this: Hitler always hated the Jews; he made no secret of that at any time. By 1939 at the latest I might have foreseen their fate; after 1941 I ought to have been certain of it.” Id. at 27. This was noted by Speer in his diary during the first few months of his twenty-year sentence. A decade a half later he said,

When I consider it, Eichmann precisely sums up the problem. . . . Desire for power and lack of scruple cannot surprise anyone really acquainted with conditions on this continent. Even the [Nazi] regime’s antisemitism was nothing unusual; throughout the nineteenth century the governments in St. Petersburg and Vienna provided many examples of antisemitism, and in Paris the Dreyfus affair revealed that something like “official” antisemitism existed even in Western Europe. In all these matters Hitler remained within the norms of European tradition.

Where he did really go beyond the norms was the way he took seriously his insane hatred of Jews and made that a matter of life and death. Like almost all
of us, I thought Hitler's antisemitism a somewhat vulgar incidental, a hangover from his days in Vienna. God only knows why he can't shake it off, we thought. Moreover, the antisemitic slogans also seemed to me a tactical device for whipping up the instincts of the masses. I never thought them really important, certainly not compared with the plans for conquest, or even with our vast projects for rebuilding the cities.

Yet hatred of the Jews was Hitler's central conviction, sometimes it even seems to me that everything else was merely camouflage for this real motivating factor. That perception came to me in Nuremberg when I saw the films of the death camps and became acquainted with the documents; when I learned that Hitler was even prepared to risk his plans of conquest for the sake of that mania for extermination.

Going over it all in Spandau, I have gradually understood completely that the man I served was not a well-meaning tribune of the masses, not the rebuilder of German grandeur, and also not the failed conqueror of a vast European empire, but a pathological hater. The people who loved him, the German greatness he always talked about, the Reich he conjured up as a vision—all that ultimately meant nothing to him. I can still recall the astonishment with which I read the final sentence of his testament. In the midst of an apocalyptic doom it attempted to commit us all to a miserable hatred of the Jews.

Perhaps I can forgive myself for everything else: having been his architect is excusable, and I could even justify my having served as his armaments minister. I can even conceive of a position from which a case could be made for the use of millions of prisoners of war and forced laborers in industry—even though I have never taken that position. But I have absolutely nothing to say for myself when a name like Eichmann's is mentioned. I shall never be able to get over having served in a leading position a regime whose true energies were devoted to an extermination program.

_id_ at 353-54; _see also supra_ note 697; _infra_ note 758. “Only Streicher remained faithful to his and Hitler's lifelong obsession; he maintained that the trial was a triumph of world Jewry. . . . Streicher's last words [at his execution] were: ‘Heil Hitler! This is the Purim festival of 1946!’ ”_ A. Speer, _supra_ note 670, at 13-14. Consider also the perverse reminiscence of the Auschwitz commandant, Rudolf Hoess: “Jewish gold was a catastrophe for the camp.”_ KL Auschwitz Seen by the SS, supra_ note 735, at 132. On the effects of hatred, see V. Farias, _supra_ note 114, at 210: An evidently respectable German academician, in response to a political denunciation of a colleague by Heidegger during Nazi times, dismissed it as “not usable, filled with hatred.” On the traditional hatred of Jews, see _supra_ note 518.

748. It should be noticed, however, that Germany had many Christians about whom this could also be said, but the Nazis did not go after them in the way or to the extent that they went after the Jews. The Jews, a distinguishable minority, were especially useful for serving the Nazis' interests as focal points for hate, thereby helping to unify otherwise antagonistic social forces. Hitler could say, in effect, “I am not opposed to labor unions, only Jewish-led labor unions; I am not opposed to capital, only Jewish capital.” Jews had been enfranchised and liberated by anti-traditionalist political movements and could easily be identified with those modern liberal movements. The Jews were few enough and weak enough to be vulnerable at the hands of those who resented disturbing social changes in Germany and elsewhere. Furthermore, traditional Christian (and especially German) anti-Jewish hatred could be exploited to make the Germans receptive to Nazi lies about not only the Jews. Rapid industrialization seems to have made many Germans particularly nostalgic for old-fashioned village and small-town community feelings. (It is prudent for traditionalists and their sympathizers to be aware of the vices that tend to accompany the virtues promoted by community feeling.) Besides, there were many Jews in high professional and academic positions, whose successes inspired envy in people who could believe that aliens were taking over. The commercial successes of European Jews
made matters worse, partly because the man of commerce tends to consider the entire world as his sphere of action, rather than any particular country. Consider how the wily Goering put these matters at the Trial:

After Germany's collapse in 1918 Jewry became very powerful in Germany in all spheres of life, especially in the political, general intellectual and cultural, and, most particularly, the economic spheres. The men came back from the front, had nothing to look forward to, and found a large number of Jews who had come in during the war from Poland and the East, holding positions, particularly economic positions. It is known that, under the influence of the war and business concerned with it—demobilization, which offered great possibilities for doing business, inflation, deflation—enormous shifts and transfers took place in the propertied classes.

There were many Jews who did not show the necessary restraint and who stood out more and more in public life, so that they actually invited certain comparisons because of their numbers and the position they controlled in contrast to the German people. In addition there was the fact that particularly those [political] parties which were avoided by nationally minded people also had Jewish leadership out of proportion to the total numbers of Jews [in Germany].

At that time, there thus ensued a continuous uninterrupted attack on everything national, national concepts and national ideals. I draw attention to all the magazines and articles which dragged through the mud things which were holy to us. I likewise call attention to the distortion which was practiced in the field of art in this direction, to plays which dragged the fighting at the front through the mud and befouled the ideal of the brave soldier.

9 TRIAL RECORD, supra note 670, at 272-73 (emphases added); see also supra notes 697, 723. However this may be, the systematic atrocities visited upon so profoundly civilized a people as the Jews in the twentieth century oblige us to notice serious failings both in Christianity and in modernity, and perhaps also in Islam. See supra note 518; infra note 794.

749. See supra note 725.

750. Consider, for example, the efforts made by the Stalinists to attribute their own murder of thousands of Polish officers in the Katyn Forest to the Nazis. See 2 F. VEALE, supra note 737, at 25-27, 38-51; see also 18 TRIAL RECORD, supra note 670, at 497, 539f; 19 id. at 606-07; supra notes 684, 716. On the other hand, the eagerness of the Nazis during the war to expose to world view, and hence exploit for propaganda purposes, what the Russians had done in the Katyn Forest confirms that they knew that what they themselves were doing in systematically killing millions of people was clearly reprehensible. See supra note 708; cf infra note 779.

Consider, also, this report about post-war activities by the Soviets: "[T]he Soviets interned more than 30,000 people at Buchenwald and about 100,000 more in other camps throughout eastern Germany. Of the total, possibly 40,000 died." Moseley, supra note 735, at 14.

751. See W. SHAKESPEARE, MEASURE FOR MEASURE act II, sc. ii, ll. 162-85. Various of the prosecuting (and judging) countries were culpable also. But just as the "unworthy minister does not invalidate the sacrament, so Nuremberg should not be evaluated by the character of the judges but rather by the justice or injustice of their verdicts." W. BOSCH, JUDGMENT ON NUREMBERG: AMERICAN ATTITUDES TOWARD THE MAJOR GERMAN WAR-CRIME TRIALS 125 (1970); see also supra note 684. The atrocities of which European colonial powers have been capable, even in the twentieth century, are suggested by the African film, Camp de Thiaroye. It has been virtually impossible, however, to subject offenses of this kind to judicial examination. In such situations, therefore, the right of revolution has had to be invoked, sometimes to good effect. Cf Riding, They Now Stand Divided for France, N.Y. Times, July 17, 1991, at A7. On the tribulations of "colonial exploiters," see A. WAUGH, MY PLACE IN THE BAZAAR 51 (1961).
752. See supra note 707.

753. Whatever the questionable acts done by the governments responsible for the trial, the judging was done by particular men who did give reasons for their judgments after hearing the evidence (including the extended defenses) presented on this occasion. Does not the acknowledgment paid by vice to virtue in the form of hypocrisy attest to the power of fundamental moral principles in normally decent souls? See G. ANASTAPLO, supra note 2, at 643 n.77, 681-82 n.18; see also infra note 759.

754. See, e.g., 9 TRIAL RECORD, supra note 670, at 422; 22 id. at 375, 376, 400, 404.

755. 22 id. at 385; see also 19 id. at 406, 433.

756. 22 id. at 384-85.

757. This is one of the lessons for which Machiavelli has been honored by his countrymen. See G. ANASTAPLO, Politics, Glory, and Religion, in The American Moralist, supra note 22, at 516-22.

758. See Angier, Pigeons Fight for Survival as Falcons Make Comeback, N.Y. Times, July 8, 1991, at 1. Even so, falcons are not suicidal, whereas the Nazis were ultimately self-destructive. See, e.g., supra note 747. Compare Churchill's comment:

When the final collapse came [for Germany] on the Western Front [during the First World War], tempters had urged [the Kaiser] to have an attack prepared, and fall at the head of his last remaining loyal officers. He has given us his reasons for rejecting this pagan counsel. He would not sacrifice the lives of more brave men merely to make a setting for his own exit. No one can now doubt that he was right. There is something to be said after all for going on to the end.

W. CHURCHILL, supra note 697, at 29; see also supra note 721.

759. From the point of view of the most sophisticated opinion about nature today, we rational animals are basically domesticated animals. But is there not still something in all of us that can understand decent reasonability as a fulfillment of nature? See G. ANASTAPLO, supra note 2, at 642-43 n.77; G. ANASTAPLO, What's Really Wrong with George Anastaplo, in Human Being and Citizen, supra note 6, at 113-14; see also supra note 746; infra note 785.

The voluminous records, both official and unofficial, of the Nuremberg Trial should be most instructive when thoroughly reviewed by a thoughtful student. A proper study of the worst can teach us, and perhaps even reassure us, about the best. See supra note 714.

760. This discussion is adapted from Anastaplo, Speed Kills: The Rosenberg Case and the Perils of Indignation, CHI. LAW., July 1979, at 19. I have had the benefit of a review of my Chicago Lawyer article by the late Malcolm P. Sharp, who had not seen it before publication there. The text remains substantially as it was in 1979, except that some portions of the text have been removed to the notes. Most of the notes have been prepared for the article's republication here.


762. Id.; see also infra note 810.


764. One was Burns v. Wilson, 346 U.S. 137 (1953), an appeal by two defendants from sentences of death, after trial by court-martial for rape and murder. The other was Stein v. New York, 346 U.S. 156 (1953), an appeal of three defendants from sentences of death, after trial in a State court for murder.

765. Morton Sobell's part in the case is indicated infra text accompanying note 768. For a conversation with Mr. Sobell, see Anastaplo, Subversion, Then and Now § IV, in Freedom of Speech: Explorations, supra note 654, at 2046-48. For my discussions of Rosenberg, see G. ANASTAPLO, supra note 2, at 188, 459, 542, 620, 632-39, 700, 703; authorities cited infra note 767.

766. See, e.g., Sharp, Aggression: A Study of Values and Law, 57 ETHICS 1 (1947). On Mr. Sharp himself, see my tribute to him in U. CHI. L. ALUMNI J., Summer 1975, at 18-24, reprinted in 121 CONG. REC. H12,486 (1975); infra note 897. See also Sharp,


767. Part of the transcript of that television discussion and my comments on it are set forth in Anastaplo, The Occasions of Freedom of Speech, 5 POL. SCI. REVIEWER 390-94 (1975). See also G. ANASTAPLO, The Occasions of Freedom of Speech, in THE AMERICAN MORALIST, supra note 22, at 199-213. I have the impression from the little that I have personally seen and heard of them that the two Rosenberg children have turned out much better than was feared among their parents’ friends in 1953. Much of the credit for this seems to belong to their adoptive parents. The children do seem to be genuinely interested in learning the truth about their parents. See, e.g., Roberts, The Rosenbergs: New Evidence, Old Passions, N.Y. Times, Sept. 23, 1983 at B1.

768. Yergin, Victims of a Desperate Age, NEW TIMES, May 16, 1975, at 22. This article provides a quite useful introduction to the case, whatever reservations one might have about some of its assessments.

769. It has been suggested, because of bank deposits made by the Greenglasses in New Mexico, that Mr. Greenglass “was deeply involved in a theft ring at Los Alamos, was entrapped by government authorities, and either voluntarily or under pressure implicated the Rosenbergs.” Id. at 26. I do not know anything about this, but it does indicate the bitter fighting this case has provoked among the parties, even within the extended Rosenberg-Greenglass family.

770. Did Mr. Fuchs identify Mr. Gold as his courier? There seems to be some question about this. See id.


772. The Russians, it should be remembered, were not, at the time of the criminal actions alleged, our enemies in the sense required for “treason” by section 3 of article III of the Constitution. Cf. infra note 779.

773. One is reminded here of what the American Ambassador to Iraq evidently said to Saddam Hussein in the summer of 1990 (before the invasion of Kuwait).

774. Yergin, supra note 768, at 23.

775. Cf infra note 791. Mr. Sobell has indicated to me that some of the regular counsel for the Communist Party did offer help to the Rosenberg-Sobell defense counsel behind the scenes. See Anastaplo, Subversion, Then and Now, in Freedom of Speech: Explorations, supra note 564, at 2048.

776. I prepared in 1954, at the request of one of Mr. Sobell’s attorneys (Stephen Love, a Chicago lawyer), a memorandum on the administrative order consigning Mr. Sobell (a well-behaved, nonviolent prisoner) to Alcatraz. There was then, I discovered from my legal research, little to appeal to in any attempt to secure a reversal of the Alcatraz order but the good faith and the sense of honor of the Department of Justice and the Bureau of Prisons. The fee that Mr. Love insisted on paying me on that occasion I donated to charity, principally I believe to the Salvation Army and to a Catholic Worker settlement house. See Anastaplo, Subversion, Then and Now, in Freedom of Speech: Explorations, supra note 564, at 2046-47.

777. On Mr. Gold, see Yergin, supra note 768, at 24-26; Ballard, Letter, JURIS DR., November 1975, at 8.

778. On the business relations between the Rosenbergs and the Greenglasses, see Yergin, supra note 768, at 25. On Mr. Cohn’s business ventures, see G. ANASTAPLO, supra note 2, at 311.

779. Consider this observation from Francis Bacon’s Maxims of the Law:
The law construeth neither penal laws nor penal facts, but considereth the offence in degree as it standeth at the time when it is committed, so as if any circumstances or matter be subsequent, which laid together with the beginning
should seem to draw it to a higher nature, yet the law doth not extend or amplify the offence.

Cf. supra Part 12-A (§§ IX, X).

Consider, also, this observation made in the light of recent revelations about the Rosenbergs and espionage (see infra note 783):

The martyr status of the Rosenbergs has been seriously diminished now, but the equivocators are making the most of FBI irregularities, the harshness of the sentence, the lesser guilt of Ethel, and so forth. Julius's legal guilt is conceded, but the moral category "traitor" has been for the most part avoided. Liberals who stressed substance over process in the Nuremberg and Eichmann trials are reordering their priorities for the Rosenbergs, giving process priority, at least, with substance. In short, even when guilt is proved, liberals see no reason for outrage against Communist traitors to this nation.

The Rosenbergs, Cont'd, NAT'L REV., Sept. 16, 1983, at 1120; see also supra note 731; cf. supra notes 712, 714, 733-37, 759, 772, infra notes 784, 811.

See infra Section IV.

780. One hears reports that David Greenglass has been deeply troubled since his release from prison. This would be consistent, I suppose, either with having told the truth and thereby having killed his sister or with having lied in order to protect his wife and to save his own skin.

781. Mr. Sharp's book was published in 1956 by the Monthly Review Press.

782. Several books on the Rosenberg-Sobell case have been published in recent years, including books by Mr. Sobell and by the Rosenberg children. The passions that can still be aroused by this case are evident in the responses, pro and con, to R. RADOSH & J. MILTON, THE ROSENBERG FILE: A SEARCH FOR THE TRUTH (1983). Alan M. Dershowitz, in his review of this book by authors who have studied extensive government files, has endorsed what he describes as the book's "six major conclusions":

Julius Rosenberg played a central role in the Soviet espionage ring and transmitted material that he believed contained important atomic secrets.

Klaus Fuchs had already given those secrets to the Russians, but David Greenglass's amateurish sketches provided some confirmation of his information. Ethel Rosenberg was not deeply involved in her husband's espionage activities but she knew about them and may have typed the notes he passed on.

The F.B.I. was aware of Mrs. Rosenberg's limited role but deliberately exaggerated it and insisted that Federal prosecutors demand the death penalty for her in order to increase the bureau's leverage on her husband to cooperate in the investigations.

Some of the evidence against the Rosenbergs was highly questionable and probably false.

Nearly all those involved—from the Soviet intelligence agency K.G.B. to the F.B.I. to some of the Rosenbergs' own "defenders"—were willing to see the Rosenbergs die so the case could be used to serve partisan interests.

Dershowitz, Spies and Scapegoats (Book Review), N.Y. TIMES BOOK REV., Aug. 14, 1983, at 1; cf. infra note 791. A seventh major conclusion, relating to the misconduct of Judge Kaufman in the case, is neglected by Professor Dershowitz. (His explanation for this neglect, when called upon it, is rather lame. See Dershowitz, N.Y. REV. BOOKS, Dec. 8, 1983, at 53.) On Judge Kaufman, see infra note 811.

Among those critical of the Radosh-Milton book are Walter and Miriam Schneir, who had prepared the most influential book in the Rosenbergs' defense, Invitation to an Inquest, first published in 1965. An updated and expanded version of the Schneir book, published in 1983, has been reviewed by Ronald Radosh and Joyce Milton, who are quite critical of it. See Rudosh & Milton, Were the Rosenbergs Framed?, N.Y. REV. BOOKS, July 21, 1983, at 17. Those of us who, although not insisting on their innocence, have always been disturbed about what was done to the Rosenbergs, find considerable support
in the Radosh-Milton findings, which are reflected in their concluding remarks about the Schneir's book:

It is true that the FBI files released so far by no means vindicate every aspect of the government's case. They reveal, for example, that even J. Edgar Hoover was well aware that the dangers to national security of the Rosenbergs' espionage ring had been greatly exaggerated. They show also that Ethel Rosenberg was arrested and prosecuted on the slenderest of evidence, so that she could be used as a hostage to pressure her husband into confessing. One of the most shocking documents in the FBI files shows that among the questions the FBI agents at the death house planned to ask Julius Rosenberg if he decided to talk was this: "Was your wife cognizant of your activities?"

The FBI documents also reveal deeply improper behavior on the part of Judge Irving Kaufman. . . .

It is a long way from these revelations, however, to the Schneirs' claim that the files prove the existence of a frame-up. They do not. The Schneirs apparently believe that a witness's inability to remember certain details of an incident during his first interrogation renders his entire testimony invalid. Their understanding of police procedure, and of the limitations of human memory, seems at best naive. . . .

Painful as it may be for those who have long held the Rosenbergs innocent, the evidence available today makes it clear that they did indeed take part in an espionage conspiracy—and that Julius Rosenberg, in particular, was deeply involved. To recognize this in no sense validates Judge Kaufman's reasoning in condemning them to death. Nor does it contradict the conclusion that the Rosenbergs died essentially for political reasons. They were—as the critics charge—made the scapegoats for American insecurity over the loss of its nuclear monopoly. Three decades after their execution, we know that the Rosenbergs were not the archtraitors Judge Kaufman accused them of being. They did not give away "the secret" of the atomic bomb, although the Russians may conceivably have used Greenglass's inadequate sketches to confirm the expert information of Klaus Fuchs—who went to jail for only nine years. They certainly did not cause the Korean War. They were shamefully treated by the court and by some of the officials responsible for protecting them. But they were not blameless martyrs.

Id. at 20-21 (emphasis added); see also infra notes 793, 811.

784. Mr. Urey, like Mr. Sharp, was on the faculty of the University of Chicago at that time. A charming and informative recollection of Mr. Urey has been prepared by Clyde A. Hutchison, also of the University of Chicago, for a volume of memoirs of distinguished professors prepared for the University's Centennial Celebration in 1991-1992.

785. Urey, Introduction: A Layman's View of the Case, in M. SHARP, WAS JUSTICE DONE? at xxi (1958). It is prudent to emphasize here the point I make supra text accompanying note 780. That point appears more and more plausible over the years. Central to the assessment of any trial, it seems to me, is not truth but justice. Thus, whatever the truth about the precise involvement of the Rosenbergs in espionage activities in 1944-1945, the critical question remains whether they should have been executed in 1953—and scholarly research is not likely to help us much in answering that kind of question. See supra note 759; infra notes 786, 796.

786. Urey, supra note 785, at xxi. The government might have figured that however nonsensical this sort of talk was, it did serve to persuade the jury to convict someone whom the government "knew" to be guilty and cunning. See supra text accompanying note 598; see also supra note 785.

787. On the newly-discovered evidence and its significance with respect to Mr. Greenglass's credibility, see M. SHARP, supra note 785, at 111-20. See also supra text accompanying note 780. Mr. Sharp describes in some detail the experiences which led him, a thoughtful and perceptive man, to conclude, "I can only say . . . that I saw the
witnesses on this matter, and found them convincing." M. Sharp, supra note 785, at 112; see also id. at xxvii-xxviii. On Judge Kaufman, see infra note 811.

788. Urey, supra note 785, at xxvi-xxvii; see also Anastaplo, Bork on Bork, 84 NW. U.L. REV. 1142, 1154 n.46 (1990). Consider also, the concluding paragraph of the Chicago Lawyer piece that inspired this Part of my Article:

Reflecting a quarter century later on the Rosenberg case, [the former Acting Solicitor General] recognizes, of course, the continuing public interest in the political aspects of the controversy. From a legal perspective, however, [he] believes that the significance of the Rosenberg decision goes well beyond the narrow question of how the Espionage Act and the Atomic Energy Act of 1946 should be reconciled. “The much more important part of the decision from the viewpoint of the administration of justice” is the Court’s general disapproval of the practice of granting standing to argue to any lawyer in the country who could say he was appearing for anyone on behalf of the accused, especially after judicial remedies had been exhausted by the accused’s own counsel. For that practice, if it had been approved, “would have presented a threat to orderly and responsible representation of accused persons” and would have made for “disorder in the administration of justice. Our policy must be that, eventually, even criminal cases must end.”

Graham, supra note 761, at 28. Compare, on the use by a lawyer of his skills in the best tradition of public service, my commentary on President Lincoln’s Emancipation Proclamation, cited supra note 166.

789. Urey, supra note 785, at xxviii; see also Anastaplo, supra note 702, at 688-715, which includes a discussion of conspiracy prosecutions and the use of accomplice testimony. It is not that accomplices cannot provide useful information, but rather that their motives for minimizing their own role and maximizing that of others can distort what they recall or what they say.


791. I believe that Mr. Sharp, who was a mild-mannered man, would have been vehement in challenging those who, on the basis of the Radosh-Milton book, have suggested that Emanuel Bloch might have been “willing to see the Rosenbergs die so their case could be used to serve partisan interests.” See supra note 783. I, too, find this hard to believe, especially since I know how highly Mr. Sharp came to regard both Mr. Bloch and his associate in Rosenberg, Gloria Agrin. See, e.g., infra note 811. I believe such personal assessments should count for something in these matters.


The Hiss case was critical to these developments. If Alger Hiss, a well-established figure, could be believed by the public to have committed espionage, why not the lowly Rosenbergs as well? On Hiss, see Gates, Hiss: Still Innocent After All These Years, NEWSWEEK, Nov. 28, 1983, at 23; Anastaplo, supra note 767, at 387-90. See also Those Who Served, Wall St. J., Aug. 26, 1991, at A10.

794. For an American case for supporting Israel, see G. ANASTAPLO, The Case for Supporting Israel, in HUMAN BEING AND CITIZEN, supra note 6, at 155-59; see also supra notes 448, 723. Consider as well the comments of Emil Fackenheim:

What is the upshot of these somber recent developments? Despite all protestations to the contrary, the post-Holocaust transfiguration of antisemitism is "anti-Zionism." A qualitative change has once again occurred, of course, but it is the same reality. For pre-Holocaust antisemites, Jews, and Jews only, have no right to exist—or, at any rate, their right to exist is debatable. For post-Holocaust antisemites the Jewish state, and that state alone, has no right to exist—or, at any rate, in its case alone the right to exist is debatable. . . . That is why, in the minds of Jewish people, the pope's recent meeting with Yasser Arafat was a shocking episode and one, indeed, that may have caused a severe setback in Catholic-Jewish relations. For if in this meeting the pope asked Arafat to abrogate the PLO's Palestinian National Covenant (which clearly calls for Israel's destruction through "armed struggle"), the media did not report it. In my view, one element of that meeting was worse even than the meeting itself. The pope used the occasion to express, once again, the Vatican's wish for the internationalization of Jerusalem. That, of course, may seem a humane, universalistic gesture. However, after 2,000 years of Christian antisemitism, much of it institutionalized, one must ask a few tough questions. The late King Saud of Saudi Arabia lamented that he could not worship in the al-Aksa Mosque because Jerusalem was in Jewish hands; yet he never bothered to go there even once in the nineteen years that it remained in Muslim hands. This is only one striking piece of evidence indicating that Muslim anti-Jewishness is not dead, that it is Jewish Jerusalem that must be negated. So I must ask this question: Why, in the nineteen years that Jerusalem was in Jordanian hands, did the Vatican never once call for the internationalization of Jerusalem? The Christian theologian Krister Stendahl of Harvard University has noted that in the view of Muslims and Christians Jerusalem has holy sites, but that for Jews Jerusalem itself is holy. That is why the present rebuilding of Jewish Jerusalem is of religious as well as secular significance—almost 2,000 years after the Jewish Jerusalem was destroyed.

FACKENHEIM READER, supra note 676, at 283-84; see also supra notes 392, 748.

795. See, e.g., Glazer, Verdicts of History, COMMENTARY, Oct. 1983, at 69: J. Edgar Hoover argued against the death sentence for Ethel [Rosenberg] not only because of extenuating circumstances but because he saw that it could become, as it did, the basis of international propaganda against the United States. Others argued against both death sentences, also on pragmatic grounds. Douglas Dillon, then Ambassador to France, sent an "eyes-only" dispatch to John Foster Dulles: "The fact . . . is that even those who accept the guilt of the Rosenbergs are overwhelmingly of the opinion that the death sentence is unjustifiable punishment for offenses as revealed at the trial, particularly when compared with prison terms meted out to British scientists Alan Nunn May and Klaus Fuchs. . . . We should not (repeat not) deceive ourselves by thinking that this sentiment is due principally to Communist propaganda. . . ." This telegram was sent to the White House but was not allowed to reach President Eisenhower.

See also Yergin, supra note 768, at 28:
On the morning of June 19, during a Cabinet meeting, Eisenhower said, “I must say I’m impressed by all the honest doubt about this expressed in the letters I’ve been seeing.” “Who’s going to decide these points—pressure groups or the Supreme Court?” retorted Attorney General [Herbert] Brownell. Eisenhower retreated. “My only concern is in the area of statecraft, the effect of the action,” he said.

Cf. G. ANASTAPLO, supra note 2, at 634-35; see infra text accompanying note 862.

796. The arguments we have had since 1953 are related, in large part, to what we were entitled to believe and to do on the basis of the information we then had available. See supra notes 705, 785. I would tend to be skeptical about any additional information coming out of the Soviet Union, whether inculpating or exonerating the Rosenbergs. Were the leaders of the Soviet Union, for example, any more reliably informed about these matters than Mr. Eisenhower was? See supra note 795; cf. Khrushchev’s Secret Tapes, TIME, Oct. 1, 1990, at 75; McFadden, Khrushchev on Rosenbergs: Stoking Old Embers, N.Y. Times, Sept. 25, 1990, at A3; Meerpool, Doubts on Khrushchev’s Rosenberg Comment, N.Y. Times, Dec. 11, 1990, at A18.

797. Although the government has not been doing much in recent years with the Rosenberg case, independent researchers of intelligence have been tending to support the proposition that some Rosenberg espionage was involved. See, e.g., supra note 793. A deliberate frame-up will be hard to establish.

798. On Sir Thomas More’s bad luck, see supra text accompanying note 624.

799. See supra notes 783, 795; infra note 811.


802. Russell, Book Review, 24 U. CHI. L. REV. (1957); see also G. ANASTAPLO, supra note 2, at 633-34 (analyzing the perhaps botched and certainly unseemly effort by the government to have the Rosenbergs executed before the Jewish Sabbath began); M. SHARP, supra note 785, at 170, 172 (on the attorney general’s sensitivity to criticisms about rushing the executions to avoid the Sabbath).

803. Another such episode for Mr. Sharp was the run-up to the outbreak of the First World War. See G. ANASTAPLO, Preface, in THE AMERICAN MORALIST, supra note 22, at xix.

804. See M. SHARP, supra note 785, at 5, 109-10, 164-68.


806. Id. at 296.

807. Id. at 308-09. One wonders if the case brought back for Justice Frankfurter memories of the Sacco-Vanzetti case in which he had been involved as a young law professor. See F. FRANKFURTER, THE CASE OF SACCO AND VANZETTI: A CRITICAL ANALYSIS FOR LAWYERS AND LAYMEN (1927).

808. Graham, supra note 761, at 28.


810. Graham, supra note 761, at 28. Was it indeed “respectable” to hasten the executions thus of both parents of quite young children, considering the reservations people had as to what had really been done to help the Russians? On “conscience,” see supra Part 10 (§ VI). It should be noticed that Mr. Sharp recorded that defense counsel’s relations with this acting solicitor general had been “excellent.” M. SHARP, supra note 785, at 170.

811. Nathan Glazer, who reported that he was satisfied upon reading the entire trial transcript in 1952 that the Rosenbergs were guilty of espionage, endorsed the Radosh-Milton book. Glazer, Verdicts of History, COMMENTARY, Oct. 1983, at 66. In the course of his review of the book, however, he passed this judgment on the trial judge in that case:

[Ethel Rosenberg] was arrested and indicted . . . as a way of putting pressure on Julius [Rosenberg] to confess. Once set in motion, the strategy moved to its grim conclusion in execution. This despite the fact that Deputy Attorney Gen-
eral Peyton Ford, acting for the Department of Justice, opposed her execution, and that J. Edgar Hoover (who . . . presumed her to "to be acting under the influence of her husband") also opposed it.

Why then was Ethel executed? This brings us to the most disturbing part of the case—the role of Judge Irving Kaufman. Kaufman sought the views of the FBI and the Department of Justice on the sentencing. When he learned that both were against Ethel Rosenberg's being sentenced to death, he asked the prosecutor to refrain from making any recommendation, and then sentenced them both to death.

There was more to Kaufman's role. While he could not be faulted in his public capacity as judge, his commitment to his sentence of death, and his concern that it would not be carried out rapidly, let him into contacts with the FBI which seem to me incompatible with the judicial office. We may allow a senior colleague, Justice Felix Frankfurter, to pass judgment on him: "The individual that Frankfurter held most responsible for the courts' less than dispassionate handling of the Rosenberg case was Judge Irving Kaufman. Writing to Judge Learned Hand in 1958, Frankfurter said of Kaufman, 'I despise a judge who feels God told him to impose a death sentence,' and he vowed, 'I am mean enough to try to stay here [on the Supreme Court] long enough so that K will be too old to succeed me.'"

... Some explanation of [Judge Kaufman's] distinctly non-judicial behavior still seems to be called for. Even if it is from the point of view of law beyond challenge, from the point of the kind of judgment we are called upon to make on the character of public persons, he must be condemned.

Id. at 68 (emphasis added). Professor Glazer added: "I am mystified as to why Professor Alan Dershowitz has not a word to say about Judge Irving Kaufman in his lengthy review of this book" Id.; see also supra notes 648, 783. On "the pretentious cruelty of the Haymarket judicial proceedings," see supra note 668. See also infra note 845.

We will probably never know what personally moved Judge Kaufman to resort to, and persevere in, the extreme measures that he did in Rosenberg. Consider how one reviewer of the Radosh-Milton book dealt with the matter:

It was widely wondered whether the death penalty would have been levied against a Gentile. But if none of the jurors was Jewish, the judge, the chief prosecutor and the Rosenbergs' defense attorney were. And the harshest cries of anti-Semitism came from Europe (France especially) and the Soviet Union, which found propaganda value in the charge. In the United States, a few voices claimed persecution. But the American Jewish Committee openly advocated the death penalty, Radosh and Milton write, preferring "to disavow the victims as in no way typical of the patriotic and anti-Communist Jewish community." Similarly, they write, many believed that the ferocity of Judge Kaufman's sentence derived from "a deep psychological animosity toward the couple whose actions had thrown into question the patriotism of 'respectable' Jews such as himself and his family."

Suplee, supra note 793, at F2. Compare the following remarks by Malcolm Sharp:

Mr. Bloch's heart attack and death on January 30, 1954, may well have been the result of his long labors on behalf of his friends, the Rosenbergs, and their sons. During the last two and a half weeks of the case, working with Miss Agrin and Mr. Emanuel Bloch, I came to think of them, with Mr. Justice Black and Mr. Justice Douglas, as symbols of justice in a time of difficulty. It is an exceptional honor and a source of deep satisfaction to have been associated with them, however briefly and modestly, in the defense to which they gave so much.

M. SHARP, supra note 785, at xxxv-xxxvi.

812. This discussion has been developed from a memorandum on subversion prepared for The Oxford Companion to the Supreme Court of the United States, January.
1990. An appropriate epigraph here is supplied by Montesquieu's *The Spirit of the Laws*: "The corruption of each government almost always begins with that of its principles."


814. Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961) [hereinafter Communist Party v. SACB]. "This litigation has a long history. On November 22, 1950, the Attorney General petitioned the Subversive Activities Control Board for an order to require that the Communist Party register as a Communist-action organization." *Id.* at 19. By November 1950, the Korean War passions had begun to distort patriotic impulses across the land. See, e.g., G. Anastaplo, *supra* note 2, at 334; see also infra note 824.


818. Justice Frankfurter's Court performance could be dismal at times. See, e.g., infra note 866 (discussing the flag salute cases); cf. *supra* note 800 and accompanying text & note 811; infra note 896. The dismal side of Justice Frankfurter is caught in this argument: "It is thus impossible to say now what effect the provisions of the Act affecting members of a registered organization will have on the Party. . . . To pass upon the validity of those provision would be to make abstract assertions of possible future injury, indefinite in nature and degree, the occasion for constitutional decision. If we did so, we would be straying beyond our judicial bounds." Communist Party v. SACB, *supra* note 814, at 81; see also infra note 824. On later occasions, the Court (including Justice Frankfurter) was willing "to make abstract assertions of possible future injury" that might follow because of registration requirements. Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958); see infra text accompanying note 870.

Would it have been better for American political morale in the 1950s and 1960s if the Supreme Court had simply said that it recognized that it could not exercise any effective power of judicial review of congressional legislation respecting the Communist Party, thereby warning everyone that Congress should proceed cautiously? What it did, instead, was to reassure both Congress and the public that what Congress was doing was undoubtedly constitutional. Even without the power of judicial review, however, the Supreme Court is obliged to consider whether the Congress, by "legislative fiat," is usurping the judicial power. See Communist Party v. SACB, *supra* note 814, at 84.


820. *Id.*

821. 249 U.S. 47 (1919); see also Communist Party v. SACB, *supra* note 814, at 91. On *Schenck*, see G. Anastaplo, *supra* note 2, at 294-305. See also supra note 666.


823. *Id.* at 137, 168-69. The quotation with which Justice Black ends is taken from Abraham Lincoln. On Justice Black, see *supra* note 811.

824. See Dennis v. United States, 341 U.S. 494 (1951); see also G. Anastaplo, *supra* note 2, at 824 index. By the mid-1960s, the Supreme Court finally began to place severe limitations upon the operations of the SACB. In 1974, the Board's Congressional funding ceased, effectively putting the Board out of business. See H. Kalven, *supra* note 816,
at 263-89, 639-40; Subversive Activity, in 4 Encyclopedia of the American Constitution 1803 (1986). Compare Justice Frankfurter's equivocating language in Communist Party v. SACB, supra note 814, at 95. We must wonder what he believed the Court might properly do to moderate what even he recognized to be "an ugly public temper." Id. at 102; see also supra notes 450, 648.

825. This talk was given at the Law and American Culture Panels, American Culture Association, St. Louis, Missouri, April 7, 1989. The original title of this talk was The Chicago Conspiracy Trial—Twenty Years Later.

826. The trial was recalled in this systematic way by the United States Court of Appeals for the Seventh Circuit in 1981:

The criminal contempt convictions which the defendants seek to set aside arose directly from their conduct during the celebrated 1969-70 "Chicago Seven" conspiracy trial . . . , at which five defendants were found guilty of violating the Anti-Riot Act of 1968, 18 U.S.C. sec. 2101 (1976), in connection with their participation in events surrounding the August 1968 Democratic National Convention in Chicago, Illinois. United States v. Dellinger, 68 CR 180 (N.D.Ill.1969). [Note 1: This court subsequently reversed the convictions on the substantive charges against the five defendants and remanded for retrial. United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970, 93 S.Ct. 1443, 35 L.Ed.2d 706 (1973). The government thereafter elected to dismiss the substantive charges.] [David] Dellinger, [Abbie] Hoffman, and [Jerry] Rubin were defendants in that case, and [William M.] Kuntsler was one of the two trial counsel for the defendants. After the Anti-Riot Act charges had been submitted to the jury, the presiding judge, the Honorable Julius J. Hoffman of the United States District Court for the Northern District of Illinois, summarily convicted all seven defendants and both trial counsel on a total of 159 specifications of criminal contempt of court, in violation of 18 U.S.C. sec. 401(1) (1976). These contempt convictions were subsequently reversed by this court and 141 of the specifications were remanded for retrial before another judge. In re Dellinger, 461 F.2d 389 (7th Cir. 1972). [Note 2: In a companion case, this court also reversed the contempt convictions of Bobby G. Seale, an eighth defendant who had been severed and summarily held in contempt by Judge Hoffman. United States v. Seale. 461 F.2d 345 (7th Cir. 1972). Subsequently, the government dismissed both the substantive charges and the contempt charges against Seale.] The Chief Justice of the United States . . . then designated the Honorable Edward T. Gignoux, District Judge of the United States District Court for the District of Maine, to hear the contempt specifications on remand. After granting the government's motion to limit the maximum sentences of any of the defendants to 177 days and to dismiss 89 of the remaining 141 specifications of contempt, the court, sitting without a jury, heard the case. In re Dellinger, 357 F.Supp. 949, 955 (N.D.Ill.1973). At the conclusion of the government's case-in-chief, which consisted solely of the introduction of the Anti-Riot Act trial transcript and tape recordings, the court acquitted two of the defendants and dismissed a number of the contempt specifications against the other defendants. In re Dellinger, 370 F.Supp. 1304, 1307 (N.D.Ill.1973). At the end of the trial, three more defendants were acquitted of all charges and judgments of acquittal were entered as to several specifications against the remaining defendants. Hoffman, Rubin and Kuntsler were each then convicted on two specifications of criminal contempt and Dellinger on seven specifications, although no sentences or fines were imposed. Id. at 1323-34. These convictions were affirmed by this court and certiorari was denied by the United States Supreme Court. In re Dellinger, 502 F.2d 813 (7th Cir. 1974), cert. denied, 420 U.S. 990, 95 S. Ct. 1425, 43 L. Ed. 2d 671 (1975).

United States v. Dellinger, 657 F.2d 140, 141-142 (7th Cir. 1981) (emphasis added in
opening sentence) (citation form of original retained). In effect, I elaborate or comment in my 1989 talk upon various of the points made in the 1981 opinion from which I have just quoted. That opinion was issued in support of a denial of the defendants’ motion for vacation and expungement of their 1974 contempt convictions. Id. at 146.

For retrospective accounts of the 1968 events, see Peck, The Seeds of Insurrection, Chicago Reader, July 26, 1985, at 1; Lyon, The World Is Still Watching, Chicago Tribune, July 24, 1988, Magazine at 8; Schultz, The Siege of ’68, Chicago Reader, Sept. 9, 1988, at 1; see also G. Anastaplo, supra note 2, at 312.


830. T. Hayden, Reunion: A Memoir 25ff (1988). “[In his book] he’s pompous, but he means to be honest. . . . Certain errors Mr. Hayden takes as his own responsibility. He regrets not criticizing the drug culture and has come to appreciate differences between Communism and democratic radicalism. . . . [H]is book [is not] a vendetta against rivals, unusual among 60’s autobiographies. Abbie Hoffman, in his own memoir, pummeled Tom Hayden mercilessly, but Mr. Hayden confines his comments about Mr. Hoffman to a quiet knife-thrust about being frozen in the past.” Perman, At the Center of the 60’s, N.Y. Times Book Rev., June, 1988, at 7; see also Wright, A Born-Again Tom Hayden Looks Back—Distantly—to the Barricades, Chicago Tribune, June 12, 1988, § 14, at 7; Galloway, Tom Hayden, Chicago Tribune, July 19, 1988, § 5, at 1. For other articles on the 1968 events, see G. Anastaplo, supra note 2, at 322-23.

831. G. Anastaplo, supra note 2, at 323; see also infra note 836.

832. T. Hayden, supra note 830, at 326.

833. A much more sensible approach to such controversies is suggested in reflections by David Broder in his column, We Should Have Shunned Oliver North, Not Put Him on Trial, Chicago Tribune, Apr. 5, 1989, § 1 at 15; see also infra Part 12-E.

834. On Mr. Humphrey and the Chicago Convention, see infra note 861. On Richard J. Daley’s concern that his city not be mishandled by federal authorities, see T. Hayden, supra note 830, at 295.

It is not generally known that, also in the 1960s, Mr. Daley was instrumental (behind the scenes) in making sure that city employees with radical associations not be harassed, and his administration not be criticized, by investigators from the House Un-American Activities Committee. What happened in Chicago at that time accelerated the decline of that House Committee. The story has been told in an unpublished account by Richard Orlikoff, a Chicago attorney, who (with Harry Kalven, Jr.) represented Milton M. Cohen on that occasion. Albert Jenner, Jr. and Thomas Sullivan represented Jeremiah Stamler and Yolanda F. Hall, who were employed by the city. (This was, I understand, Mr. Daley’s desire.) See Stamler v. Willis, 371 F.2d 413 (7th Cir. 1966), on remand, 287 F. Supp. 734 (N.D. Ill. 1968), appeal dismissed, 393 U.S. 217, vacated and remanded, 393 U.S. 407, on remand, 415 F.2d 1365 (7th Cir. 1969), cert. denied, 393 U.S. 929 (1970).

Another Chicago lawyer, Bernard Weisberg, who is now a United States magistrate, recalled recently that the late Stanley A. Kaplan, “as a member of the [Chicago] Bar Association was instrumental, along with the father of our present mayor [Richard M. Daley], in ending its longstanding exclusion of black lawyers.”

835. This anticipated the folly of collecting eight volatile characters and their spirited lawyers in one courtroom for the Chicago Conspiracy Trial the following year. See G. Anastaplo, supra note 2, at 314.

836. The school district was in South Holland, Illinois. Judge Hoffman, who had been appointed to the federal bench in 1953 and who died at age 87 in 1983, elicited “mixed reviews” in his obituaries. See, e.g., Baumann & Houston, Judge Julius Hoffman Dies: Famed Jurist Presided over ‘Chicago Seven’ Trial in 1969, Chicago Tribune, July 1,
Loyola University Law Journal

1983, at 1; Warren, Judge Julius Hoffman Dies: Tried Chicago 7, Chicago Sun-Times, July 2, 1983, at 1. "His oldest colleague, Senior District Judge Abraham Lincoln Marovitz, expressing sorrow, underlined Judge Hoffman's 'impact,' but pointed to a two-sided facet of his personality and career that baffled many and created constant controversy. Engaging and often delightful off the bench, Judge Hoffman could be badgering, cold and even a touch cruel in the courtroom. 'He had a dual personality,' Marovitz said. 'He was sociable and most affable off the bench. He was different on the bench. But he did have a full and eventful life.' " Warren, supra, at 36; see also G. Anastaplo, supra note 2, at 317-18.

Ruth G. Bergman, a student for many years in an adult education program in which I have taught in Chicago, was a longtime anonymous speech-writer for Judge Hoffman. She, a lady of talent and integrity, spoke of him with respect.

837. Sensible government officials would have permitted these spectators to wait in the lobby of the building. Such sensibleness could have been exhibited elsewhere as well, to the Government's advantage. See infra text accompanying note 861; see also supra note 648.

838. I was present for these ugly episodes. See United States v. Seale, 461 F.2d 345 (7th Cir. 1972); G. Anastaplo, supra note 2, at 320-21; supra note 826; see also Koshner, Bobby Seale at 41; Revolutionary Minus Rage, Chicago Sun-Times, Jan. 31, 1978, at 13.

839. What is the significance of Sidney Lens's recollection, which I once heard from him, that Jerry Rubin had been concerned lest he not be indicted? See Neal, Tearful Eulogies Wasted on a Bum—Abbie Hoffman, Chicago Sun-Times, Apr. 21, 1989, at 38; see also infra note 861. One can get a reliable sense of each of the defendants and their counsel by studying the transcript portions relating to each of them (selected by Judge Hoffman) which are quoted in the appendices to the court opinion dealing with the contempt convictions. See Seale, 461 F.2d at 373-89; In re Dellinger, 461 F.2d 389, 404-65 (7th Cir. 1972); In re Dellinger, 370 F. Supp. 1304, 1324-48 (N.D. Ill. 1972); see also infra note 852; cf. infra note 854.

840. We can expect to learn someday from Reagan administration memoirs how disturbed the powerful and glamorous figures of the 1981-1988 period could be at times. Consider, for example, the testimony by Attorney General Meese about the fear of presidential impeachment because of the Contra-aid situation. See supra note 827.

841. A suggestion of what may be behind the facade of "notorious people" may be seen in a Rosary College press release prepared by Mary Gorman and Ruth G. Wahlgren, September 27, 1972:

Daniel Ellsberg will never spend a single day in jail, said . . . Dr. George Anastaplo and Dr. Malcolm P. Sharp. The two talked recently with Ellsberg in a Chicago panel discussion.

Ellsberg, accused of violating the Espionage Act, stealing classified government documents (the Pentagon Papers), and entering into a conspiracy to undermine the classification system, has been traveling around the country during the temporary suspension of his trial in Los Angeles. He seemed astonished when Professor Anastaplo offered 3-to-1 odds against a conviction which would stand up on appeal.

"This is the first time anyone has said this to me," he observed. "I wish my wife could hear it."

The professors reviewed their conversation with Ellsberg recently in a current issues seminar for Rosary students . . . "We think there is really no law which Ellsberg has broken," Prof. Sharp said, "thus we feel his chances of going to jail are slim." Dr. Anastaplo added that he would not want to say this publicly in the jurisdiction where the trial is being conducted.

In the professors' judgment the existence of the case is due to the very size of the security leak—more than 40 volumes of classified documents. It must have been felt by the Justice Department, they said, that if Ellsberg cannot be con-
vicited in a case of such massive proportions, it is extremely doubtful that they can ever convict anybody. The question of how and why documents are classified is raised by this prosecution. If they were classified unnecessarily or improperly, that could have some effect.

Both professors were surprised by Ellsberg’s demeanor. From his writings they expected an aggressive . . . attitude, but in conversation they found him interesting, sensitive and restrained.

Dr. Anastaplo suggested that if by some chance Mr. Ellsberg should go to jail, he could do wonders “exposing” the problems of prison life and contributing to much-needed reforms in that area. Ellsberg was barely consoled by the prospect.

When Mr. Ellsberg asked us why he had not been given such an encouraging appraisal by his New York and California lawyers, I suggested that we in the midwest tend to be more moderate about such matters than people on the east and west coasts. See supra note 793.

Our prediction about Mr. Ellsberg’s fate proved sound. On the Pentagon Papers, see Anastaplo, Preliminary Reflections on the Pentagon Papers, 118 CONG. REC. 2490 (July 24, 1972); G. ANASTAPLO, The Pentagon Papers and the Abolition of Television §§ III-IV, in The American Moralist, supra note 22, at 250-54.

For another collaboration by Mr. Sharp and me, see our memorandum on the promises that Presidents make, in Abraham Lincoln, The Gettysburg Address, and American Constitutionalism 136-37 (L. de Alvarez. ed. 1976).

842. G. ANASTAPLO, supra note 2, at 313. Consider as well the following observation: “The occasion for the 1967 usurpation [in Greece] was provided the Colonels by prolonged constitutional turmoil to which virtually every prominent Greek leader contributed.” G. ANASTAPLO, Dissent in Athens: An Invocation of First Principles, in Human Being and Citizen, supra note 6, at 223 n.1; see also G. ANASTAPLO, supra note 6, at 3-7; G. ANASTAPLO, The Greek Case, in The American Moralist, supra note 22, at 501-15.


844. See G. ANASTAPLO, supra note 2, at 320-21.

845. This is insisted upon in the Hayden book and is referred to in the 1981 appeal. See United States v. Dellinger, 657 F.2d 140, 142, 145 (7th Cir. 1981); see also infra note 846. Judge Hoffmann’s misconduct here was anticipated by Judge Kaufman’s in Rosenberg. See supra note 811.

846. Dellinger, 657 F.2d at 146. The court of appeals added here, “The documents submitted at this time suggest additional improprieties. We have little doubt that the wrongdoing suggested by the FBI documents would have required reversal of any convictions obtained in the 1969 conspiracy trial [if they had not already been reversed]. The government’s alleged acquiescence in the surveillance of private meetings of the defendants and their counsel appears particularly egregious in this regard.” Id. at 446 & n.15.

847. “The district judge’s deprecatory and often antagonistic attitude toward the defense is evident in the record from the very beginning. It appears in remarks and actions both in the presence and absence of the jury.” United States v. Dellinger, 472 F.2d 340, 386 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973). “Remarks made by the prosecutors in considerable number, and before the jury, were not called for by their duties, and whatever contribution the defense conduct may have made to the deficiencies of this trial, these remarks were not justified thereby and fell below the standards applicable to a representative of the United States.” Id. at 389.

848. On the effects of conspiracy charges, see Anastaplo, supra note 702, at 688; see also supra note 702.

849. T. Hayden, supra note 830, at 407.

850. See G. ANASTAPLO, supra note 2, at 315. Compare the anarchists’ speeches and writings quoted in the Haymarket Case, Spies v. People, 122 Ill. 1, cert. denied, 123 U.S. 131 (1887), discussed supra Part 11.

851. See In re Dellinger, 370 F. Supp. 1304, 1321-22 (N.D. Ill. 1973), aff’d, 502 F.2d
Present government counsel urge that substantial jail sentences for these defendants are necessary to vindicate the judicial process and to deter other defendants and defense counsel from similar misbehavior. After a careful evaluation of the record, however, this Court is convinced that, in the particular circumstances here present, the affirmation of the integrity of trial proceedings and the goal of deterrence have both been achieved by the findings of guilt. . . . The condemnation of [Mr. Kuntsler's] conduct and the potentially grave consequences of a criminal contempt conviction to a member of the bar should serve as adequate deterrents to other lawyers who may be disposed to similar misbehavior.

Id. at 1321-22; see also G. ANASTAPLO, supra note 2, at 317, 319. Compare George Will's argument, supra note 729. On Mr. Kuntsler, see G. ANASTAPLO, supra note 2, at 324-30.

852. On the original contempt findings, see H. KALVEN, CONTEMPT (1970). See also T. HAYDEN, supra note 830, at 358; supra note 839; cf. infra note 854.

853. Mr. Hayden ran unsuccessfully for the United States Senate in 1976. See T. HAYDEN, supra note 820, at 467-71. It is sad to notice that the marriage he spoke so warmly of in his book fell apart not long after the book was published. Consider the comment made by Grey Gowrie upon reviewing Sylvia Plath's career, "Whenever I read her, I feel as if I were living with her and wanting a divorce." See Porlock, On the Critical List, Sunday Times (London), July 7, 1991, Features Sec. I had felt, upon reading Mr. Hayden's book, that certain intimate relations he described should not have been expected to survive public display. See, e.g., T. HAYDEN, supra note 820, at 447-48. Compare my comments on a similar incident: "When Siminov, the popular author of Days and Nights, published a volume of moderately passionate love poems a few years ago, Stalin was said to have remarked that only two copies should have been printed—one for the writer and the other for the lady." G. ANASTAPLO, supra note 2, at 547. A reviewer in the London Daily Mail, however, has condemned Janet Morgan's recent biography of Edwina Mountbatten as "Too nice," saying that the author lacked "the killer instinct [that] great biographers possess. She seems to think that her subjects have a right to emotional privacy." See Porlock, supra. Is there not something, indeed much, to be said for tact in these matters, especially considering the expectations and jaded tastes of our time? See infra note 881. Unfortunately, however, those who write about the tactful are sometimes not as tactful as their subjects. See, e.g., Lambert, The Polymath and the Viceroy's Wife, The Independent (London), June 20, 1991, at 14.

854. It can be salutary to study the oral arguments in Somerset v. Stewart, 98 Eng. Rep. 499 (K.B. 1772), in which the highest stakes—the fate of slavery in Great Britain—could be argued on both sides in a most elevated fashion. See also Somerset's Case, in 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1710 (1986). Also instructive are Lord Mansfield's statements in that case, dealing in a technical, even prosaic manner with issues that have profound consequences for human liberty. A similar constructive craftsmanship can be seen in the subsequent judicial assessments of the record in the Chicago Conspiracy Trial. See supra note 826.

On self-restraint and effectiveness, see G. ANASTAPLO, supra note 45, at 323, 329-30. Janet Morgan has observed, "Nehru was a tremendously honorable man with very good manners. Some people may laugh at this, but good manners can see you through almost anything. They constrain you." Lambert, supra note 853, at 14; see also infra note 857.

855. I touch upon this kind of deterioration in my review of Allan Bloom's The Closing of the American Mind. See Anastaplo, supra note 464; see also infra note 856.

856. Consider my comments on Robert H. Bork's career in Anastaplo, supra note 788. These comments apply as well to some of the Chicago Conspiracy Trial defendants and counsel. Perhaps the most talented, certainly the most witty, of the lot was Abbie Hoffman. Did he, after the 1960s, become "frozen in the past"? See supra note 830. Mr.
Hoffman apparently committed suicide in 1989, at age 52. See Abbie Hoffman, Chicago Seven Defendant and Yippie Founder, Chicago Tribune, Apr. 13, 1989, § 2, at 11 (obituary); How Yippie Hoffman Led the Radical Surge of '68, Chicago Sun-Times, Apr. 14, 1989, at 35; Yuengler, Hoffman at the End: 'Movie Not Over Yet', Chicago Tribune, Apr. 14, 1989, § 2, at 10; Casale & Lerman, Rebel with Too Many Causes, Chicago Tribune, Apr. 28, 1989, § 5, at 1; Hoffman Gave Up a Fortune, Daily Times (Ottawa, Illinois), May 6, 1989, at 3; cf. No Weepy Nostalgia, Chicago Sun-Times, Apr. 14, 1989, at 32 (editorial); supra note 839; infra note 861. In any event, Mr. Hoffman had the knack for apt descriptions. Thus the Surgeon General of the United States has recently observed, "Remember Abbie Hoffman said, 'Violence has become as American as apple pie.' I believe the time has come for us to say [that] we have to make violence un-American."


857. See supra text accompanying note 801; see also G. Anastaplo, supra note 2, at 322; G. Anastaplo, Eastern European Prospects and the United States, in The American Moralist, supra note 22, at 555-69.

We return to Judge Gignoux and his humane opinion in the 1973 trial on the contempt charges:

Trials which proceed in accordance with the law, the rules of evidence and the standards of demeanor not only reaffirm the integrity and viability of the judicial process, but also serve to insure the ability of each one of us to protect the rights and liberties we enjoy as citizens. The point is well made by the following dialogue which comes, not from a judicial opinion or a legal treatise, but from Robert Bolt's play, "A Man For All Seasons." The dialogue is between Sir Thomas More and his son-in-law, William Roper, a young lawyer:

Roper: So now you'd give the Devil benefit of law!

More: Yes, What would you do? Cut a great road through the law to get after the Devil?

Roper: I'd cut down every law in England to do that!

More: Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.

In re Dellinger, 370 F. Supp. 1304, 1322-23 (N.D. Ill. 1973) (citation omitted), aff'd, 502 F.2d 813 (7th Cir. 1974), cert. denied, 420 U.S. 990 (1975); see also supra notes 131, 729, 854. On Thomas More, see supra, Part 10. On the Devil, see supra Parts 1-A, -B.

858. This discussion of September 15, 1974 was published in an abridged form in the Chicago Tribune, on September 30, 1974, section 2, at 6. The original title was In Defense of Forthright Decency, Now and Then. See also Hyde Park Herald (Chicago), Oct. 9, 1974, at 5.


860. See G. Anastaplo, Legal Realism and the New Journalism § VII, in The American Moralist, supra note 22, at 291-94; see also supra note 833.

861. See Anastaplo, Passion, Magnanimity, and the Rule of Law, 50 S. Cal. L. Rev. 350, 363-69 (1977). "Truth be told, [Abbie] Hoffman was the forerunner of Watergate operatives Donald Segretti and G. Gordon Liddy. But neither Segretti nor Liddy was nearly as effective as Hoffman in sabotaging the Democratic Party and boosting the fortunes of Richard M. Nixon. Hoffman helped elect Nixon. . . . 'I was a victim of [the Chicago Convention],' [Hubert H.] Humphrey recalled not long before his death in 1977. 'I felt when we left that convention, we were in an impossible situation. Chicago was a
catastrophe. My wife and I went home heartbroken, battered and beaten.' Humphrey's loss was a win for Abbie." Neal, supra note 839, at 38; cf. G. ANASTAPLO, in Canada and Quebec Separatism, in HUMAN BEING AND CITIZEN, supra note 6, at 142; supra text accompanying note 834 (on Mr. Humphrey's lack of the necessary resoluteness).

862. See supra text accompanying note 794.

863. Consider, for example, how the mass media allowed themselves to be used in the shameless "Willie Horton" campaign run against Governor Michael Dukakis in 1988, thereby contributing to the corruption of the American people. Father Andrew Greeley has observed, "Gov. Michael Dukakis of Massachusetts had an excellent idea for an education program—grants to students that are paid back later in life by an extra tax on the students' income—which would have lifted a huge burden from the shoulders of middle-class parents. But the plan was obscured by such really important national issues as Willie Horton, the Pledge of Allegiance and the American Civil Liberties Union." Greeley, The Democrats Can Win in '92, Chicago Sun-Times, Aug. 18, 1991, at 42; see also infra note 866. "It is fair to point out that Nixon, Reagan and Bush have presided over the streets, and the law enforcement machinery, for 19 of the last 23 years, but they have nothing to show for their [racist] promises of law and order. Many cities will see all-time record numbers of murders this year. The nation's prisons and jails bulge with record numbers of inmates, and Mr. Bush's Justice Department wants billions of dollars for new prisons to hold an expected horde of new criminals." Rowan, Bush Signals a Rerun of Politics of Racism, Chicago Sun-Times, Aug. 18, 1991, at 42; see also infra note 881.

864. "[Richard Nixon] takes a surprisingly relaxed view of flag burning. 'If the day comes when [people] refrain from desecrating [the flag] only because of the law or some dimly remembered custom, it will have truly become an empty symbol,' he says." Nixon Sorry His Swearing Was on Tape, Chicago Tribune, Mar. 29, 1988, § 1, at 6; see also Anastaplo, supra note 788, at 1165 n.71. Governor Mario Cuomo has identified Mr. Nixon as the smartest politician in this country today. See Henry, Are These The Smartest People in America?, PARADE, Aug. 4, 1991, at 7.

865. This discussion was published in an abridged form in 14 LEGAL STUDIES FORUM 329 (1990). The original title of this discussion was "Cases and Controversies" and Human Beings. The original text of this discussion is expanded for inclusion here.

The parenthetical citations in the text are to P. IRONS, THE COURAGE OF THEIR CONVICTIONS; SIXTEEN AMERICANS WHO FOUGHT THEIR WAY TO THE SUPREME COURT (1988). The sixteen cases dealt with are summarized in the following passage in a book review:

This book is about sixteen Americans who fought their way to the Supreme Court. The men and women whose cases the book explores include Lillian Gobitis, a Jehovah's Witness who [with her brother, William] refused to salute the flag [infra note 886]; Gordon Hirabayashi, a Japanese-American who defied the military curfew and exclusion orders that forced Japanese-Americans into wartime internment camps [infra note 867]; J. S. Shelley, a black man who faced eviction with his family, because they violated a racially restrictive covenant when they moved into a white neighborhood in St. Louis [infra note 868]; Lloyd Barenblatt, a college teacher and former Communist who relied upon his first amendment rights to block the congressional inquiries of the McCarthy era [infra note 869]; Daisy Bates, a member of the Arkansas NAACP who resisted efforts to obtain NAACP membership lists during the fight for school integration in Little Rock [infra note 870]; Robert Mack Bell, a black man arrested during a "sit-in" protesting lunch-counter segregation [infra note 871]; Daniel Seeger, a young man who challenged the draft law that compelled conscientious objectors to swear belief in a Supreme Being [infra note 872]; Barbara and Vern Elfreland, junior high school teachers who refused to sign "loyalty" oaths that violated their Quaker principles [infra note 873]; Susan Epperson, a high school biology teacher who challenged the Arkansas law that barred the teaching of human evolution [infra note 874]; Mary Beth Tinker, a 13-year-old suspended
from school for wearing a black arm band to protest American bombing in Vietnam [infra note 875]; Dr. Jane Hodgson, a pre-Roe v. Wade victim of a Minnesota law against abortion [infra note 876]; Demetrio Rodriguez, a man who challenged the property-tax finance system in Texas that kept poor children in poor schools [infra note 878]; Jo Carol LaFleur, a junior high school teacher who challenged a maternity leave rule that forced pregnant teachers out of their classrooms [infra note 878]; [Elmer Gertz], who fought a lengthy battle over false charges that [he] headed a "red" crusade against the police [infra note 879]; Ishmael Jaffree, a person who took school officials to court over the classroom prayers recited against his protests [infra note 880]; and finally, Michael Hardwick, a homosexual who challenged the Georgia law against sodomy after his arrest for having sex with a consenting male friend in his own bedroom [infra note 881].


866. 310 U.S. 586 (1940), overruled by West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); see also G. ANASTAPLO, supra note 2, at 640 n.77, 664 n.118; Anastaplo, supra note 99, at 156 n.126; supra note 863; infra note 883. Justice Frankfurter wrote the opinion for the Court in Gobitis and then dissented in Barnette. On Justice Frankfurter, see supra note 818. See also G. ANASTAPLO, supra note 2, at 691 n.45, 703 n.73; infra note 896.

867. 370 U.S. 81 (1943).
869. 360 U.S. 109 (1959); see also infra note 896.
870. 361 U.S. 516 (1960); see also supra note 818.
872. 380 U.S. 163 (1965); see also Anastaplo, supra note 99, at 127; infra note 883.
873. 384 U.S. 11 (1966); see also infra note 897.
876. 295 Minn. 294, 204 N.W.2d 199 (1973). This case was finally decided by the Minnesota Supreme Court after the United States Supreme Court had ruled in Roe v. Wade, 410 U.S. 113 (1973). On the abortion issue generally, see infra note 882.


880. 472 U.S. 38 (1985); see also Anastaplo, supra note 99, at 109f, 145f.
881. 478 U.S. 186 (1986). This case has been much commented on, partly because of what it suggests both about the right of privacy and about the continuing vulnerability of homosexuals in the Western world today. Both of these concerns are touched upon in my constitutional comment which has been appended to a recent book by Gera-Lind Kolarik, Freed to Kill. The serial killer dealt with in that book operated for the most part in Indiana. My suggestions about this matter include the following:

Who are likely to be the victims of a serial killer? One model is provided by the female prostitutes who were the victims of Jack the Ripper in nineteenth-century London. This pattern may also be seen in the Rochester, New York serial murders in the 1980s. Many but not all of the Indiana and Illinois victims investigated by the police in 1982-1983 were young males evidently available for homosexual prostitution. A similar pattern may be seen in the Milwaukee, Wisconsin serial murders exposed in 1991.

Such victims are often drifters or otherwise outcasts, misguided if not even self-destructive people that no one really cares much for, except in some instances for their immediate relatives. Young male homosexuals are particularly vulnerable, since they usually do not have the opportunity to set up any associations resembling conventional families or to move in "regular channels."
Can anything be done for these potential victims, aside from trying to persuade the all-too-often hostile police to be more concerned for their welfare? We can see in [the Kolarik] book the way a highly mobile society permits, if it does not contribute to, criminal homicidal epidemics. We can also see that the things described there can go on in part because of an ever-growing emphasis among us upon sexual gratification. We have even come to insist upon the hedonistic “principle” that one is entitled to live pretty much as one pleases, that the community has no right to interfere, and that what consenting adults do between themselves is usually no one else’s business, making it almost inevitable that more and more bizarre experiments will be resorted to. The police are often discouraged from interfering with such intimate affairs, however dangerous those relations may sometimes be.

This permissive approach to disciplining human beings affects what appetites people have, who the consumers are of purchased indulgences, and how victims are recruited and exploited.

We have learned in recent years how these developments bear upon the problem of drug control in our society. The limitations of recourse to the criminal law as the principal way to handle the drug problem or to reduce its damage are becoming evident.

We can also see in the drug problem the considerable role of the influential middle-class consumer who helps sustain vigorous markets in immoral, if not illicit, commodities. Such irresponsible consumers also help keep the multitude of hustlers on the street, the vulnerable youngsters that an occasional madman can “safely” kill.

Murders aside, should we not reconsider the current notion of “victimless crimes,” especially when youngsters are corrupted, questionable appetites are heightened, and disturbed people are left to sordid devices? It should be evident that all of us are likely to be affected by those “free choices” that are said to “harm only oneself.”

Many citizens are tempted to see these developments as due primarily to the rules “coddling criminals” that have been developed by judges. If only a few changes were made, it is often said, we would be safe from the criminal. But the problems we have been surveying are much deeper in their origins: fundamental changes in our way of life may be called for, changes that we simply may not be prepared to make.

It hardly seems likely that building and filling more and more prisons will help much. Indeed, considering the corrupting effect of much of prison life, increased reliance on prisons can make matters even worse. Besides, it should be noticed, out of the more than thirty million serious crimes against persons or property committed annually in the United States, only a few hundred thousand result in felony convictions and imprisonments. Vital to making the law more effective in curbing such crimes is the shaping of a sound public opinion about how we should all act. At the least, certain crimes should be made practically unthinkable. Instead we have more and more exposure of our people, and especially our children, to violence (much of it televised for all to enjoy) as a major part of life, so much so that our hedonism is developing a taste for the vicious and the macabre. The monstrous is in effect promoted among us.


882. See supra text accompanying note 394. These issues have probably found their most dramatic expression during the last two decades in the abortion controversy. Substantial changes in medical technology and in public opinion may soon make this controversy less susceptible to judicial intervention than it had once been. See G. Anastaplo, Medicine and the Law, in THE AMERICAN MORALIST, supra note 22, at 389-406; see also supra text accompanying note 572; infra text accompanying note 890.

Such controversies raise questions about natural right, about the very nature of nature, and about the legislation of morality. See G. Anastaplo, Natural Right and the American Lawyer, in HUMAN BEING AND CITIZEN, supra note 6, at 46-60; see also supra note 95; infra note 889.

883. See supra note 866; see also supra note 807. The District Court judge was Albert B. Maris, the Court of Appeals opinion was written by William S. Clark. See Gobitis v. Minersville School Dist., 24 F. Supp. 271 (E.D. Pa. 1938), aff'd, 108 F.2d 683 (3d Cir. 1939); rev'd, 310 U.S. 645 (1940). Justice Frankfurter's determined patriotism in Gobitis and Barnette did lead to Justice Jackson's brave words for the Court in Barnette:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.


It remains to be seen whether sexual license and hedonism will ever secure the respectable place in American public opinion that the civil liberties invoked by the much-maligned Jehovah's Witnesses a half-century ago now have. Those civil liberties, like the campaign in recent decades for racial justice, did draw upon fundamental principles of the American regime. See G. Anastaplo, Obscenity and Common Sense, in HUMAN BEING AND CITIZEN, supra note 6, at 117; see also Anastaplo, supra note 99, at 127 (discussing the claims of conscientious objectors); cf. supra note 864 (Mr. Nixon's salutary caution about relying primarily on the law to prevent desecration of the flag).


885. See Powell Waivered on Sodomy Ruling, Chicago Tribune, July 14, 1986, § 1, at 3.

886. Bowers, 478 U.S. at 220 n.13 (Stevens, J., dissenting) (quoting Marks v. United States, 430 U.S. 188, at 198 (1977) (Stevens, J., concurring in part and dissenting in part)).

887. Id. at 220 n.13 (Stevens, J., dissenting); see also supra note 886.

888. Powers, 478 U.S. at 197 (Burger, C.J., concurring) (quoting 4 W. BLACKSTONE, COMMENTARIES *215). This is indeed quite a way from the innocent times of the Gobitis children. See supra text accompanying note 883.

889. The State of Georgia saw fit to concede, during the oral argument in the United States Supreme Court, that prosecution of a married couple for sodomy would be unconstitutional. See P. Irons, supra note 864, at 388. Why this should be so is not clear since the Georgia statute itself does not distinguish in this respect between homosexual and heterosexual relations. See infra text accompanying notes 891-92.

890. The same may apply as well to the status of abortion before the law. See supra note 882.

891. Bowers, 478 U.S. at 217 (Stevens, J., dissenting) (emphasis added).

892. This attitude is a variation upon the excessive respect for individuality seen in
the protection of property found in such cases as *Lochner v. New York*, 198 U.S. 45 (1905), overruled by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *cf. supra* text accompanying note 349.

893. 341 U.S. 494 (1951); *see also supra* note 657 & text accompanying notes 813-24; *infra* note 894.


895. 249 U.S. 47 (1919); *see also supra* note 666.

896. 360 U.S. 190 (1959). Lloyd Barenblatt’s account in the Irons book includes this revelation:

> During my first two years [teaching psychology] at Vassar I was still in the Communist party. At the time I was called before the House Un-American Activities Committee in 1954, I was not a Communist. I was in effect expelled or dropped from the Communist party, but I wasn’t going to tell them that or, for a long time, anybody else. I didn’t want to be involved in the ‘separating the sheep from the goats’ process. That would be counter to my stand. The irony of the thing was that, according to reports I got later on, the Communists in Poughkeepsie were going around telling people not to support my case or contribute to my defense. When I first got the subpoena, they had offered to support my case, if I came under their wing and did what they said. And I told them I didn’t need them, which they took very negatively and angrily.

P. Irons, *supra* note 865, at 97-98. Mr. Barenblatt also reports:

> Being in the Supreme Court was fascinating. One of my strongest impressions of the [oral argument] in my case was the behavior of Felix Frankfurter. Hopping around, interrupting, screeching! I couldn’t believe this; in fact, I thought maybe he was playing devil’s advocate—but it was clear later that he came with his mind made up against me.

> Which direction [the Supreme Court would go] I did not know until I read the papers months later that I had lost, by a 5-to-4 vote. I was a little surprised, pleasantly, that it was as close as it was. What was historically important was the minority opinion written by Justice Black. No one reads the majority opinion any more, but Black’s opinion has become history.

*Id.* at 102-03. Another report by a layman, Laurence Berns, upon observing the Supreme Court during oral argument in that period is useful to notice here:

> Despite Justice Frankfurter’s occasional displays of bad temper, I was impressed by the great dignity of the Court. The manly bearing of the Chief Justice contributed to this impression. His large size, handsomeness and apparent strength, combined with his kindly, pleasant and almost gentle manners, in addition to his quite plain diction, would seem to have the effect of putting those facing the Bench at their ease and at the same time impressing them with the dignity of the Court. I thought of him a kind of living argument for democracy.

G. Anastaplo, *supra* note 2, at 364; *see also supra* note 818.

897. 384 U.S. 11 (1966). Barbara Elfbrandt, a Tucson, Arizona junior high school teacher, refused (along with her husband, Vern) to sign a “loyalty oath” provided for by state law. This meant, in effect, that although they could continue teaching in their public schools, they would not be paid. Mrs. Elfbrandt includes in her recollection of the oral argument in the Supreme Court (where the Elfbrandts won, five-to-four), this report:

> One of the interesting interchanges during the argument was in reaction to a remark by the state’s lawyer that the law had some relationship to those Wobblies in the Arizona hills. This went back fifty years to the copper strikers at Bisbee, who had been put on a train and dumped in the desert. Abe Fortas was on the Court and he just could not let that go by. He leaned down over the
bench and peered at the state's lawyer and wanted to know more about these Wobblies in the hills. Justice Black wanted to know if the state of Arizona was in any imminent danger of being overthrown by the Wobblies. I'm sure the lawyer was sorry he said anything about Wobblies. So there were some light moments during the argument.

P. IRONS, supra note 865, at 201-02. Mrs. Elfbrandt concludes her account:
I have talked with other people who have been through what you might call ordeals like mine. Unlike them, mine turned out not to be an ordeal. For all your intellectual ideals that you're getting a chance to live out, you really need a lot of emotional support. I got a lot of support, not only from the Friends Meeting but from the group of people who stood by us for a long time. And the loyalty oath case was not the most important thing in my life at that time. I think that's important. I've known people for whom a case has become an obsession. For me, life went on every day. I could go for weeks without thinking about the case. And that helped me to keep a perspective. It was a very busy time in my life. I had to get up and go to school. Yeah, I was different because I didn't get paid. But I learned that I didn't go to school because I got paid. For me, the case was a real lesson in who I was and what my life was about.

Id. at 203. Or, as Malcolm Sharp used to say, a man who would not teach for nothing should not be teaching at all. See supra note 766. Eventually, it seems, Barbara and Vern Elfbrandt did collect their back pay for almost five years of teaching. P. IRONS, supra note 865, at 189-90.


It is the privilege of the artist to help us discern, through graphic particulars, that which is universal. See G. ANASTAPLO, supra text accompanying notes 45, at 144. Whatever interest the typical reader is likely to have in this Article of mine probably depends, for the most part, on the individual cases themselves or the stories I tell about them, not on any general statement by me about such cases. Since cases depend on facts to a considerable extent. one does have to get the facts straight in order to begin to understand the issues in a controversy. A gifted artist can give his audience the impression that the facts are indeed grasped.

899. I hope to do, in the form of a book or a book-length article, some of the cultivation called for here. On culture and cultivation, see L. STRAUSS, LIBERALISM ANCIENT AND MODERN (1968). Cf supra note 720. On nature and natural right (or, as some say, natural law), see supra text accompanying notes 412-16. See also supra text accompanying notes 199, 300, 443, 541, 640; notes 3, 7, 24, 57, 95, 105, 117, 163, 178, 229, 271, 305, 343, 398, 450, 510, 590, 626, 683, 700, 714, 738, 759, 882; G. ANASTAPLO, Psychiatry and the Law §§ VI-VII, in THE AMERICAN MORALIST, supra note 22, at 412-16. Compare the caution, by Alexandre Kojève, recorded supra note 640. Is there a "natural" movement (a decline?) from Adam and Eve to Doctor Faustus, just as there is from Lillian and William Gobitis to Michael Hardwick? See supra Parts 1, 13.


900. J. KASEY, THE YOUNG MAN'S GUIDE TO TRUE GREATNESS (1858). One can see in this story the combination of persuasion and force evident in the way Athena deals with the Furies in Aeschylus' Oresteia. See supra note 139.

It is sometimes argued that the laws of nature get their efficacy from God. See, e.g., J. KASEY, supra, at 77-94. If one asks what gives God His efficacy, the answer is likely to be
that that is just the way He is—that is, it is His nature. Should the same be said, therefore, about “the laws of nature” (or even about the nature of matter and its awesome multitude of productive manifestations and combinations)? But do not most people want the guiding principles of the universe to be intelligent, if not intelligible? What does this virtually universal yearning suggest about the nature of things? Consider, for example, the status and role of the ideas in Plato’s Republic. Cf. ARISTOPHANES, THE CLOUDS, supra notes 269, 309, 325, 337, 344, 393; see also supra notes 105, 152, 163, 178, 510 & text accompanying note 1.

Leo Strauss has suggested that “the only question which ultimately matters” is whether “the Bible or philosophy is right.” See supra note 625. Is this so? It may depend partly on what one takes the Bible, or revelation, to be, and whether any other (that is non-biblical) revelation is to be taken seriously. Certainly, the Strauss position here depends on his extraordinary interest in theoretical pursuits. (What is the significance of the fact that much of revelation has to do with what seem to be quite mundane matters?) Cf. G. ANASTAPLO, supra note 2, at 30-32 (drawing upon Shakespeare’s Hamlet, in which Horatio, while examining the skull of Yorick, states: “‘Twere to consider too curiously, to consider so.”). On the relation of reason and revelation, see supra notes 19, 69, 269, 277, 337, 339, 398, 450, 625, 639 & text accompanying note 274. Should genuine prudence and true inspiration direct one to the same action in any particular situation? See, e.g., supra notes 69, 344, 501. Even so, one may have to emphasize different things to different peoples with respect to the same matter. See. e.g., supra Parts 7-A, -B.

On the relation of providence to justice, see supra notes 7, 600, 661. See also supra note 450.