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.[1] However, he went on to say that his outlook on society became more somber over time.[2] It is much too easy to make dark prophecies, indeed. I emigrated to the United States in 1964. Over these decades our country, in a myriad of ways, has become a better place than it was at that time. However, today is not the Fourth of July and we, especially the lawyers among us, have many reasons to be somber. I would 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, it is nevertheless appropriate to invoke Abraham Lincoln's explication of the meaning of Independence Day when referring to the United States. In 1858, in his senatorial campaign against Stephen A. Douglas, Lincoln estimated that about half of the United States population had its origins not in Great Britain, but rather that they or their ancestors came from "Europe"—he referred to the Germans,

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

Irish, French, and Scandinavians.[3] 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."[4]

Earlier, Lincoln referred to the fact that the United States had become "a mighty nation" with a population of about thirty million.[5] Less than a century and a half later, the head count is 274 million. Twenty-four percent of the present population of California is foreign-born.[6] If we add to that percentage those born in the United States to immigrant mothers, one-third of the state's population has intimate links to other countries and cultures.[7] Since I moved to the United States from Germany thirty-six 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 day. He chose the slightly overlapping lives of three former presidents: James Madison, Benjamin Harrison, and Dwight Eisenhower.[8] While obviously you could make a similar calculation for any country, there is no country in the world, and I

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

4. *Id.* at 456.

5. *Id.*

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

7. *Id.*

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

include Britain in this comparison, where those three lives would cover as much apparent constitutional and institutional continuity.

By contrast, for instance with France and Germany, our 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 eighteenth century daily are 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, 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, multi-racial, multi-ethnic society within an eighteenth century republican, democratic, federal constitutional structure that, but for the Civil War Amendments, remains formally unchanged.

My second reference point, the "end of the American century," obviously is my escape from the ceaseless talk about the twenty-first 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 we can actually make verifiable statements about it.

The British historian Eric Hobsbawm has called his book on the twentieth century *The Age of Extremes*.[9] He also considers the twentieth century the "short" century and dates it from 1914 to 1991.[10] 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 twenty-first century. Having said that, it is convenient to divide up the past. Politically, this has been the century of the first World War, the Russian Revolution, the Stalinist evils, the horrors perpetrated by Nazi Germany and the second World War that was followed by the third, "cold" world war. The second half of this century 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 playing key roles. In the second half of the

9. E.J. HOBSBAWM, THE AGE OF EXTREMES: THE SHORT TWENTIETH CENTURY 1914-91 (1994).

10. *Id.*

twentieth century, Western European nations joined together in ways that are breathtaking if seen against the history of the outgoing millennium. Finally, the Soviet Union and its dominance over Central and Eastern Europe fell with the Berlin Wall.

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," both cultural and material, embraced abroad. To a large extent, the twentieth century has been the "American century." 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 only 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 with the accomplishments of our legal system? Is the United States' legal system something we should want to export? Thus, I now 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 often bandied about as identifying what is missing in many countries, such as China, without anybody bothering much 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 the Magna Carta. In the American context, Thomas Paine contrasted it succinctly with absolutism. In America, he wrote, the law is king.[11] "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."[12]

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, I think

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

12. *Id.*

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 the abuse of power, an independent judiciary and equality before the law. Of course, none of these components 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 eighteenth 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 administered by a civil service so that the messy phenomena of life could be made to fit the Code.[13] The final result was a comprehensive effort to clearly define the subject's rights (and, of course, obligations) in all stations of life, public and private, from the cradle to the grave.

The Prussian Code included a title headed "of the rights and Duties of the State in general."[14] It postulated that these rights and duties were united in the monarch, who maintained external and internal peace and security, but who also protected the individual in "his own."[15] It was the state's task to provide the inhabitants with the means and opportunity to develop their abilities and strengths so that they might apply those skills to further their fortunes. This potentially far-reaching conception of the state led to the creation of a cadre of administrators subject to "general norms and prescribed procedures and committed to impersonal efficiency."[16]

The Prussian Code contained the astounding number of over 17,000 articles covering public and private law. Frederick himself thought it was much too long. It contained, of course, provisions about marriage and even detailed when partners were excused from the performance of their marital duties (for instance, when away on

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

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

15. *Eg., id.*

16. HANS ROSENBERG, BUREAUCRACY, ARISTOCRACY, AND AUTOCRACY: THE PRUSSIAN EXPERIENCE 1660-1815, 48 (1966).

government business). Even more comprehensive detail could be found in the 104 provisions dealing with the legal consequences of extra-marital intercourse, and others that dealt with sexual harassment of household employees. The Prussian 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, were motivated by "animosity, private passions or other ulterior purposes."[17]

The comprehensiveness of this regulatory effort should not seem overly foreign to us, for the Prussian Code does find a counterpart in the American legal system at *fin de siècle*, as we, too, try to make the messy phenomena of life fit the law. Indeed, Prussia pales by comparison when it comes to the all-encompassing breadth and depth that reaches the picayune; and it keeps getting 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.[18] That is about 200 pages a day, including 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 been ostensibly committed to deregulation. The results are mostly pitiful. Furthermore, the Prussian Code had one 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 resembled daily life. What our system produces is mostly incomprehensible to everyone, including lawyers.

I am going to spare you a litany of contemporary regulatory excesses and absurdities. Philip K. Howard did a good job of that in his 1994 book *The Death of Common Sense—How Law is Suffocating America*.[19] I will, however, give you just two up-to-date illustrations of latter day enlightened absolutism. The City of San Francisco, one

17. PRUSSIAN CODE, *supra* note 14.

18. *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).

19. HOWARD, *supra* note 18.

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.[20] Health Commission Policy number twenty-four stated, in captivating English, that a "contractor's ethnicity, gender identification, and sexual orientation composition is to be representative of the clients served."[21] The commission canceled a contract with the Catholic Youth Organization, which ran mental health services for troubled children, because the group would not comply with the disclosure policy.[22] This is an example of enlightened absolutism because of its 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 anti-discrimination protections" and—run for cover—"cultural competence."[23]

The second example is the Department of Labor's recent breathtaking proposal to extend the reach of workplace health and safety regulations into the homes of telecommuters. The Occupational Safety and Health Administration (OSHA) had not received a single complaint from home office workers at the time it posted its advisory letter, which has since been withdrawn. We are now going to have a "national dialogue" on the matter.[24] The dialogue will undoubtedly be followed by some form of government regulation. In the interest of comprehensiveness we regulate even if there is no discernible problem or if the costs to other important values outweigh the regulatory gain. The great twentieth century writer Robert Musil 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."[25]

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

21. *Id*.

22. *Id*.

23. HEALTH COMMISSION, CITY AND COUNTY OF SAN FRANCISCO, RES. 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).

24. Sarah Lueck, *Home Workers Didn't File Any OSHA Protests*, WALL ST. J., Jan. 10, 2000, at A6.

25. ROBERT MUSIL, THE MAN WITHOUT QUALITIES 247 (Eithne Wilkins & Ernst Kaiser,

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 and associational and religious freedoms. Can a society that systematically obliterates the distinction between the public and the private realms be free and civilized 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 both the ordinary and legal meanings of the word, thus chilling the very privacy and personal autonomy that is one of the great accomplishments and results of modernity, especially in its American version.

The pursuit of 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 the potential that government officials implementing syllogistic interpretations of the mandates of enlightened government will end up 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."[26] Surely one of the most astounding recent news items 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.[27] The United States'

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trans., Coward-McCann 1953).

26. 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).

27. *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.

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 battling the "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 today is not what constitutes a just society, but a much more limited examination of some aspects of our performance as a legal system, or the rule of law, in a narrower sense. Even so, I will choose just a few illustrations from a few areas of the law, some ordinary and some remote, to make a larger point: that our performance is often mindless and frequently disproportionate and at times, even cruel. Achievements in our legal system are no excuse for our considerable shortcomings. My primary point is not that "law suffocates America" (although, it does), but that our performance, under the rule of law, is often lacking. Our performance too often displays an insufficient exercise of discretion on the part of government actors, and an insufficient 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 example is taken from a column by Bob Herbert of *The New York Times*.[28] 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.[29] Before the mistake was realized, he was dragged naked into a fourth-floor hallway and his hands were cuffed behind his back.[30] He was repeatedly addressed as "nigger" and "black mother-so-and-so."[31] When he begged for clothes, the police first said that, as a mere animal, he did not deserve

28. Bob Herbert, *In America: Day of Humiliation*, N.Y. TIMES, Mar. 8, 1998, at 17.
29. *Id.*
30. *Id.*
31. *Id.*

any and then, finally, gave him some of his girlfriend's clothes to wear.[32] Dressed in women's clothing, he was taken out on the street in front of a crowd of onlookers.[33] At the precinct station, Mr. Elliot's humiliation continued. He was put in a cell and left for several hours, in women's clothing, and with wrists cuffed behind his back for part of the time.[34] At about 1:00 a.m. the following day when the investigators learned of their mistake, they released him.[35] Later, Mr. Elliot returned to his apartment only to find police officers lounging in his living room, eating snacks and watching television.[36] Amused, one of them suggested that Mr. Elliot find a good lawyer and "sue the hell out of them."[37] Is this what we mean by the rule of law? Is this what the war on drugs justifies?

My illustration is not the worst that I could have chosen: Ellis Elliot is alive. In the fiscal year of 1998, 2,266 claims of police misconduct were filed in New York City,[38] continuing disturbing trends that led Amnesty International to call for an independent inquiry of New York police practices in 1997.[39] Unfortunately, New York City is not 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.[40]

Decades ago, Nat Nathanson invoked the adage that the sternest test of a civilization is provided by the humaneness of its criminal process.[41] 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* told a number of stories emanating from the Immigration and Naturalization Service's implementation of the

32. *Id*.
33. Herbert, *supra* note 28.
34. *Id*.
35. *Id*.
36. *Id*.
37. *Id*.
38. Joel Berger, *The Police Misconduct We Never* See, N.Y. TIMES, Feb. 9, 1999, at A1.
39. AMNESTY INTERNATIONAL, REPORT 1997 (1997).
40. *See* JEWELLE TAYLOR GIBBS, RACE AND JUSTICE: RODNEY KING AND O.J. SIMPSON IN A HOUSE DIVIDED (1996).
41. Nathaniel L. Nathanson, 64 CRIMINAL LAW & CRIMINOLOGY 130, 131 (1973) (reviewing LOIS FORER, NO ONE WILL LISSEN: HOW OUR LEGAL SYSTEM BRUTALIZES THE YOUTHFUL POOR (1970)).

Illegal Immigration Reform and Immigrant Responsibility Act of 1996.[42] The Act was signed by the president and enforced by the executive branch with mindlessness and cruelty. Some of the detention centers and jails used by the INS to hold detainees before deportation are so overcrowded that conditions have led to hunger strikes.[43] The following stories, told by Anthony Lewis, do not involve criminals, or even suspects, but rather people like you and me.

John Psaropulous, a British subject and a native of Greece, was a television journalist working for CNN. He 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.[44] 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 with a five-year-ban on returning to the United States.[45] After things had cleared up, he was issued a new visa by our embassy in Athens, and, once again, he arrived in Atlanta and was forced back to Greece.[46] Authorities then reversed themselves yet again and issued Mr. Psaropulous another visa.[47] However, "the real wrongs" in Mr. Psaropulous's 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 ban from this country because of an innocent mistake."[48] 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 returning again and again.

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42. 8 U.S.C. § 1221, *et seq.* (2000).

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

44. Anthony Lewis, *Abroad at Home: Is This America?*, N.Y. TIMES, Aug. 18, 1997, at A19.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

In another similar story, Martina Thompson, a German citizen, married an American and came to the United States on a visitor visa.[49] As the law allows, Ms. Thompson applied for status adjustment as a permanent resident.[50] While her application was pending, the young couple returned to Germany to visit her parents, but before doing so asked the New Orleans office of the INS whether she could leave and then subsequently return.[51] They were wrongly told that she could.[52] Shortly after her return to New Orleans, Ms. Thompson was arrested and jailed.[53] She was thrown into one of the most degraded prisons in the country, New Orleans Parish prison.[54] Moreover, Ms. Thompson was held in jail for eight days and her husband was not allowed to visit her.[55] She was later handcuffed, taken to the airport, chained to a seat, and flown back to Germany under guard.[56] More than a year later, the State Department had refused Ms. Thompson's application for an immigration visa because, under the regulations, the State Department required three years of business tax returns from her husband, who is in the construction business but had been in business for only eighteen months.[57] Fortunately, this story did end happily; after further anguish, the U.S. Consulate in Frankfurt issued an immigrant visa to Ms. Thompson last winter.[58] She reached her new home in Louisiana some time in May.[59] Is this the rule of law in all its majesty? Is this what the war against illegal immigration justifies?

I now turn to territory 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 concern. I am concerned with how others were affected by the events

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49. Anthony Lewis, *Abroad at Home: End of a Dream*, N.Y. TIMES, Aug. 29, 1997, at A23.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. Lewis, *supra* note 49.
55. *Id.*
56. *Id.*
57. Anthony Lewis, *Abroad at Home: The Trial*, N.Y. TIMES, Nov. 10, 1998, at A29.
58. E-mail from Anthony Lewis, *The New York Times*, to Robert Hur, Research Assistant to President Casper (Oct. 20, 1999) (on file with author).
59. *Id.*

that 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. Ms. Tripp taped these telephone conversations without Ms. Lewinsky's knowledge. Maryland, where Ms. Tripp lives, apparently does not permit such tapings.[60] Ms. Tripp has been indicted on two counts of violating Maryland's wiretapping law and is scheduled to stand trial in July.[61] Ms. Tripp surrendered copies of the tapes to the lawyers for Paula Jones, who was suing the President for sexual harassment. Ms. Tripp also told 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.[62]

Putting legal issues to one side, we are so ready to shrug our shoulders that the rankness of all of these events hardly sinks in anymore. Why should we assume it was acceptable for private litigators to make use of tapes obtained surreptitiously; to employ an old metaphor, "fruit of the poisonous tree?" Without more, how can it be acceptable for a government prosecutor 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, it is admissible in federal proceedings.[63] He also opines that Starr behaved in a manner similar to any responsible independent counsel, stating that "[w]here there is smoke, there is usually fire."[64] I disagree with Judge Posner's answer to the question that we so rarely ask these

60. Michael Gaynor, *Why They Barred Wiretaps*, LEGAL TIMES, Nov. 9, 1998, at 31.

61. *Judge Postpones Tripp's Trial*, BALTIMORE SUN, Dec. 24, 1999, at 3B.

62. Daniel H. Pollitt, *Essay: Sex in the Oval Office and Cover-Up Under Oath: Impeachable Offense?* 77 N.C.L. REV. 259, 259-60 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).

63. RICHARD A. POSNER, AN AFFAIR OF STATE 61 (1999).

64. *Id.* at 70.

days, which is whether certain practices, even if legal, are *good* practices in a civilized society.

It is one of the most frequent and greatest conceits encountered in present-day legal America to assume that if you *can* do something you *should* do it, demonstrating a rather perverse reading of the understanding that the United States is a land of unlimited possibilities. We have abdicated the delineation of the 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."[65] However, citizens and governments must constantly re-evaluate the balance between laxity and zeal, because 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. It seems to be established that they hindered her, or at least discouraged her, from calling her lawyer, and that they tried to obtain an immunity agreement by conjuring up the specter of long jail sentences and threatening to prosecute her mother.[66] In fact, the independent counsel's office did bring Lewinsky's mother before the grand jury, questioning her for over two days. A *Time*'s article states that "[t]hough 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."[67] The independent counsel even subpoenaed records of Lewinsky's book purchases from Washington bookstores.[68] Starr's spokesman, Charles Bakaly III, said of his office's conduct: "However unpleasant these techniques, they are part of what federal prosecutors do."[69] Some commentators agree. Judge Posner believes that Starr used "typical hardball prosecutorial

65. *Id*.

66. Sam Skolnik, *The Year of the Prosecutor*, LEGAL TIMES, Dec. 21, 1998, at 8.

67. Richard Lacayo, *Turning Up The Heat*, TIME, Feb. 23, 1998, at 32.

68. 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.

69. Skolnik, *supra* note 66.

methods"[70] that at most could be deemed harmless error.[71] 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 could there be than this comparison of the need to discover the reading lists of mass murders and Monica Lewinsky?[72]

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 as a result.[73] It is true that 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."[74] Moreover, those who were not targets of the independent counsel's investigation ostensibly had no reason to hire lawyers.[75] On the other hand, 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 dollar, 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."[76] Mr. Smaltz is correct. If a U.S. attorney decided to go after you tomorrow, 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, under the American rule, if I was sued

70. POSNER, *supra* note 63, 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).

71. POSNER, *supra* note 63, at 76.

72. Lewis, *supra* note 68.

73. *Caught in the Web*, NEWSWEEK, Aug. 31, 1998, at 34.

74. POSNER, *supra* note 63, at 72.

75. *Id.*

76. Skolnik, *supra* note 66.

tomorrow in a civil case and won, the losing party ordinarily would be under no obligation to reimburse my expenses. This is why corporations and institutions, such as universities, settle so many lawsuits. In other words, it is often cheaper to pay the plaintiff than to pay for your own lawyers. If I had the authority to make one change in the American legal system, I would introduce the British rule of cost shifting, despite the frequently made point that such a rule might deter and starve a great many worthy suits.[77] Yes, there is a price to pay. European countries consider the "loser pays" rule a basic requirement of justice and fairness. The poor are aided by legal services to litigate their claims and by other protections.

To address a different problem set, I shall analyze the Racketeer Influenced and Corrupt Organizations Act of 1970.[78] The issue is an old one. A statute is enacted for a limited purpose, but its vagueness permits innovative lawyers to push the limits of its application. It is difficult to believe that various federal courts of appeals had to decide that RICO claims cannot be brought against the federal government,[79] and that the question of whether the Internal Revenue Service is a racketeering enterprise cannot be answered because of sovereign immunity.[80]

According to its statement of findings and purposes,[81] RICO was meant to provide more effective ways of fighting organized crime, including requiring the payment of treble damages for private attorneys general.[82] Instead, as Chief Justice Rehnquist states, "[m]ost of the civil suits filed under the statute have nothing to do with

77. Kathleen Sullivan, Speech at The Commonwealth Club of California (June 9, 1999) *in The Good That Lawyers Do*, THE COMMONWEALTH (The Commonwealth Club of California, San Francisco, Ca.), Aug. 23, 1999, at 2-5.

78. 18 U.S.C. §§ 1961-1968 (1994).

79. *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) (on remand, the district court was ordered to hold a hearing as to whether Rule 11 sanctions should be applied in a case involving Section 1962(d) claims against the federal government), *cited in* THE HON. JED S. RAKOFF AND HOWARD W. GOLDSTEIN, RICO: CIVIL AND CRIMINAL LAW AND STRATEGY 1-19 (1999).

80. *See* Chow v. Giordano, No. 93-56162, 1994 U.S. App. LEXIS 11048 (9th Cir. May 16, 1994), *cited in* RAKOFF & GOLDSTEIN, *supra* note 79, at 1-19.

81. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 922-23 (1970).

82. 18 U.S.C. § 1964(c) (1994).

organized crime. They are garden-variety civil fraud cases of the type traditionally litigated in state courts."[83] 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 and even to claims against abortion protesters.[84] RICO has given rise to yet another litigation racket.

However, my main concern is what the vagueness of the statute says about our legal culture. A defendant violates RICO by participating in the conduct of an enterprise through a pattern of racketeering.[85] Any entity can be an "enterprise" for RICO purposes and a "pattern" is fairly easily established by showing at least two crimes or a conspiracy to commit at least two crimes.[86] 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 and stretches the concept to new extremes. To be liable under RICO, the conspirator-to-racketeer does not need to personally agree 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 other crimes of the enterprise to have implicitly "agreed" or consented to their commission.[87]

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83. William H. 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).

84. *See* Illinois Dep't of Revenue v. Phillips, 771 F.2d 312, 317 (7th Cir. 1985) (holding that the state tax agency may maintain a civil RICO action against a retailer who filed fraudulent state sales tax returns); United States v. Aleman, 609 F.2d 298 (7th Cir. 1979) (applying RICO to burglaries in two states by non-organized crime defendants); National Org. 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).

85. 18 U.S.C. § 1962(C) (1994).

86. 18 U.S.C. § 1961(4)-(5) (1994).

87. *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 agreement that other 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 (Spring, 1999). The author describes:

Additionally, his liability extends to *all* the crimes of the enterprise. If this is not "Alice in Wonderland," what is?[88] 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.[89]

The ease with which public or private prosecutors may seize upon the breadth of the statute 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, and 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 Eighteenth Amendment.[90]

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 the harm done. The federal government has long known about the health risks associated with smoking; nevertheless, it permitted the sale of

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> 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.

Id. See also 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 (1997) ("A conspiracy to commit the other RICO violations may occur absent the actual commission of those violations or the racketeering activities that underpin them . . . [E]ither racketeering activity or classic overt conspiracy acts may qualify as "predicate acts" to a RICO violation that causes injury.") (quoting Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1169 (3d Cir. 1989)); 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 (1996) ("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.") (quoting United States v. Elliot, 571 F.2d 880, 902-03 (5th Cir 1978)).

88. Memorandum from Robert Weisberg, Stanford Law Professor (on file with author).

89. 18 U.S.C. § 1963(a) (1988).

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

tobacco products and profited enormously from taxing such sales. The ranks of the racketeers logically include the party who regulated and taxed tobacco (or protected it, at the behest of Senators from tobacco growing states). It requires extraordinary "chutzpah" to bring a RICO suit while mindful of this history. 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 campus representative for the Office of Naval Research, filed a *qui tam* suit under the so-called False Claims Act against the University that alleged overbilling of the government.[91] 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 U.S. 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."[92]

The settlement required Stanford to pay the government an additional $1.2 million as an adjustment for the years 1981 through 1992 and to 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.

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91. GERHARD CASPER, STANFORD UNIVERSITY, CARES OF THE UNIVERSITY: FIVE-YEAR REPORT TO THE BOARD OF TRUSTEES AND THE ACADEMIC COUNCIL OF STANFORD UNIVERSITY 37, 37-39 (1999), *available at* http://www.Stanford.edu/home/standford/cares.

92. *Id.*

This case, however, was not normal. Not one sponsored research dispute at any university, including Stanford, has ever received as much attention and scrutiny as indirect costs at Stanford. As the public controversy developed, the inquiry caused much pain, distress, and expense. Between 1991 and 1994, Stanford spent twenty-seven million dollars on accountants, auditors and consultants to address issues raised by federal government auditors.[93] 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, such errors were wholly regrettable. But the irresponsible accusations against Stanford and University officials were also regrettable. To this day, I receive 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, since *New York Times v. Sullivan*, there is no protection against defamation of public actors except when false statements are made with actual malice.[94] The ease with which accusations were made against the university, complex accounting issues were irresponsibly oversimplified by the media, and vast costs were imposed on the University is disheartening to a lawyer 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 are from different, but by no means all, walks of life. I have not even scratched the surface. 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 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 rather on the so-called procurement powers of all levels of government, from local to federal.

My examples are not exceptions, but rather symptomatic of a

93. *Id.*
94. 376 U.S. 254 (1964).

larger problem. What I have described can and does happen to poor people, middle-class people, politicians, businesses and institutions. It goes without saying that I am not making the point that all policemen, bureaucrats and prosecutors are on the wrong track. Many try to do the decent thing under trying circumstances. They must 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.[95] Where just 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, three, or four to have their say. Not only do multiple government agencies have a say, but so do innumerable citizens acting as private attorney generals, empowered to bring private suits. Government decisionmaking is further distorted when enforcement rights, over matters concerning the public interest, are granted to private parties, such as in *qui tam* actions.[96]

More generally, lawyers for private parties employ private litigation as a bulldozer for the implementation of ill-thought-through bureaucratic policy preferences. For instance, EEOC concepts such as the vague notion of a "hostile environment," are increasingly

95. *See, e.g.*, Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. 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.")

96. *See* Sean Hamer, *Lincoln's Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act*, 6 KAN. J.L. & PUB. POL'Y 89 (1997) (discussing constitutional and policy arguments surrounding *qui tam* actions from the 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 the constitutionality of *qui tam* actions in general).

prominent in Title VII litigation. While this regulatory concept undoubtedly has some legitimacy, its role as the decisive criterion in discrimination cases and its inherent vagueness subject employers to the real fear that almost anything could create a hostile work environment. This "enlightened" concept leads to both chilling life and engendering unpredictability—a bad combination.

The mixing of administrative and criminal law approaches leads to legal overreach by blurring any distinction between auditing and prosecuting. Furthermore, the excessive use of administratively imposed sanctions, that are often very substantial, 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 control also breaks down for the opposite reason—the politicization of public administration. Think 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 need to know who the rascals are, and we voters often have no clue.

Finally, the fact is that 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 most people. We have an independent judiciary, but that judiciary feels little responsibility for systemic excesses. During a recent three-month period, 10% of my regular working hours were spent in depositions, preparation for depositions and review of deposition transcripts for a single lawsuit over tenure. All of the underlying events took place in 1988, four years before I even arrived at Stanford. The case was in state court, and California procedure allows depositions as a means for obtaining evidence, which amounts to the contemporary equivalent of torture.

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. Overall, legal costs are staggering, and the only explanation I can see for why we have not yet broken down under them is the fact that we are a prosperous country accustomed to so much waste.

IV

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

When I say "personal freedom," I, of course, mean political freedom, as found in the protection given to the freedom of speech or 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, and personal mobility. By comparison not only to eighteenth century Prussia but also to eighteenth-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 are 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 as an unholy alliance where the law becomes the often contradictory, creeping, undisciplined, chaotic and definitely expensive means for the

implementation of absolutist visions of the world.

Ideologies are not dead. All-embracing ones have, for the time being, become a rarity. Ideological politics, however, are still very much alive. In the legal system, they find their expression through the 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."[97] 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." Frequently, non-interest-group politics allow for political compromise and belief-driven politics that override every other consideration. Unfortunately, compromise is viewed as a compromise with evil and sin, and therefore, is unacceptable.[98]

In the United States, the organizational skills of belief-driven politics often result in politicians providing immediate satisfaction to sectional ends[99] through the passing of mostly vague and ill-thought through laws 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, not allowing for discretion, common sense, balancing, proportionality or 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

97. SHILS, *supra* note 1, at 25-26.
98. *Id.* at 52.
99. *See id.* at 51.

believed that reason can prescribe virtue, however, in that respect, a democratic pluralistic polity cannot be self-confident.

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."[100] If our politics do not become more modest, more responsible and more understanding of the costs of virtuous policies in terms of other virtuous policies, then our legal system will continue to grow more expensive, more unruly and more despotic.

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100. *Id.* at 52.