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A RATIONAL CONSTITUTIONAL FAITH: REMARKS IN RESPONSE TO PROFESSOR AMSTERDAM

*Eric M. Freedman**

There are a few substantive thoughts about the future that I wanted to share before letting you get acquainted with each other at the reception. But in order to talk about the future, I will have to go back to the past.

On a beautiful spring day, April 5, 1588, there was a young woman in an advanced state of pregnancy strolling along a beach on the south coast of England when she had an experience that is directly comparable to sitting in your office at the World Trade Center and seeing an airplane heading for your window. She saw the 2,400 ships of the Spanish Armada, with 30,000 men aboard bent on invading England. The shock drove the young woman into labor, and she gave birth to a son who eventually grew up to be the English philosopher named Thomas Hobbes.

And Hobbes, who is the source of this story about the circumstances of his birth, wrote in his famous work *Leviathan* that the origin of the state was in people's fear of violent death at the hands of others, whether they be criminals or enemy soldiers, and that the success of a state should be measured only by the degree of its ability to protect us—not by its success in achieving any other goal, but simply by looking to the extent to which it provided physical safety from violence. The premise is that people are fundamentally creatures of emotion, and

* The following is a lightly-edited version of the remarks given by Professor Freedman at the ceremony on November 22, 2004. For related thoughts, see Eric M. Freedman, *The Bush Military Tribunals: Where Have We Been? Where Are We Going?*, Criminal Justice, Summer 2002, at 14. See Anthony G. Amsterdam, *Remarks at the Investiture of Eric M. Freedman as the Maurice A. Deane Distinguished Professor of Constitutional Law, November 22, 2004*, 33 HOFSTRA L. REV. 403 (2004).

that the most basic emotion of all is fear, so we must give strength to the state as a consequence of our fears of what others will do to us.

So the sovereign in Hobbes' ideal state has total and unquestionable power, not just over adjudication and the physical liberty of every person, but over what opinions may be promulgated, "[f]or the Actions of men proceed from their Opinions; and in the well governing of Opinions, consisteth the well governing of mens Actions, in order to their Peace, and Concord."¹

The problem is, though, that under that theory, in the interests of an illusory peace, you are giving up the potential for human progress. And I say an illusory peace, because there have been lots of wars since the ultimately unsuccessful invasion of the Spanish Armada, and plenty of acts of criminal violence. In fact, when Thomas Hobbes was seventeen, you had the Gunpowder Plot, in which thirty-six barrels of gunpowder were planted beneath the House of Lords, to go off on opening day. The plot was uncovered and a huge crackdown on numerous utterly innocent English Catholics, featuring torture and executions, followed. Every generation has had its own security threats and its own wars, and people have been deeply influenced by them, just as Thomas Hobbes was in his day.

Specifically, in every one of those generations, war and the perceived threat to political institutions has spurred a fear of dissent and a fear that due process before incarceration is an unaffordable luxury in dealing with enemies bent upon our physical destruction. (And I have here deleted a dreary litany of examples in this country running from the anarchists at the end of the 19th century, through World War I and its aftermath, then the excesses at home surrounding World War II, the 1950s, and into the Vietnam era).

Suffice it to say that in every one of those instances we have eventually, on sober second thought, concluded that the repression was wrong. We have, and I think very rightly, decided that the costs had been far too high. Now, some of those costs are obvious. On a political level, we damage our influence around the world whenever we hypocritically abandon our own ideals. On a personal level, the costs have come in the form of the shattering of the lives of individuals who suddenly found themselves somehow swept up by arbitrary government action.

But, more subtly and ultimately more dangerously for all of us, the costs have come in the chilling of creative brainstorming that might lead

1. THOMAS HOBBS, *LEVIATHAN* 233 (C.B. MacPherson ed., 1985) (1651).

to better ideas and better policies as people have inhibited themselves out of fear of the very government that they had looked to for protection from our adversaries.

That brings us to today and our war, not the war in Afghanistan or the war in Iraq, but “the war on terrorism.” And comparing that one to the wars we have discussed, I would propose to you one difference and one similarity.

The difference is that, conceived of as a war, the war on terrorism has far more potential danger to civil liberties than all the ones we have mentioned. Those all had defined and identifiable enemies and endpoints, so at least if one were to limit civil liberties one would be doing it within some temporal boundaries. Here, it seems we are in a war which will last as long as there is terrorism in the world, which, it seems to me will be as long as there is crime in the world—that is, for a long time indeed.

There is no intrinsic difference between the act of destroying the World Trade Center and the act of destroying our embassies in East Africa at the cost of hundreds of lives. But we called the second event a crime, not an act of war, and prosecuted it successfully in open proceedings as a crime. And I think that choice, rejecting all the same set of concerns about security and efficiency and so forth, did honor to our values, to our system and to its reputation.

So this “war,” unlike others, in many respects exists only as a label that is supposed to be a justification for freeing government of the restraints that would otherwise apply in its prosecution of crime.

The similarity I would propose to you between this war and the previous ones is that once again we are in grave danger of over-reacting. I won't rehearse for you the whole litany of disturbing actions the government has taken. But the common thread in all of these actions is that the executive authorities are going to be judge, jury and executioner. When the inmost reaches of the executive branch will make decisions unilaterally, and for you who are not in that circle to seek to create a process that leaves room for skepticism is at best bad for efficiency and at worst outright disloyal.

Well, let me remind you about Dr. Wen Ho Lee. The government was sure, very sure, that he had stolen the secrets of the hydrogen bomb. But the government was wrong, which was shown when—after a huge fight about secrecy in which the executive branch said that the court was risking having the whole world blown up—it was forced to try to lay out the case in public. And the government has been wrong in over 115 cases of people sentenced to death row, after due process, and with

access to lawyers, who have turned out to be simply innocent—even under the absurdist definition of “innocence” that Professor Amsterdam has just described.²

Recognizing the realities of human fallibility and the dangers both to individuals and to society at large when government errs, when we created the Constitution we chose, in contradiction to Hobbes’ approach, to take the view that no one has a monopoly on wisdom. For people to question, to debate, and to ask “how do you know that?” is the safer, surer, sounder way to exercise government power.

Is this slow, messy and inefficient? Yes. Does it pose dangers? Yes. It poses the danger that we may be too slow to react to some threat. Tyranny can be much more efficient.

But we have made the policy choice of deliberation over speed. And so we have rejected not only the tyranny of an absolute monarch, but also the tyranny of the majority. Checks and balances are built into the system so that in moments of public passion a majority cannot simply trample on the minority.

We don’t have a direct democracy, we have a republic, which means that public opinion governs only in an attenuated way, through a mediated process, so that hopefully calmer heads will have time to prevail.

But eventually—and this is of at least equal importance—we do need to have a majority willing to stand up for constitutional values; in the most basic and real way, the Constitution belongs to all of us. However well or badly the civil liberties lawyers may do in court cases in the short run, in the long run, the majority will rule and the country will have no more civil liberties than the majority wishes to give.

So I conclude that we, the majority, can learn something from history, something that will enable us to improve upon the record of the past. People have been afraid in the past, and rightly so. Like us, they faced real threats, which they rightly saw as unprecedented. But what we should learn from them is that the true courage that the present moment requires is the courage to reject what has been proven to be the false safety promised by measures aimed at stifling challenges to government, and the courage to speak out affirmatively in favor of the messy processes of republican dialogue. The reason is simple: to defend dialogue is to affirm our faith that the road towards the world we would

2. See Anthony G. Amsterdam, *Remarks at the Investiture of Eric M. Freedman as the Maurice A. Deane Distinguished Professor of Constitutional Law, November 22, 2004*, 33 HOFSTRA L. REV. 411 (2004).

all like to see begins in a country that does not pander to our transient fears but rather challenges us to accept the risk of continuing to pursue our enduring hopes.

I thank you all so very much.
