

**The United States at the End of the “American Century”:
The Rule of Law or Enlightened Absolutism?***

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I

My former colleague and friend, the late Edward Shils, once wrote that he never wanted to be against his fellow countrymen or to be a Cassandra—it was much too easy to make dark prophecies. But, he went on to say, his outlook on society had become more somber over time.¹ It is much too easy to make dark prophecies, indeed. I emigrated to the United States in 1964 and, since then, our country has become a better place in myriad respects. However, today is not the Fourth of July and we, especially the lawyers among us, have many reasons to be somber. I should like to talk about a few of them. I shall do this because there are grounds aplenty to attempt to do better.

Let me begin by defining the four reference points of the question that is my title, “The United States at the End of the ‘American Century’: The Rule of Law or Enlightened Absolutism?” First, a few observations about “the United States.” While today is not the Fourth of July, in referring to the United States it is appropriate to invoke Abraham Lincoln’s explication of the meaning of Independence Day. In 1858, in his senatorial campaign against Stephen A. Douglas, Lincoln estimated that about half of the United States population at the time had its origins not in Great Britain but that they or their ancestors had come from “Europe”—he referred to Germans, Irish, French, and Scandinavians. To “loud and long continued applause” he stated that the Declaration of Independence and its self-evident truth of equal creation gave them “a right to claim it as though they were blood of the blood, and flesh of the flesh of the men who wrote that Declaration.”²

Earlier, Lincoln had referred to the fact that the United States had become “a mighty nation” with a population of about 30 million. Less than a century and a half later, the head count is 274 million. 24 percent of the present population of California is foreign-born.³ If we add those who were born in the United States but had immigrant mothers, one third of the state’s population has intimate links to other countries and cultures.⁴ The Governor of Texas finds it to be of great advantage that he is fluent in Spanish. Since I moved to the United States from Germany 36 years ago, profound political changes have taken place. One might say that, over these decades, the hegemony of White Anglo-Saxon Protestantism has almost disappeared. I remind you that as recently as the election campaign of 1960, the fact that John F. Kennedy was a Roman Catholic was a matter of considerable controversy, something that is much harder to imagine today.

There can be little doubt that the country’s culture has become more diverse and, in some areas, more contentious, even as the great legal documents of 1776 and 1787 remain the common denominator that makes us one society. It is a cliché that the United States is a young country. A few years ago, my former teacher, Charles Black, of the Yale Law School, pointed out that just three human lives, not phenomenally long, can more or less cover the period from the Revolution to the present. He chose the slightly overlapping lives of three former presidents: James Madison, Benjamin Harrison, and Dwight Eisenhower.⁵ While you obviously could make a similar calculation for any country, there is no country in the world, and I include Britain in this comparison, where those three lives would cover as much apparent constitutional and institutional continuity.

By contrast with, for instance, France and Germany, the 213 years of the world’s oldest written constitution represent an extraordinary constitutionalist accomplishment. Furthermore, can you name any other society where politicians of the late 18th century are daily looked to for guidance on present-day political issues? As I make these claims of continuity, it goes without saying that there also have been profound constitutional discontinuities and adaptations and changes. Indeed, many of the legal disputes of recent decades are due to our efforts to deal with the tensions of a large, multiracial, multiethnic society within an 18th century republican, democratic, federal constitutional structure that, but for the Civil War Amendments, formally remains mostly unchanged.

My second reference point, the “end of the American century” obviously is my escape from the ceaseless talk about the 21st century, the bridge thereto, and the never-ending invocations of the third millennium. I chose the end of the present century (I count the year 2000 as its last year) because about it we can actually make verifiable statements.

The British historian Eric Hobsbawm has called his book on the 20th century *The Age of Extremes*.⁶ He also considers the 20th century the “short” century and dates it from 1914 to 1991. Centuries and millennia are, of course, wholly arbitrary fictions of calendar makers and the “fin de siècle” is as unreal as the notion that we need a “bridge” to the 21st century. Having said that, it is convenient to divide up the past. Politically, this has been the century of the first World War, of the Russian Revolution, of the Stalinist evils, of the horrors perpetrated by Nazi Germany, of the second World War that was followed by the third, the *cold*, world war. Its second half saw decolonization, Mao, and the emergence of the People’s Republic of China as a major player, as well as the increasing significance of the global economy with Japan and other Asian countries as important factors. In the second half of the 20th century, Western European nations have joined together in ways that are breathtaking if seen against the history of the outgoing millennium. Finally, with the Berlin Wall fell the Soviet Union and its dominance over Central and Eastern Europe.

During all of this, the United States increased its power and influence, while also undergoing significant internal evolutions, most importantly the extension of civil rights protection. The United States saw many aspects of the “American way of life,” cultural and material, embraced abroad. Yes, to a large extent, the 20th century has been the “American century.” Especially, our economic system has served, and continues to serve, as a model, even if its adoption is often highly qualified. We can now see what, as recently as twenty years ago, would have been less clear: The most influential economist of the century has probably been the American Milton Friedman.

I am not an economist by profession, but a lawyer. How satisfied should we be about the accomplishments of our legal system? Is the United States’ legal system something we should want to export? I, thus, turn to the third component of my title, “the rule of law.”

In the United States, that concept has been primarily the domain of bar associations and political rhetoric. It rarely is invoked by courts as a rule of decision. At present, the rule of law is bandied about a lot as identifying what is missing in many countries, such as China, without anybody much bothering about institutional details.

The concept of the rule of law has venerable origins and, as far as Anglo-American legal traditions are concerned, it gained lasting prominence in Magna Carta. In the American context, Thomas Paine contrasted it succinctly with absolutism. In America, he wrote, the law is king. “For as in absolute Governments the King is Law, so in free countries the Law *ought* to be King; and there ought to be no other.”⁷

But what is the substance of this rule of law? A complicated question since the concept seems to be a fairly empty vessel whose contents, depending on the speaker, can differ even more than the various approaches to constitutional interpretation. However that may be, I think the rule of law can be understood as including, at a minimum, the requirement of a clear basis in law for the exercise of public authority, the protection of individual rights, including safeguards against abuse of power, an independent judiciary, and equality before the law. None of these components, of course, is self-defining, but they can serve as reference points.

Finally, in the fourth part of my title, what do I mean by “enlightened absolutism”? Instead of an abstract definition, let me invoke the late 18th-century example of the General Code for the Prussian States, a product of the enlightened absolutism of Frederick II who desired a natural law, reason-based codification that would be administered by a civil service so that the messy phenomena of life could be made to fit the Code.⁸ The final result was a comprehensive effort to define clearly the subject’s rights (and, of course, obligations) in all stations of life, public and private, from the cradle to the grave.

The Code included a title headed “of the rights and Duties of the State in general.”⁹ It postulates that these rights and duties are united in the monarch, who maintains external and internal peace and security, but also protects the individual in “his own.”¹⁰ It was the state’s task to provide the inhabitants with the means and opportunity to develop their abilities and strengths so that they may apply these to further their fortunes. This potentially far-reaching conception of the state led to the creation of a cadre of administrators who were subject to “general norms and prescribed procedures and committed to impersonal efficiency.”¹¹

The General Code comprised the astounding number of more than 17,000 articles covering public and private law. Frederick himself thought it was much too long. Of course, it contained provisions about marriage, even detailing when partners were excused from the performance of their marital duties (for instance, when away on government business). Further comprehensive detail could be found in the 104 provisions dealing with the legal consequences of extramarital intercourse, and others that dealt with sexual harassment of household employees. On another topic, the Code was draconian in dealing with malfeasance in office, prescribing, for example, removal from office and two to five years of incarceration for judicial officers who, in violating their duties, had been motivated by “animosity, private passions or other ulterior purposes.”¹²

The comprehensiveness of this Prussian regulatory effort should not seem overly foreign to us, for the Code does find a counterpart in the American legal system at fin de siècle as we too try make the messy phenomena of life fit the law. Indeed, Prussia pales by comparison when it comes to all-encompassing breadth and depth that reaches the picayune. And it is getting worse and worse and worse. The Federal Register, a daily report of new and proposed regulations, increased from 15,000 pages in the final year of John F. Kennedy’s presidency to over 72,000 pages in 1998.¹³ That is about 200 pages a day, counting weekends.

Beginning with President Carter and continuing with Presidents Reagan, Bush, and Clinton, winning presidential candidates have run on platforms complaining about big government and have ostensibly been committed to deregulation. The results are mostly pitiful. Furthermore, the General Code for the Prussian States had one great advantage over any laws and regulations passed in the United States in the last few decades. The language in which it was written had an immediate, vivid quality and was close to daily life. What our system produces is mostly incomprehensible to everybody, including lawyers.

I am going to spare you a litany of contemporary regulatory excesses and absurdities. That job has been done well by Philip K. Howard in his 1994 book *The Death of Common Sense—How Law is Suffocating America*.¹⁴ I will, however, give you just two up-to-date illustrations of latter day enlightened absolutism. The City of San Francisco, one of the American jurisdictions that think of themselves as enlightened, has required private contractors doing business with the city to disclose the distribution of sexual preferences among its employees. Health Commission Policy #24 stated, in captivating English, that a “contractor’s ethnicity, gender identification, and sexual orientation composition is to be representative of the clients served.” The commission canceled a contract with Catholic Youth Organization, which ran mental health services for troubled children, because the group would not comply with the disclosure policy.¹⁵ I call this an example of enlightened absolutism because of the intrusiveness and mindless overreach in the service of a cause. After the archdiocese threatened legal action, the disclosure provision was replaced with one requiring “compliance with antidiscrimination protections” and—run for cover—“cultural competence.”¹⁶

The second example is the breathtaking recent Department of Labor proposal to extend the reach of workplace health and safety regulations into the homes of telecommuters. The Occupational Safety and Health Administration had not received a single complaint from home office workers at the time it posted its advisory letter since withdrawn. We are now going to have a “national dialogue” on the matter¹⁷ The dialogue undoubtedly will be followed by some form of government regulation. In the interest of comprehensiveness we regulate even if there is no discernible problem or the costs to other important values outweigh the regulatory gain. Robert Musil, the great 20th-century writer, once said: “Ideals have curious properties, and one of them is that they turn into their opposites when one tries to live up to them.”¹⁸

Both episodes illustrate that in the pursuit of “enlightened” policies, government does not hesitate to invade the private sphere, including, in the San Francisco case, privacy of information, associational and religious freedoms. But can a society that systematically obliterates the distinction between the public and the private realms be a free and civilized one in the long run? The fact that there is much sin does not necessarily mean that we can afford to eradicate all of it without turning law enforcement into something both oppressive and trivial. Government, the media, other powerful commercial interests, the high tech revolution and many ordinary people pay scant attention to the fact that the refusal to recognize any line between the public and the private makes all human relations and preferences subject to discovery in the ordinary, and in the legal, meanings of the word and thus chills the very privacy and personal autonomy that is one of the great accomplishments and results of modernity.

The pursuit of ever greater comprehensiveness (itself resulting from the “necessity” to deal with lacunae the number of which increases exponentially with regulatory growth) also tends to create a maze in which one can all too easily run afoul of the law that is king. The greater the maze, the greater also the potential of those government officials who are implementing syllogistic interpretations of the mandates of enlightened government to end up being despotic. James Madison foresaw this danger, believing that “there are more instances of the abridgement of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations.”¹⁹ Surely one of the most astounding news items recently was the effort of the Secretary of Health and Human Services, the Attorney General and the FBI Director to mobilize the elderly to scrutinize their doctors’ bills for fraud.²⁰ The United States government organizes patients, campaign-style, to inform on their doctors. I certainly hope that the deputized seniors will succeed in figuring out the Medicare regulations.

II

How is our legal system coping with the tasks of law enforcement in the service of the various “wars” on various evils that our society has ordained at all levels of government: local, regional, state, and federal?

In what follows, I shall not address tall and large, “Rawlsian” issues. My question here and today is not what constitutes a just society, but a much more limited examination of some aspects of our performance as a legal system, the rule of law in a narrower sense. Even then, I will choose just a few illustrations from a few areas of the law, from the most ordinary to the more remote, to make a larger point. The larger point is that our performance is often mindless and frequently disproportionate, at times even cruel. What we do right as a legal system, is no excuse for our considerable shortcomings. My point is not primarily that “law suffocates America” (yes, it does that also) but the more modest point that our performance, under the rule of law, is often lacking. Too often, our performance displays little sense of responsible exercise of discretion on the part of government actors, little examination of the overall balance, of the costs and benefits entailed in governmental decisions. My examples will illustrate what can happen to ordinary people and ordinary institutions.

The first is taken from a column by Bob Herbert of *The New York Times*. It is the story of Ellis Elliot, whose apartment the New York police mistakenly invaded and wrecked in search of a drug dealer. There was shooting from both sides. This is what happened to Mr. Elliot before the mistake was realized: He was dragged naked into the fourth-floor hallway and his hands were cuffed behind his back. He was repeatedly addressed as “nigger” and “black mother-so-and-so.” When he begged for clothes, the police first said that, as a mere animal, he did not deserve any and then gave him some of his girlfriend’s clothes to wear. That way, he was taken out on the street in front of a crowd of onlookers. At the precinct station, he was further humiliated, put in a cell and left for some hours, in women’s clothes, and with wrists cuffed behind him for part of the time. When the investigators learned they had made a mistake, he was released at about 1 A.M. the following day. When he got back to his apartment, police officers were lounging in his living room, eating snacks, watching TV. They seemed amused and one of them suggested that he get a good lawyer and sue the hell out of them.²¹ Is that what we mean by the rule of law? Is that what the war on drugs justifies?

My illustration is not the worst that I could have chosen: Ellis Elliot is alive. In fiscal year 1998, 2,266 claims of police misconduct were filed in New York City,²² continuing disturbing trends that led Amnesty International to call for an independent inquiry of New York police practices in 1997.²³ Nor is New York City alone. It was only nine years ago that the entire world was treated to the video of police violence against Rodney King in Los Angeles.²⁴

Nat Nathanson, decades ago, invoked the adage that the sternest test of a civilization is provided by the humaneness of its criminal process.²⁵ Since the days of the ancient Greeks, a civilization also has been measured by the way in which it deals with foreigners. In dispiriting columns over the last three years, Anthony Lewis of *The New York Times* has told a number of stories emanating from the Immigration and Naturalization Service's implementation of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, signed by the president, and enforced by the executive branch with mindlessness and, indeed, cruelty. Some of the detention centers and jails used by the Immigration and Naturalization Service to hold detainees before deportation are so overcrowded that conditions have led to hunger strikes.²⁶ Here are two of Anthony Lewis' stories, not involving criminals, or even suspects, but people like you and me.

John Psaropulous, a British subject, a native of Greece, and a television journalist working for CNN, returned from Athens to Atlanta after a vacation. At the airport, he was told that he was ineligible to enter because his work visa had expired and the INS had not yet acted on CNN's application for extension. Let in provisionally, Mr. Psaropulous was eventually arrested, detained, and, using the so-called "expedited removal" of aliens procedure, put on a plane to Athens under a five-year-ban on returning to the United States. When, after things had been cleared up, he was issued a new visa by our embassy in Athens, he once again arrived in Atlanta and once again was forced back to Greece. Then authorities reversed themselves yet again and he got still another visa. I quote Anthony Lewis: "But the real wrongs in this story are not over: the wrong of vesting in INS bureaucrats unreviewable power to destroy people's lives; the wrong of bureaucrats using their power to punish someone because his employer didn't file a piece of paper; the wrong of making people subject to a five-year bar from this country because of an innocent mistake."²⁷ Is this what we mean by the rule of law? I do understand, of course, that it is easy for immigration officials to become desensitized when for every incident like this there are hundreds that involve convicted felons coming back and back and back.

Here follows the second story. Martina Thompson, a German citizen, married an American, came to the United States on a visitor visa, and applied for status adjustment as a permanent resident, as the law allows. While her application was pending, the young couple went back to Germany to visit her parents but before doing so asked the New Orleans office of the INS whether that would be all right. They were wrongly told yes. Shortly after her return to New Orleans, she was arrested, jailed, thrown into one of the most degraded prisons in the country, New Orleans Parish prison, held there for eight days (her husband was not allowed to visit her), and then she was handcuffed, taken to the airport, chained to a seat, and flown back under guard. As of November of last year, the State Department was holding up her application for an immigration visa because, under the regulations, the State Department wanted three years of business tax returns from her husband who is in the construction business, but, alas, had been in it only for 18 months. Fortunately, this story does end happily; after much further anguish, the U.S. Consulate in Frankfurt issued an immigrant visa to Martina last winter. She reached her new home in Louisiana some time in May. But is this the rule of law in all its majesty?²⁸ Is this what the war against illegal immigration justifies?

I turn to territory by now well familiar to all of you: the investigation that led to the impeachment of President Clinton. Whether President Clinton was rightly or wrongly impeached and acquitted, is not my subject. I am concerned with how others were affected by some of what occurred.

A White House intern, Monica Lewinsky, befriends another government employee, Linda Tripp, to whom she confesses, in a number of telephone calls, that she is in love with the President and has had an affair with him. These telephone conversations were taped by Linda Tripp without telling Ms. Lewinsky. Maryland, where Ms. Tripp lives, apparently does not permit such tapings.²⁹ Ms. Tripp has been indicted on two counts of violating Maryland's wiretapping law, and is scheduled to stand trial in July.³⁰ Ms. Tripp had turned copies of the tapes over to the lawyers for Paula Jones, who was suing the President for sexual harassment. Ms. Tripp also had told the office of independent counsel Kenneth Starr about her tapes. His office then "wired" her for a four-hour meeting with Lewinsky in a Virginia hotel. Virginia law apparently permits such wiring.³¹

Putting legal issues to one side, we are so ready to shrug our shoulders that the rankness of it all hardly sinks in anymore. Why should we assume it was acceptable for private litigators to make use of tapes obtained under conditions that made these tapes, to employ an old metaphor, fruit of the poisonous tree? How can it be acceptable for a government prosecutor, without more, to wire a witness in order to obtain an extension of his mandate to investigate the president of the United States? Under the rule of law, as commonly understood in the United States, all of this seems to pass muster.

In his book on the Lewinsky matter, Judge Posner accurately states that evidence obtained in violation of state law is not technically “fruit of the poisonous tree,” and therefore admissible in federal proceedings;³² he goes on to opine that Starr behaved as would have any responsible independent counsel, for “[w]here there is smoke, there is usually fire.”³³ I disagree with Judge Posner’s answer to the question that we so rarely ask these days: whether certain practices, even if legal, are *good* practices in a civilized society.

It is one of the greatest conceits, frequently encountered in present-day legal America, to assume that if you *can* do something you *should* do it—a rather perverse reading of the understanding that the United States is a land of unlimited possibilities. We have abdicated the delineation of law’s impact on society to the letter of the law and to “anything goes” reasoning by lawyers about what we *can* do—foregoing the use of discretion in determining what we *should* do. Possibly it is true, as Judge Posner writes, that if prosecutors were not so aggressive, “our crime rate would be even higher than it is.”³⁴ However, citizens and government must constantly reevaluate the balance between laxity and zeal, for the danger of destroying a desirable society exists at both ends of the spectrum.

Independent counsel staff initially confronted Monica Lewinsky on January 16, 1998. As far as I know, it seems more or less established that they hindered, or at least discouraged her from calling her then lawyer, and that they tried to obtain an immunity agreement by conjuring the specter of long jail sentences for her and of the prosecution of her mother.³⁵ The independent counsel's office did indeed bring Lewinsky's mother before the grand jury, questioning her over two days. This is *Time's* commentary: "Though Starr was operating within the law, not many people have seen up close how rough the law can get when a determined prosecutor pulls out all the stops."³⁶ And yes, they subpoenaed records of Lewinsky's book purchases from Washington bookstores.³⁷ Starr's spokesman, Charles Bakaly III, said of his office's conduct: "However unpleasant these techniques, they are part of what federal prosecutors do."³⁸ Some commentators agree; Judge Posner believes that Starr used "typical hardball prosecutorial methods"³⁹ that at most could be deemed harmless error.⁴⁰ Members of Starr's office defended their issuance of subpoenas by pointing to precedents in the investigations of Ted Kaczynski and Timothy McVeigh; what better example of the lost sense of proportion than this comparison of the need to discover the reading lists of mass murders and Monica Lewinsky?⁴¹

If you have done nothing other than be in the wrong place at the wrong time, these same prosecutors can impose extraordinary expenses on you. Twenty-nine current and former White House employees went before the Washington grand jury in the Clinton investigation, and some have substantial legal bills to show for it.⁴² True, some of these people may have committed felonies, and so, as Judge Posner writes, "we needn't wring our hands over their incurring legal expenses."⁴³ And those who were not targets of the independent counsel's investigation ostensibly had no reason to hire lawyers.⁴⁴ But can we truly fault those who were genuinely frightened and rightfully awed by prosecutorial power, and sought to minimize the risk of inflicting grave damage upon their reputations and careers?

Independent counsel Donald Smaltz commented about the acquittal of former Secretary of Agriculture Michael Espy on (all) thirty corruption charges after a \$17 million four-year investigation: “[T]he actual indictment of a public official may in fact be as great a deterrent as a conviction of that official.”⁴⁵ Right he is. If a U.S. attorney tomorrow decided to go after you, for whatever alleged offense, he could impose extraordinary expenses on you, and, if you were acquitted in court, you would still have lost because the government would not reimburse you for your legal defense. For that matter, if I got sued tomorrow in a civil case and I won, the losing party ordinarily would be under no obligation to reimburse my expenses. That is why corporations and institutions, such as universities, settle some lawsuits: It is cheaper to pay the plaintiff off than to pay your own lawyers. If I had the authority to make one change in the American legal system, I would introduce the British rule on cost shifting despite the frequently made point that such a rule might deter and starve a great many worthy suits.⁴⁶ Yes, there is a price to pay. European countries consider the “loser pays” rule a basic requirement of justice and fairness. The poor are helped by legal services to litigate their claims and have other protections.

To change the problem set, I shall turn to RICO, the Racketeer Influenced and Corrupt Organizations Act of 1970. The issue is an old one. A statute gets enacted for a limited purpose, but its vagueness permits “innovative” lawyers to push and push its application. It is hard to believe that various federal courts of appeals have had to decide that no RICO claims could be brought against the federal government⁴⁷ and that the question, whether the Internal Revenue Service was a racketeering enterprise, alas, could not be answered because of sovereign immunity.⁴⁸

According to its statement of findings and purposes,⁴⁹ the statute was meant to provide more effective ways of getting at organized crime, including treble damages inducements for “private attorneys general.”⁵⁰ Instead, I quote Chief Justice Rehnquist’s evaluation of RICO’s application: most “of the civil suits filed under the statute have nothing to do with organized crime. They are garden-variety civil fraud cases of the type traditionally litigated in state courts.”⁵¹ I might add that the Supreme Court has not exactly distinguished itself in reining in expansive readings of RICO. The statute has been made applicable to mailing fraudulent tax returns, to burglaries in two states by non-organized crime defendants, even to claims against abortion protesters.⁵² RICO has given rise to yet another litigation racket.

However, my main concern is what the statute's vagueness says about our legal culture. A defendant violates RICO by participating in the conduct of an enterprise through a pattern of racketeering. Any entity (for instance, a political association) can be an "enterprise" for RICO purposes and a "pattern" is fairly easily established through the requirement of at least two crimes or a conspiracy to commit at least two crimes. The most disconcerting aspect of RICO is that the application of its special conspiracy provision further attenuates the already loose common law concept of conspiracy, stretching it to new extremes. To be liable under RICO, the conspirator-to-racketeer does not need to agree personally to commit a crime. Nor must he have contact with or knowledge of other participants in the enterprise, or be able to infer their existence by being dependent on their cooperation. Incredibly, a defendant may be guilty of conspiracy to violate RICO if the government can show, using even circumstantial evidence, that he was sufficiently associated with the enterprise's other crimes to have implicitly "agreed" or consented to their commission.⁵³ Furthermore, his liability extends to *all* the crimes of the enterprise. If this is not "Alice in Wonderland," what is?⁵⁴ We call this the rule of law? Is this what the war against organized crime justifies? Furthermore, the forfeiture provisions of RICO are of a breathtaking sweep: The convicted defendant is to forfeit his entire interest in any business that is used in some way to facilitate the RICO offense.⁵⁵

The ease with which public or private prosecutors may seize upon the statute's breadth is illustrated by the Justice Department's recent RICO suit against tobacco companies. The lawsuit exemplifies litigation's erosion of the rule of law in two respects. First, more mundanely, the federal government is applying RICO far outside the context of organized crime in order to accomplish a prohibition that it could not muster the political support to legislate. As Robert Bork notes, at least when the nation decided to end the "scourge" of alcohol, it duly ratified the 18th Amendment.⁵⁶

More striking, however, is the government's breathtaking hypocrisy in using a racketeering statute against the tobacco industry, when the plaintiff itself could be described as a co-conspirator to do harm. The federal government has long known of smoking's health risks; nevertheless, it permitted the sale of tobacco products and profited enormously from taxing such sales. The ranks of racketeers logically include the party who regulated and taxed tobacco (or protected it, at the behest of Senators from tobacco growing states); to bring a RICO suit while mindful of this history requires extraordinary chutzpah. Is this what the war against tobacco justifies?

Let me end my illustrations by providing an example from the life of a university president. In 1991, before I became president of Stanford, Paul Biddle, the former Office of Naval Research representative on campus, filed a *qui tam* suit under the so-called False Claims Act against the University that alleged overbilling of the government. In December 1993, more than three and one-half years after Biddle had made his first charges, the Justice Department declined to enter the lawsuit brought by Biddle.

In October 1994, Stanford and the United States government agreed to settle all disputed matters related to the billing and payment of the indirect costs of federally sponsored research at Stanford from 1981 through 1992. In settling this contractual dispute, the Office of Naval Research, the responsible government agency, acknowledged that "the Navy has concluded that it does not have a claim that Stanford engaged in fraud, misrepresentation, or other wrongdoing with respect to the Memoranda of Understanding, costs, submissions, claims or other matters covered by the settlement agreement."

The settlement required Stanford to pay the government an additional \$1.2 million as an adjustment for all the years 1981 through 1992 and dismiss its appeals concerning 1991 and 1992. As a normal business settlement, this was unremarkable. Over the course of twelve years, Stanford had conducted research under nearly 18,000 federally sponsored contracts and grants involving hundreds of millions of transactions and dollars. Adjustments when closing out the books for open years are normal and expected under the applicable government rules, and the amount of the adjustments for the years settled were within the normal range.

Yet this case was not normal. No sponsored research dispute at Stanford—nor, I believe, at any university—has ever received as much attention and scrutiny as indirect costs at Stanford. The inquiry caused much pain, distress and expense as the public controversy developed. Between 1991 and 1994, Stanford spent \$27 million on accountants, auditors and consultants to address issues raised by federal government auditors. This figure does not include legal costs. All of these expenditures had to be paid for with funds from unrestricted sources (of which the most important is tuition). To the extent that Stanford made errors, they were wholly regrettable. But also regrettable were the irresponsible accusations against Stanford and university officials. To this day, I get letters from alumni who simply assume that the sensational headlines they read told the truth and gave a fair picture.

In our overheated public life, a presumption of innocence is hardly ever granted and, of course, since *New York Times v. Sullivan* there has been no protection against defamation of public actors except when false statements are made with actual malice. For a lawyer, the ease with which accusations were made against the university, complex accounting issues were irresponsibly oversimplified by the media, and vast costs were imposed is disheartening because the story is in no way unique. It seems that many regulatory disputes these days are prejudged by government officials and then tried in legislative committees and the media. Audits are treated as if they were criminal prosecutions.

The illustrations that I have offered have been taken from different, but by no means all, walks of life. I have not even scratched the surface. And there are much more basic issues. I said at the beginning that the concept of the rule of law requires a basis in law for the exercise of public authority. All too often, that basis is far-fetched and tenuous. I remind you, for instance, how much regulation (such as the San Francisco example with which I began) is based not on statutes passed by state or federal legislatures but on the so-called procurement powers of all levels of government, from local to federal.

My examples are not exceptions, but symptomatic. What I have described can happen and does happen to poor people, to middle-class people, to politicians, to businesses, to institutions. It should go without saying that I am not making the point that all policemen, all bureaucrats, all prosecutors are on the wrong track. Many try to do the decent thing under trying circumstances. They themselves have to cope with a deeply flawed system that makes the thoughtful weighing of costs and benefits the exception, rather than the rule. Let me turn to some more general observations.

III

The many wars for which law provides the weapons are often characterized by inconsistent and conflicting orders. In our system of public administration and adjudication of public law issues, we suffer from too many layers of government with concurrent jurisdiction. Preemption is nonexistent in too many areas of law.⁵⁷ Where a single level of government would busily produce a regulatory maze complex and internally inconsistent enough to employ legions of handholding lawyers, we allow two or three or four to chime in. And not only do multiple government agencies have a say, but so do innumerable citizens acting as attorneys general, empowered to bring private suits. The granting of enforcement rights over matters concerning the public interest to private parties, such as in *qui tam* actions, further distorts government decision-making.⁵⁸

More generally, lawyers for private parties employ private litigation as a bulldozer for the implementation of ill-thought-through bureaucratic policy preferences. I think, for instance, of the role of EEOC concepts, such as the vague notion of a “hostile environment” that is increasingly prominent in Title VII litigation. While this regulatory concept undoubtedly has some legitimacy, its role as the decisive criterion in discrimination cases and its vagueness subject employers to the real fear that almost anything could create a hostile work environment. An “enlightened” concept has led to a bad combination, both chilling life and engendering unpredictability.

The mixing of administrative and criminal law approaches leads to legal overreach through the blurring of any distinction between auditing and prosecuting. If the public eye rarely grants the presumption of innocence, even less prone to do so is the body of administrative auditors. The excessive use of administratively imposed and often very substantial sanctions gives the enforcement of administrative law a quasi-criminal character and insulates low-level decision-makers from the oversight of their hierarchical superiors; the bureaucrats’ tyranny persists because higher-ups do not want to be seen as interfering with “enforcement actions.”

Ironically, hierarchical controls also break down because of the opposite—the politicization of public administration. Think, for instance, of the influence of congressional staffers, representing a powerful committee chair, on mid-level executive branch activities. Much of the time our government, where, in Paine’s words, the law is king, does not act by majority rule. Our system of checks and balances has become so extreme and byzantine that political accountability is difficult to obtain. The most important measure of a democracy is whether you can “throw the rascals out.” In order to do that you have to know who the rascals are, and we, as voters, often have no clue.

Finally, the fact of the matter is we have no efficient and cheap recourse for those who suffer at the hands of public authority. Indeed, our judicial process is neither timely nor affordable for almost anybody. We have an independent judiciary, to be sure, but that judiciary feels little responsibility for systemic excesses. Recently, a single lawsuit over tenure, for a three-month period took ten percent of my regular working hours in depositions, preparation for depositions, and review of deposition transcripts. All the underlying events took place in 1988, four years before I even arrived at Stanford. The case was in state court, and California allows depositions to be the contemporary equivalent of torture as a means for getting evidence.

As I said, in Britain and on the European continent, cost shifting to the losing party is considered a fundamental requirement of justice. The absence of cost shifting in the United States leaves many of us with the unhappy choice between ruining ourselves in vindicating our rights or paying off a plaintiff because spending inordinate amounts of money on lawyers seems a poor use of resources, especially if the resources are those of a philanthropic institution, such as a university. Legal costs overall are staggering, and the only explanation I can see for our not yet having broken down under them is the fact that we are such a rich country and are accustomed to so much waste.

IV

So, what do I really think? Since the 18th century, we have seen extraordinary growth in personal freedom, formal and substantive equality, societal and, in many instances, personal wealth. While welfare systems have not succeeded in eliminating poverty, they represent at least an acknowledgment of the obligation to moderate poverty. Apart from poverty, stark differences between the haves and the have-nots remain—and indeed, in the United States, are worrisomely on the increase. Yet, at least equality of opportunity, not infrequently, is more than a mere aspiration.

When I say “personal freedom,” I mean, of course, political freedom, as found in the protection given freedom of speech or in the enforcement of voting rights. However, I also refer to the freedom to fashion your life, to choose the people with whom you want to spend your life, personal mobility. By comparison with 18th-century Prussia, but also 18th-century Massachusetts or Virginia, no personal status limits the freedom to develop one’s personality. The commodification of life seems to favor much shallowness and disconnectedness, but questions concerning the quality of life are rather complex and answers all too easily marked by prejudice.

If there is so much to admire, why am I somber? I have suggested some of the reasons through the illustrations and conclusions I provided earlier. The question that constitutes my title poses the rule of law and enlightened absolutism as alternatives. In reality, we have them both: not as parallel phenomena but in an unholy alliance where the law becomes the often contradictory, creeping, undisciplined, even chaotic, and definitely expensive means for the implementation of absolutist visions of the world.

Ideologies are not dead. All-embracing ones have become rarer for the time being, but ideological politics are very much alive. In the legal system, they find their expression in ideological law firms of the left or right, mostly masquerading as “foundations.” Edward Shils defined ideological politics as based on the assumption “that politics should be conducted from the standpoint of a coherent, comprehensive set of beliefs which must override every other consideration.”⁵⁹ If we omit the attributes “coherent” and “comprehensive,” the definition can still serve to capture what in the vernacular has come to be called “single-issue politics.” These are frequently not interest-group politics that allow for political compromise, but belief-driven politics that are taken to override every other consideration. Compromise is viewed as compromise with evil, compromise with sin and therefore unacceptable.⁶⁰

In the United States, the organizational skills of belief-driven politics often result in politicians providing immediate satisfaction to sectional ends⁶¹ through the passing of a law, mostly vague and ill-thought through, with complete disregard for the systemic consequences. In some states, such as California, we have the added problem of an increasingly populist electorate that has abandoned a basic commitment to representative government and, instead, rules by referenda. A multitude of causes with “zero tolerance” for this, that, or something else, have captured law for their ends and do not allow for discretion, common sense, balancing, proportionality, judgment. “Enlightened absolutism” is not dead, it has simply become pluralistic.

Though I do believe that my profession, the legal profession (including the law schools), has been woefully unmindful of the systemic consequences of what legislatures, administrations, courts, and lawyers are doing, and that a call for careful and thorough reengineering of the legal system is overdue, it is also the case that our political system has encouraged absolutism, including pluralistic absolutism, to capture the law. Frederick II of Prussia may have believed that reason can prescribe virtue. A democratic pluralistic polity cannot be self-confident in that respect.

Let me conclude by quoting the same author with whom I began, Edward Shils: “Above all, civil politics require an understanding of the complexity of virtue, that no virtue stands alone, that every virtuous act costs something in terms of other virtuous acts, that virtues are intertwined with evils, and that no theoretical system of a hierarchy of virtues is ever realizable in practice.”⁶² Unless our politics becomes more modest, more responsible, more understanding of the costs of virtuous policies in terms of other virtuous policies, our legal system will continue to grow even more expensive, more unruly, and more despotic.

* A somewhat different version of this lecture was delivered at the University of San Diego in 1999.

¹ EDWARD SHILS, *THE VIRTUE OF CIVILITY* 21 (Steven Grosby ed. 1997).

² Abraham Lincoln, *Speech at Chicago, Illinois*, in *SPEECHES AND WRITINGS: 1832-1858*, at 456 (1989).

³ Ramon G. McLeod, *Immigration Top Factor in '90s Growth*, S.F. CHRON., Jan. 9, 1999, at A2.

⁴ *Id.*

⁵ Charles L. Black, Jr., "And Our Posterity", 102 YALE L.J. 1527, 1527 (1993).

⁶ E. J. HOBBSAWM, *THE AGE OF EXTREMES: THE SHORT TWENTIETH CENTURY, 1914-1991* (1994).

⁷ Thomas Paine, *Common Sense*, in 1 *THE POLITICAL AND MISCELLANEOUS WORKS OF THOMAS PAINE* 32 (1819).

⁸ MACK WALKER, *GERMAN HOME TOWNS: COMMUNITY, STATE, AND GENERAL ESTATE 1648-1871*, at 160 (1971).

⁹ ALLGEMEINES LANDRECHT FÜR DIE PREUßISCHEN STAATEN VON 1794 (Dr. Hans Hattenhauer ed. 1970) [hereinafter PRUSSIAN CODE].

¹⁰ *Id.*

¹¹ HANS ROSENBERG, *BUREAUCRACY, ARISTOCRACY, AND AUTOCRACY: THE PRUSSIAN EXPERIENCE 1660-1815*, at 48.

¹² PRUSSIAN CODE, *supra* note 9.

¹³ See PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE* 25 (1994). See, e.g., Agency Responsibilities, Organization, and Terminology for the Department of Agriculture, 63 Fed. Reg. 72,352 (1998).

¹⁴ HOWARD, *supra* note 13.

¹⁵ Sabin Russell, *S.F. Braces for Possible Lawsuit by Archdiocese*, S.F. CHRON., Jan. 13, 1999, at A17.

¹⁶ HEALTH COMMISSION, CITY AND COUNTY OF SAN FRANCISCO, RESOLUTION NO. 9-99, AMENDING THE DEPARTMENT OF PUBLIC HEALTH'S POLICY DIRECTIVE #24, ETHNICITY AND GENDER OF STAFF AND BOARD OF DIRECTORS; AND RENAMING THE POLICY TO: CONTRACTORS' COMPLIANCE WITH ANTIDISCRIMINATION PROTECTIONS AND CULTURAL COMPETENCY (1999).

¹⁷ Sarah Lueck, *No Home Workers Have Complained to OSHA on Safety*, WALL ST. J., Jan. 10, 2000, at A6.

¹⁸ ROBERT MUSIL, 1 *THE MAN WITHOUT QUALITIES* 247.

¹⁹ J. Madison, *The Debates in the Convention of the Commonwealth of Virginia on Adoption of the Federal Constitution* (June 6, 1788), reprinted in 3 J. ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 87 (1836). (Elliot erroneously lists the date of Madison's address as June 16, 1788).

²⁰ See Robert Pear, *U.S. Is Asking for Patients' Help In Fight Against Medicare Fraud*, N.Y. TIMES, Feb. 21, 1999, at A1; Nancy W. Dickey, *Government to Grandpa: Rat Out Your Doctor*, WALL ST. J., Feb. 24, 1999, at A18.

²¹ Bob Herbert, *In America: Day of Humiliation*, N.Y. TIMES, Mar. 8, 1998, § 4, at 17.

²² Joel Berger, *The Police Misconduct We Never See*, N.Y. TIMES, Feb. 9, 1999, at A1.

²³ AMNESTY INTERNATIONAL, REPORT 1997 (1997).

²⁴ See JEWELLE TAYLOR GIBBS, *RACE AND JUSTICE: RODNEY KING AND O.J. SIMPSON IN A HOUSE DIVIDED* (1996).

²⁵ Nathaniel L. Nathanson, Book Review, 64 CRIMINAL LAW & CRIMINOLOGY 130, 131 (1973) (reviewing LOIS FORER, *NO ONE WILL LISSIN: HOW OUR LEGAL SYSTEM BRUTALIZES THE YOUTHFUL POOR* (1970)).

²⁶ *Jailed Migrants Hold Hunger Strike*, SAN DIEGO UNION & TRIBUNE, Nov. 24, 1998, at A3; Andrew Blankstein, *Detention Center Locked Down, Hunger Strikers Ill*, L.A. TIMES, Nov. 23, 1998, at B2.

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- ²⁷ Anthony Lewis, *Abroad at Home: Is This America?*, N.Y. TIMES, Aug. 18, 1997, at A19.
- ²⁸ Anthony Lewis, *Abroad at Home: End of a Dream*, N.Y. TIMES, Aug. 29, 1997, at A23; Anthony Lewis, *Abroad at Home: The Trial*, N.Y. TIMES, Nov. 10, 1998, at A29; E-mail correspondence from Anthony Lewis, *The New York Times*, to Robert Hur, Research Assistant to President Casper (Oct. 20, 1999) (on file with author).
- ²⁹ Michael Gaynor, *Why They Barred Wiretaps*, LEGAL TIMES, Nov. 9, 1998, at 31.
- ³⁰ *Judge Postpones Tripp's Trial*, BALTIMORE SUN, Dec. 24, 1999, at 3B.
- ³¹ Daniel H. Pollitt, *Essay: Sex in the Oval Office and Cover-Up Under Oath: Impeachable Offense?* 77 N.C.L. REV. 259, n.2, citing Md. Code Ann., Cts. & Jud. Proc. 10-402 (Supp. 1997), Va. Code Ann. 19.2-62(B)(2) (Michie 1995) (providing an exception to wiretapping prohibitions when at least one party consents).
- ³² RICHARD A. POSNER, AN AFFAIR OF STATE 61 (1999).
- ³³ *Id.* at 70.
- ³⁴ *Id.*
- ³⁵ Sam Skolnik, *The Year of the Prosecutor*, LEGAL TIMES, Dec. 21, 1998, at 8.
- ³⁶ Richard Lacayo, *Turning Up The Heat*, TIME, Feb. 23, 1998, at 32.
- ³⁷ Nick Bravin, *Is Morrison v. Olson Still Good Law? The Court's New Appointments Clause Jurisprudence*, 98 COLUM. L. REV. 1103 (1998); Anthony Lewis, *Abroad at Home: Sense of Proportion*, N.Y. TIMES, Apr. 20, 1998, at A19.
- ³⁸ Skolnik, *supra* note 35
- ³⁹ POSNER, *supra* note 24, at 69. See also Stuart Taylor, Jr., *Must a Parent Testify*, NEWSWEEK, Feb. 23, 1998, at 33 (opining that Starr's tactics were not outside the bounds of common prosecutorial practice).
- ⁴⁰ POSNER, *supra* note 24, at 76.
- ⁴¹ Lewis, *supra* note 37.
- ⁴² *Caught in the Web*, NEWSWEEK, Aug. 31, 1998, at 34.
- ⁴³ POSNER, *supra* note 32, at 72.
- ⁴⁴ *Id.*
- ⁴⁵ Skolnik, *supra* note 35.
- ⁴⁶ Kathleen Sullivan, *The Good That Lawyers Do*, THE COMMONWEALTH, Aug. 23, 1999.
- ⁴⁷ See *McNeily v. United States*, 6 F.3d 343 (5th Cir. 1993); *Berger v. Pierce*, 933 F.2d 393 (6th Cir. 1991), *on remand* 771 F. Supp. 865 (N.D. Ohio 1991), *rev'd on other grounds* 983 F.2d 1065 (6th Cir. 1992) (mem. Not recommended for publication) (on remand, district court ordered to hold hearing as to whether Rule 11 sanctions should be applied in case involving Section 1962(d) claim against the federal government), *cited in* THE HON. JED S. RAKOFF AND HOWARD W. GOLDSTEIN, RICO: CIVIL AND CRIMINAL LAW AND STRATEGY 1-19 (1998).
- ⁴⁸ See *Chow v. Giordano*, No. 93-56162 1994 U.S. App. LEXIS 11048 (9th Cir. May 16, 1994), *cited in* RAKOFF AND GOLDSTEIN, *supra* note 47, at 1-19.
- ⁴⁹ Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922-23.
- ⁵⁰ 18 U.S.C. § 1964(c) (1994).
- ⁵¹ Rehnquist, *Reforming Diversity Jurisdiction and Civil RICO*, 21 ST. MARY'S L.J. 5, 9 (1989) (originally presented at the Brookings Institution's Eleventh Seminar on the Administration of Justice, Apr. 7, 1989).
- ⁵² See *Illinois Dep't of Revenue v. Phillips*, 771 F.2d 312, 317 (7th Cir. 1985) (holding that state tax agency may maintain civil RICO action against retailer who filed fraudulent state sales tax returns); *United States v. Aleman*, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 445 U.S. 944 (1979) (applying RICO to burglaries in two states by non-organized crime defendants); *National Organization for Women, Inc., v. Scheidler*, 510 U.S. 249 (using RICO against abortion protesters); *Northeast Women's Cent., Inc., v. McMonagle*, 868 F.2d 1342, 1345 (3d Cir. 1989) (using RICO against abortion protesters).

⁵³ See, e.g., *United States v. Neapolitan*, 791 F.2d 489, 502 (7th Cir. 1986) (affirming conviction of RICO conspiracy by using circumstantial evidence of defendants' association with the enterprise's activities to establish that they agreed that those other enterprise patterns of crime occur). See also Jeremy M. Miller, *RICO and Conspiracy Construction: The Mischief of the Economic Model*, 104 COM. L.J. 26, 31 (describing "a real and felt concern that RICO's 'enterprise,' combined with conspiracy and the RICO (statutory) construction clause . . . had diluted the time-honored, common-law principles of actus reus and the limited breadth of inchoate offenses—that is, RICO's liberal construction and 'conspiracy to form a criminal enterprise' had perilously approached a full-fledged due process violation."); Brian M. Molinari, *Conspiracy Theory: The RICO Predicate Act Requirement for Wrongful Discharge Cases Brought Under 18 U.S.C. 1962(d)*, 31 SUFFOLK U. L. REV. 481, 493 ("A conspiracy to commit the other RICO violations may occur absent the actual commission of the other violations or the racketeering activities that underpin them . . . Either racketeering activity or classic overt conspiracy acts may qualify as "predicate acts" to a RICO violation that causes injury."); G. Robert Blakey & Kevin P. Roddy, *Reflections on *Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO**, 33 AM. CRIM. L. REV. 1345, 1447 ("Under the statute, it is irrelevant that each defendant participated in the enterprise's affairs through different, even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise's affairs.").

⁵⁴ To obtain a better understanding of RICO issues, I have consulted my colleague Professor Robert Weisberg.

⁵⁵ 18 U.S.C. § 1963(a).

⁵⁶ Robert H. Bork, *Tobacco Suit is Latest Abuse of the Rule of Law*, WALL ST. J., Sept. 23, 1999, at A22.

⁵⁷ See, e.g., *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 191 (1983) (holding that "Congress has preserved the dual regulation of nuclear-powered electricity generation: the federal government maintains complete control of the safety and "nuclear" aspects of energy generation; the states exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like.")

⁵⁸ See Sean Hamer, *Lincoln's Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act*, 6-WTR KAN. J.L. & PUB. POL'Y 89 (1997) (discussing constitutional and policy arguments surrounding qui tam actions from False Claims Act); James T. Blanch, *The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 HARV. J.L. & PUB. POL'Y 701 (1993) (same); Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341 (discussing constitutionality of qui tam actions in general).

⁵⁹ SHILS, *supra* note 1, at 25-26.

⁶⁰ *Id.* at 52.

⁶¹ See *id.* at 51.

⁶² *Id.* at 52.