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1991]

BATS AND OWLS AND THE INSANE MOON: THE
SEARCH FOR THE REPUBLIC'S UNWRITTEN
CONSTITUTION†

E.F. ROBERTS*

LOCKED up in the rare book room of the Deering Library at Northwestern University is a book containing some extracts from the works of Friedrich Nietzsche. Tradebooks cobbled together for the popular market are not normally numbered among the prized possessions of librarians, and the librarians I know are wont to frown when they see a book chock-full of interlineations authored by a reader. The transvaluation of values obtained in this case because the scrivener was William Butler Yeats. And on a page where nothing in the text appears to call for it, Yeats executed the marginal quare: "But why does Nietzsche think that the night has no stars, nothing but bats and owls and the insane moon?"¹

In retrospect this coupling of a philosopher who wrote like a poet and a poet who had a distinct philosophy seems appropriate. Nietzsche anticipated the advent of nihilism. Addressing Easter Week, 1916, Yeats saw that a terrible beauty was born. And there does seem to be a direct line connecting the episode at the Dublin Post Office with the fate of the King David Hotel to the almost everyday examples of terrorism which give our own world its flavor of nihilism.

In a world of infinite contingencies seemingly devoid of meaning, one might be excused if one were to delve into chaos theory. That might be a fine topic for a lecture across the tracks in the physics department. But we are met in the law school, and law is, after all, the ultimate study of systems of order. Even so, Yeats did suggest that civilization was hooped together by illusion. It may be—for all of its appearance of stability—that so is our system of order. What I propose to do is to put this possibil-

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1. See Heller, *Reflections on a Poet's Marginal Notes*, ENCOUNTER, Dec. 1969, at 67.

(1559)

ity to the test and assay public law from the perspective of an imaginary Celtic poet.

The crucial thing about the American constitutional system is that it is built around a lawyers' constitution. Parliamentary supremacy was replaced by judicial supremacy and the myth of the rule of law. I say myth precisely because all governing in the ultimate analysis is ruling done by men and women. The real distinction is whether elected representatives or life tenured judges have the last word when it comes to saying what the law is. Charles Evans Hughes spoke the unvarnished truth when he explained that, "[w]e are under a Constitution, but the Constitution is what the judges say it is."²

Still, Yeats' observation that civilization is held together by illusion is critical. The judges themselves are constrained by the myth that judges interpret the fundamental law and are not in fact members of an unfettered House of Lords able to fashion law to their own liking. Judicial supremacy is bottomed upon an aura. This was something Max Lerner adumbrated some years ago. "Since the Constitution is America's covenant, its guardians are the keepers of the covenant and therefore touched with its divinity. As the tenders of the sacred flame, the justices of the Supreme Court cannot help playing the role of a sacerdotal group."³

Yet it must strike a poet that there is something odd about lawyers performing a sacerdotal role. Lawyering, at bottom, is a business. The old verities about the comradeship of the bar were demolished during the recent recession when leading firms across the nation terminated partners left and right, to say nothing about the slaughter done amidst the ranks of the associates. The bottom line on a balance sheet is the order of the day, not any notion of a communitarian duty to look after the welfare of a firm's members during hard times.

One hears much of the Coase Theorem in the law schools, and one is urged to idealize a state of affairs in which transaction costs would not prevent a tranquil polis emerging out of universal bargaining. Yet lawyers live and die on the basis of transaction costs—the sand that eats into the gears of perfect exchange. Indeed, a poet might be struck by the fact that the law of late seems deliberately designed to implicate lawyers, and their costs and fees, into every conceivable aspect of life. Coasean reflection

2. A. MASON, *THE SUPREME COURT: PALLADIUM OF FREEDOM* 143 (1962).

3. M. LERNER, *AMERICA AS A CIVILIZATION* 442 (1957).

ought to be had, perhaps, upon Grant Gilmore's ipse dixit that, "The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed."⁴

But let us not forget the academicians. Enlightened opinion requires that we still periodically enjoy a guffaw when recalling the "silly" debates between nominalists and realists in the university at Paris. But has anyone read the law reviews of late? Might one be forgiven seeing here innumerable schools flogging their own solutions to the nation's jurisprudential problems? Might it not be the case that much of this is not scholarship at all, but instead attention-getting platform building by people none too subtly promulgating secular dogmas, if not actually announcing their availability should the call come for elevation to the bench?

T.S. Eliot observed that human kind cannot bear very much reality. The recent televised judicial confirmation hearings have ignored this admonition. It is becoming altogether too clear that judging is a political function. But what might the ultimate cost be were the courts to lose their aura, were the myth to be destroyed? Reflect for a moment that we live in the year 1991. In this heyday of a secular Republic we seem to have reached the most inopportune moment in all our history for the nine justices to discard their medieval robes and mount the bench in mufti. But these, as I said, are the thoughts that might be expected from a Celtic poet, not a responsible person.

We should not expect a poet to be content to read the text of the Constitution or the cases decided under it. Poets are not interested in the dance but in the music the dancers do not hear to which they nonetheless respond. Holmes had a way of putting this. Imagine a parade moving down a main avenue, with two little boys out in front "leading" it. At some point the boys turn off onto a side street—and the parade proceeds down the main avenue. The world simply moves on in inscrutable ways whether or not we would have it otherwise.

What things would our poet want to illuminate? First, he or she might note that the Republic until well after World War II was structured around the cultural values of the WASP, indeed, around the mainline Protestant churches and the Ivy League universities. Attend these words: work, tidiness, promptness, savings, three piece suits, ties, golf, scotch and soda, the martini,

4. G. GILMORE, *THE AGES OF AMERICAN LAW* 111 (1977).

discipline, housewives. This order died sometime ago in our urban centers, and is pretty well dead even in the polite suburbs. We are now all invited to snicker at it by attending the cinema to view Mr. and Mrs. Bridge.

This order did survive longest perhaps in small cities and major towns. It was best portrayed in the novels of James Gould Cozzens, a near neighbor of this place who lived across the river from Bucks County and whose addresses to that bar can be found in that county's law reports. If one were to date the demise of the WASP cultural predominance, as good a moment as any would be when Dwight MacDonald savaged Cozzens' novel *By Love Possessed*. Yet a perceptive observer, very likely a Celtic poet, might have seen the unravelling begin long before this and on Boston Common. The select youth of Beacon Hill used to take on all comers in a gigantic snowball fight waged on the Common. That is until 1850, and a winter day with darkness descending. "A dark mass of figures could be seen below, making ready for the last rush, and rumor said that a swarm of blackguards from the slums, led by a grisly terror called Conky Daniels, with a club and a hideous reputation, were going to put an end to the Beacon Street cowards forever."⁵ And this was part of the education of Henry Adams.

What we have now is a multi-racial, multi-ethnic, multi-lingual and tri-gendered society. As for religion, in so far as opinion makers go on private and public television, in the high tone journals and in the entertainment industry generally, God is dead. Certainly in the society at large no core of values is any longer common currency. Tom Wolfe has made the argument, in fact, that the trend toward legitimating an ever increasing circle of rights will ultimately culminate in the recognition of a right to be free from any kind of moral code. Meanwhile, we are in our daily lives ruled neither by legislators nor judges, but by administrative agencies. Government, out of necessity, has become in Alasdair MacIntyre's words, "a set of institutional arrangements for imposing a bureaucratized unity on a society which lacks genuine moral consensus."⁶

Second, our poet or poetess would reflect upon this society's reliance upon material progress to tranquilize a heterogeneous population by encouraging private pursuit of affluence in lieu of public pursuit of any common purpose. "Go West, young man;"

5. H. ADAMS, *THE EDUCATION OF HENRY ADAMS* 41-42 (Mod. Lib. ed. 1931).

6. A. MACINTYRE, *AFTER VIRTUE* 236 (Am. ed. 1981).

“opportunity beckons”—we have always had our slogans, all of which suggested that if you were down and out, it was likely for lack of gumption. It was only after the Second World War that we seemed to have deliberately set about to create a secular heaven in the affluent suburbs. One has only to rehearse the concatenation of expressway building, mortgage interest deductions, FHA mortgage insurance, and implementation of consumer credit with the promulgation of the notion that every American family deserved a decent home of its own to suspect that a strategy for attaining a Camelot was being orchestrated.

When you stop to think about it, this strategy contained within it some contradictions. Mortgage and car payments make people conservative; they need to attend to their tightly disciplined work habits in order to meet their payments. Yet the whole thrust of the consumer demand economy was to destroy the notion that one should save for a rainy day. Frugality, an old fashioned Yankee virtue, was replaced by hedonism, and soon enough hedonism undermined the work ethic itself. Americans became content with the shoddy products which they themselves were making so long as they lasted the term of the conditional sale contract. The affluent society became a throwaway society, successful so long as full employment guaranteed that the periodic replacement of these consumer artifacts was all but a certainty.

There was a similar concatenation of remarkable events which gave rise to the Industrial Revolution in England, what with the steam engine, the power loom, and any number of inventions coming together all at once. The steam engine was invented to be sure. But it had to have been invented or the English could not have pumped water out of the mines which bore the coal they needed because they had run out of trees in their profligate search for fuel. “Necessity is the mother of invention.” Why then, one might ask, did the Dutch not invent something? Holland, after all, was the leading commercial nation of the day, but soon was surpassed by England’s new style factory-based economy and fell into the second rank of powers. Ah, you say, but the Dutch had no coal with which to power any new inventions. Which, to a poet, suggests that chance, luck if you will, plays a far larger part in the affairs of mankind than we like to think.

As we sit here today we are not so certain that progress is all that inevitable, or if it is, that we Americans are going to be numbered among its vanguard. A poet might note that we are attend-

ing to global warming, acid deposition and holes in the ozone layer, but a poet might wonder whether these horror stories do not have an attractive side to them. That is to say, all of human kind are implicated together when it comes to finding solutions to these global problems. Meanwhile, however, we lament the fact that Americans have lost the knack of making reliable products. In reflective moments we ask ourselves whether it will be one of us who may invent a miracle clean engine, or the next stage super-computer technology, or whatever? It may be that we are going to find ourselves, like the Dutch, left behind as yet another industrial revolution occurs, because commerce and manufacture are, despite the global veneer put upon them, the stuff whereby either Europe, Japan or us will be the affluent society of the future.

It is common enough to look for larger forces that explain all of these economic convolutions, whether it be an invisible hand or scientific materialism. The poet thinks in terms of the music the dancers do not hear but to which they dance. What he or she has in mind is that choices are made by individuals and that what happens in the world is the result of all of these choices. Invisible hands, material determinism, or what have you, the supposedly serious observers of the human comedy are reduced themselves to poetic devices to explain what makes the world go round precisely because no one has been able to bring under one intellectual roof the dynamic interplay of every decision made by every individual now living and who ever lived. Only a poet strumming a blue guitar refuses the temptation to reduce this infinite cacophony to a coherent melody.

Individuals count—be it the person who decides to bankroll the development of a new-fangled photocopying machine, the person who decides that life does not require possessing an electric toothbrush, or the person who invents a new magneto which makes possible a super-efficient jet engine. This also means that the good guys, namely us, may not always win; chance may be our undoing. This, however, is hardly a new idea.

I returned and saw under the sun, that the race is not to the swift, nor the battle to the strong, neither yet bread to the wise, nor riches to men of understanding, nor yet favor to men of skill; but time and chance happeneth to them all.⁷

7. ECCLESIASTES 9:11 (King James)

But enough of Ecclesiastes—what has any of this to do with the law?

Let us speak of the law, say of *Brown v. Board of Education*,⁸ decided while I was sitting the bar examination in Massachusetts. “Free at last!” the Warren Court seemed to be saying, given that an equal education would be made available to our then negro population. The window of opportunity to enter the mainstream seemed to have been opened. Certainly there did evolve a black middle class. But, as chance would have it, attend to this very week’s edition of *The Economist*.⁹ The world is being advised that forty-three percent of Afro-American children are born poor and that more than ten percent of Afro-Americans remain unemployed. The ghetto still exists. Washington D.C. erstwhile capital of the free world, is seventy percent black. Chicago remains our most segregated city and there the ghetto on the south side comprises some fifty square miles, an area larger than occupied by Paris. What hope in the future can these citizens have?

Let us speak of civil liberties, Miranda rules and all that. But let us then turn on our television sets and watch the Los Angeles police department at play with their night sticks. While we are at it, academics ought to ponder why it is still fashionable to admire English law, when Irishmen can spend years in prison on trumped up charges and the judges seem unwilling to seriously police the police. There is more than irony here, more than the old saw that law in practice is not law in the books, and yet these contradictions seem almost too absurd to amount to tragedy. Ours is not a world to be limned by the likes of Shakespeare; we are condemned to contemplate it along with Camus.

Along with blacks in urban America, one must wonder what tales of the law’s injustice could be told by the occupants of barrios in Texas or by the backhill folks dwelling in Kentucky and West Virginia. All of which suggests that, the law be damned, we are, in Disraeli’s phrase, two nations. Two nations we have been for some time, but until after the Second World War the lower orders were kept in their place. What with the explosion of civil rights, particularly voting rights, blacks, hispanics and poor whites have learned that they have rights. Important as they are, rights measured in terms of expectancy of certain standards of police behavior are not paramount. The fact of the matter is that for most Americans the basic right is the chance to get ahead, to

8. 347 U.S. 483 (1954).

9. *America’s Blacks: A World Apart*, THE ECONOMIST, Mar. 30, 1991, at 17.

make it, as it were, in the private sector. The civil rights revolution held out the promise that these hitherto excluded groups would have an equal opportunity for education and for entry into the job market. As chance would have it, just at the time the poor began to think that they had the right to get at a piece of the economic pie, the pie began to shrink.

But herein lay the problem. Anyone who had achieved a place in the private sector was likely willing to cede a place to these new claimants, provided that it came out of new opportunities created by an expanding economy. But the economy had become a leaner and meaner place, what with less growth and a tendency of growth to occur in low-paying service industry jobs. Inflation, moreover, was taking its toll, and most middle-income American families became two income families. The celebration of women's "liberation" may have disguised the fact that women had to enter the workplace if the family were to hold its own. The result, of course, is that blacks, hispanics and the rural white poor remain at the bottom of the heap, this after they had been promised better in several versions of the Great Society that was to come. Even the most naive among us must consider the fact that there is promise for civil disorder inherent whenever large segments of a population begin to believe that the larger society is at bottom an "unjust" one.

The problem has been compounded by the fact that bureaucracy began to numerate progress in terms of race and gender. Many Afro-Americans and Hispanics, as well as women, are persuaded that there will not exist a level playing field until employment statistics reflect the anthropographic constellation illuminated by the census statistics. But in these lean times, white males of European ancestry are beginning to assay their prospects in a polyglot society and to feel that they are going to suffer a form of reverse discrimination. Again, a large segment of the society may begin to believe that it is an "unjust" one.

"Indeed without justice, what are kingdoms but great robberies?"¹⁰ The author of this quare goes on to relate the story of Alexander the Great capturing a pirate and berating him for seizing ships. This pirate, however, spoke up. "What thou meanest by seizing the whole earth; but because I do it with a petty ship, I am called a robber, whilst thou who dost it with a great fleet art styled emperor?"¹¹ Obviously we are met with Saint Augustine.

10. The Political Writings of St. Augustine 29 (1962).

11. *Id.* at 30.

An Augustinian campus appears a particularly appropriate setting for these ruminations. Ethnicity, race, religion, even gender are categories transcended by the concept of catholicity, which suggests that a Catholic campus might be a place where efforts to spawn some new ethic suitable for much leaner but far more catholic secular times might be ongoing. Disinterested learning, as opposed to the industry of scholarship, may still have a place on these campuses. Learning, which in its very sinews knows the frailty of all secular societies and how transient are civilizations, must find itself at home in these places. One can only hope that these places remain detached enough from the larger society to draw upon a two thousand year Roman perspective.

Meanwhile, if new notions about the larger meaning of values in the American polity are not forthcoming, one cannot be sanguine about the future of the Republic. Again, it is the poets who should be consulted. Asked what form he thought the collapse of civilization would take, Eliot responded, "Internecine warfare." Pressed to be more specific, he explained: "People killing one another in the streets."¹² And it was Yeats, after all, who not only perceived that a terrible beauty had been born, but who foresaw the time when the rough beast, its hour at last come, slouches towards Bethlehem to be born.

POSTSCRIPT

When delivered, a lecture is not cluttered up with footnotes, but time outs are had for the identification of the sources of express quotations. The reader of what was a lecture ought to be entitled to the same treat. Still, curiosity is sometimes aroused about the sources which influenced the lecturer. Let me address, briefly, some of these bats and owls.

The poems of Yeats are available in *The Collected Works of W.B. Yeats* (1951). *Easter 1916*, speaks for itself, *Meru* posited a civilization hooped together by illusion, and the rough beast comes out of *The Second Coming*. The poet with the blue guitar is Wallace Stevens, a lawyer. Particularly germane is *The Idea of Order at Key West*, which can be found in *The Collected Poems* (1982). Eliot's notion that human kind cannot stand very much reality was iterated in *Burnt Norton* and reiterated in *Murder in the Cathedral*, both of which are in *T.S. Eliot, The Complete Poems and Plays 1909-1950* (1952). Access to James Gould Cozzens can be had through a

12. S. SPENDER, *T.S. ELIOT* 120 (Am. ed. 1976).

little piece that appeared in this law review back in volume 6 at page 451.

The brooding omnipresence of economic decline and the reference to the original Industrial Revolution derive from my work in environmental law. It is a theme that began with a book review of *Braudel, The Perspective of the World*, which appeared in 70 *Cornell Law Review* 1213, and came to a head in a brief piece entitled *Re-regulation, The Global Environment, and Ignorance Equals Pessimism: A Tory Perspective*, which can be found in 45 *Washington & Lee Law Review* 1345.

My use of poetry derives from nothing more than a hunch that we need new metaphors, new ways of looking at the world, if we are to adjust to leaner and meaner times. If I were to limn the new values of which I see the need, I am afraid I would have to fall back on the early Christians and draw on Thomas More's attack on property in his *Utopia*. At this particular moment, what may appear to be themes not totally alien to Marxism, would seem to be, to put it politely, not all that viable. There is an element of profound tragedy inherent here and, in this regard, I think that a movie, *The Mission*, may be germane. I realize, too, that whether addressing affluent law school alumni or upwardly mobile law students, my message is not one calculated to leave behind an audience of happy campers. *Mea culpa*, I am sorry about this. I do not, however, repent.

FINIS