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# Terrorism as an Intellectual Problem<sup>1</sup>

CHARLES W. COLLIER†

“This religion is a universal declaration of human liberation on earth from bondage to other men or to human desires. . . . To declare God’s sovereignty means: comprehensive revolution against human governance in all its perceptions, forms, systems and conditions and the total defiance against every condition on earth in which humans are sovereign . . . .”

Sayyid Qutb<sup>2</sup>

God please save me from your followers.

Bumper Sticker

The past few years have been instructive for observers of religious terrorism. Events have conspired to reveal ever more of its grim visage, inner logic, and awful potential. Religious terrorism has been exhaustively analyzed as a security problem, a military problem, an economic problem, a political problem, and more. But it is also an *intellectual*

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1. This Essay focuses mainly on events that occurred and theories that emerged after September 11, 2001. Newspapers of record are often the primary sources for accounts of such recent history. See FOUAD AJAMI, *THE FOREIGNER’S GIFT* 347 (2006) (describing use of newspaper sources).

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This Essay is dedicated to the memory of Francis A. Allen, whose tremendous encouragement and generous if not extravagant praise of a young scholar will be repaid in kind.

2. Yvonne Haddad, *Sayyid Qutb: Ideologue of Islamic Revival*, in *VOICES OF RESURGENT ISLAM* 67, 81 (John Esposito ed., 1983) (quoting Sayyid Qutb).

problem, one with particular implications for the study of law, culture, and history. This Essay examines the intellectual assumptions of religious terrorism, and it does so from three distinct perspectives: the theory of religion and American constitutional law (Part I); the common law (Part II); and cultural and institutional history (Parts III and IV).

## I. RELIGION, FUNDAMENTALISM, AND TERRORISM

One of the most difficult tasks facing intellectuals today is to reconcile an attitude of tolerance toward religion in general, and Islam in particular, with a moral condemnation of terrorism, and with an overall intellectual responsibility for challenging beliefs that are inherently improbable, unsupported by evidence, or otherwise contrary to reason.<sup>3</sup> I aim to strike this balance by focusing on *fundamentalism* ("strict adherence to any set of basic ideas or principles"<sup>4</sup>) as the point of contact between religion and terrorism.<sup>5</sup>

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3. See generally LEWIS WOLPERT, *SIX IMPOSSIBLE THINGS BEFORE BREAKFAST: THE EVOLUTIONARY ORIGINS OF BELIEF* (2006).

In this brief Essay it will not be possible to explore the bases of religious beliefs in the depths or detail they deserve. I hope only to suggest a few general principles that go substantially beyond the critical thinking that most religious believers devote to their own beliefs.

4. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 776 (2d ed. 1987).

5. See BERNARD LEWIS, *THE CRISIS OF ISLAM* 131 (2003) ("It has now become normal to describe [religious extremist] movements as fundamentalist. The term is . . . now common usage."); Paul Scott, *Questions for Martin E. Marty: Sacred Battles*, N.Y. TIMES, Sept. 30, 2001, § 6 (Magazine), at 19 ("Words like 'extremism' or 'fanaticism' miss what followers are extreme or fanatic about. 'Fundamentalism,' however, connotes a fundamental religious vision behind the movement.").

For a definition of *terrorism*, see the recent United Nations Security Council resolution condemning as "under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature," S.C. Res. 1566, ¶ 3, U.N. Doc. S/RES/1566 (Oct. 8, 2004),

[C]riminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act . . . .

*Id.* See generally WAYNE MCCORMACK, *LEGAL RESPONSES TO TERRORISM* § 1.01(A) (2005) (discussing various definitions of terrorism).

The argument advanced here is thus no more hostile to the claims of religion or Islam than to those of astrology, alchemy, sorcery, magic, mysticism, pantheism, transcendentalism, solipsism, shamanism, Satanism, superstition, "luck" (good or bad), faith healing, fortune-telling, extrasensory perception, or vacation bible school. I wish the practitioners of all those enterprises every success. I object only when they take their enterprises seriously and literally, and put them at the service of fundamentalism (by, for example, terrorizing "infidels" or "unbelievers" who do not share in an unlikely assortment of inherently unverifiable beliefs).

It might be objected that taking one's religion "seriously and literally" is hardly unique to Muslims, and that even if it were, violence and terrorism are hardly the inevitable result (it could make one a monk or a hermit, a saint or a fool).<sup>6</sup> One could cite a few salient factors in response: the humorless lack of irony so characteristic of contemporary Islamic fundamentalism;<sup>7</sup> its virulent and often violent intolerance of competing religious traditions (even within their own lands of origin);<sup>8</sup> its insistence that unprovable and implausible (and thus deeply contested) religious beliefs be the basis for social, political, and governmental decision-making;<sup>9</sup> and its elevation of the *sharia* over domestic law and of *jihād* over customary international

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6. These objections are drawn from comments by an anonymous referee for the *Journal of Legal Studies* (on file with author).

7. See Roger Scruton, Op-Ed., 'Islamofascism,' WALL ST. J., Aug. 17, 2006, at A8 ("[I]t is from a posture of irony that every real negotiation, every offer of peace, every acceptance of the other, begins.").

8. See, e.g., Daniel Schwammmenthal, Op-Ed., *Europe's New Dissidents*, WALL ST. J., Feb. 4-5, 2006, at A8 ("The Islamists demand no less than absolute supremacy for their religion—and not only in the Muslim world but wherever Muslims may happen to reside. That's why they see no hypocrisy in their demand for 'respect' for Islam while the simple display of a cross or a Star of David in Saudi Arabia is illegal."); see also Alan Abelson, *Off with Their Heads*, BARRON'S, Feb. 13, 2006, at 8 ("Lest we be the target of a fatwa (remember Salman Rushdie), let us say we understand perfectly why those angry Islamic mobs are so angry. All they're demanding, after all, is that you observe their customs when you're in their country and you observe their customs when you're in your country.").

9. See, e.g., BERNARD LEWIS, WHAT WENT WRONG? 100 (2002) ("The idea that any group of persons, any kind of activities, any part of human life is in any sense outside the scope of religious law and jurisdiction is alien to Muslim thought.").

law.<sup>10</sup> Nevertheless, these are at best necessary though not sufficient conditions, and it may be impossible to identify all the remaining, additional factors that make Islamic fundamentalism the leading source of contemporary terrorism. But, that it is the leading source is not, as an empirical matter (and as documented in this Essay), in serious dispute.<sup>11</sup> Indeed, this counts as one of the defining features of the present era.<sup>12</sup> In this way, as the night

10. See, e.g., LENN E. GOODMAN, *ISLAMIC HUMANISM* 49 (2003) (“[E]very major Muslim movement in history has claimed political as well as spiritual authority, and many have used military and other coercive means to win their claims, even as they used spiritual inspiration to legitimate their temporal authority. That *jihād*, construed as military contest aimed at the expansion of Islam, should be counted a central institution of Islam reflects the worldly claims made by Islam in behalf of otherworldly aims.”); Tawfik Hamid, Op-Ed., *The Trouble with Islam*, WALL ST. J., Apr. 3, 2007, at A15 (“It is vital to grasp that traditional and even mainstream Islamic teaching accepts and promotes violence. Shariah, for example, allows apostates to be killed, permits beating women to discipline them, seeks to subjugate non-Muslims to Islam as *dhimmi*s and justifies declaring war to do so. It exhorts good Muslims to exterminate the Jews before the ‘end of days.’ The near deafening silence of the Muslim majority against these barbaric practices is evidence enough that there is something fundamentally wrong.”).

11. See LEWIS, *supra* note 5, at 137 (“Most Muslims are not fundamentalists, and most fundamentalists are not terrorists, but most present-day terrorists are Muslims and proudly identify themselves as such.”); John Kifner, *Massacre Draws Self-Criticism in Muslim Press*, N.Y. TIMES, Sept. 9, 2004, at A8 (“It is a certain fact that not all Muslims are terrorists, but it is equally certain, and exceptionally painful, that almost all terrorists are Muslims,” Abdel Rahman al-Rashed, the general manager of the widely watched satellite television station Al Arabiya said . . .”).

12. To take an example almost at random, in a single busy day for Islamic terrorism the following stories from around the world all appeared on the same front page of the *New York Times* on September 1, 2004:

*16 Are Killed in Two Bombings in Israel* (complete with graphic, four-column color photo showing lifeless bodies hanging out of bus windows), stating “[t]he terrorist group Hamas claimed responsibility.” Steven Erlanger, *16 Are Killed in Two Bombings in Israel*, N.Y. TIMES, Sept. 1, 2004, at A1.

*Talks to Disarm Shiites Collapse*: “Also on Tuesday, a militant Islamic group announced a mass killing in Iraq, showing pictures of 12 dead Nepali laborers for a Jordanian company.” Dexter Filkins & Erik Eckholm, *Talks To Disarm Shiites Collapse*, N.Y. TIMES, Sept. 1, 2004, at A1.

*Suicide Bomber Kills 9 in Russia*: “A group linking itself to Al Qaeda and the conflict in Chechnya claimed responsibility for the attack, as it did for the terror bombings of two Russian airliners a week ago.” Steven Lee Meyers, *Suicide Bomber Kills 9 in Russia*, N.Y. TIMES, Sept. 1, 2004, at A1.

This edition came out a few hours too early to include news of the hostage-

follows the day, "the culture of terrorism [has] put down roots in Arab lands."<sup>13</sup>

It was not an isolated band of misguided young men who came America's way on 9/11. They emerged out of the Arab world's dominant culture and malignancies. There were the financiers who subsidized the terrorism. There were the intellectuals who winked at the terrorism and justified it. There were the preachers—from Arabia to Amsterdam and Finsbury Park—who gave it religious sanction and cover. And there were the Arab rulers whose authoritarian orders produced the terrorism and who looked away from it so long as it targeted foreign shores.<sup>14</sup>

There is of course much to distinguish superstition, say, from religious fundamentalism, not to mention terrorism. But what connects them is their shared acceptance of what

taking and torture in Beslan that left over 300 Russian schoolchildren, parents, and teachers dead. See David Brooks, *Cult of Death*, N.Y. TIMES, Sept. 7, 2004, at A23 ("We should by now have become used to the death cult that is thriving at the fringes of the Muslim world. . . . This is the cult that sent waves of defenseless children to be mowed down on the battlefields of the Iran-Iraq war, that trains kindergartners to become bombs, that fetishizes death, that sends people off joyfully to commit mass murder."); Thomas L. Friedman, *At a Theater Near You* . . . , N.Y. TIMES, July 4, 2007, at A19 ("Of course, not all Muslims are terrorists. But it's been widely noted that virtually all suicide terrorists today are Muslims. Angry Norwegians aren't doing this—nor are starving Africans or unemployed Mexicans. Muslims have got to understand that a death cult has taken root in the bosom of their religion, feeding off it like a cancerous tumor.").

13. FOUAD AJAMI, *THE FOREIGNER'S GIFT*, at xi (2006).

14. *Id.* at xi-xii; see also Fouad Ajami, *Heart of Darkness*, Op-Ed., WALL ST. J., Sept. 28, 2005, at A16 ("The extremist is never just a man of the fringe: He always works at the outer edges of mainstream life, playing out the hidden yearnings and defects of the dominant culture. Zarqawi is a bigot and a killer, but he did not descend from the sky. He emerged out of the Arab world's sins of omission and commission . . . . Zarqawi's war, it has to be conceded, is not his alone; he kills and maims, he labels the Shiites *rafida* (rejecters of Islam), he charges them with treason as 'collaborators of the occupiers and the crusaders,' but he can be forgiven the sense that he is a holy warrior on behalf of a wider Arab world that has averted its gaze from his crimes, that has given him its silent approval. He and the band of killers arrayed around him must know the meaning of this great Arab silence."); Abdurrahman Wahid, *Right Islam vs. Wrong Islam*, WALL ST. J., Dec. 30, 2005, at A16 ("While a few are quick to shed blood themselves, countless millions of others sympathize with their violent actions, or join in the complicity of silence . . . . Islamic fundamentalism has become a well-financed, multifaceted global movement that operates like a juggernaut in much of the developing world . . . . The armed *ghazis* (Islamic warriors) raiding from New York to Jakarta, Istanbul, Baghdad, London and Madrid are only the tip of the iceberg, forerunners of a vast and growing population that shares their radical views and ultimate objectives.").

would not count as *evidence* for a scientist, what would not count as *authority* for a political philosopher, and what would not count as *justification* for a moral philosopher. Terrorism merely represents the extreme position on each of these three axes. In other words: religion, fundamentalism, and terrorism are situated on a continuum. It is a tortuously long, complicated, and variegated continuum; but it is a continuum nonetheless.

Andrew Sullivan writes:

If you believe that there is an eternal afterlife, and that endless indescribable torture awaits those who disobey God's law, then it requires no huge stretch of imagination to make sure that you not only conform to each *diktat* but that you also encourage and, if necessary, coerce others to do the same. The logic behind this is impeccable. Sin begets sin. The sin of others can corrupt you as well. The only solution is to construct a world in which such sin is outlawed and punished and constantly purged—by force if necessary. It is not crazy to act this way if you believe these things strongly enough. In some ways, it's crazier to believe these things and not act this way.<sup>15</sup>

Even so sympathetic an interpreter of religious language as Ian Ramsey describes religion as “a dominating loyalty linked with a world view”<sup>16</sup> or, more specifically, a *discernment* that “there are situations which are spatio-temporal and more”<sup>17</sup> and a *commitment* that is “based upon but goes beyond rational considerations.”<sup>18</sup> A man might (to use Ramsey's examples) leap into a raging flood to rescue his child even when there is little chance of success, or crawl down a precarious mountain precipice in a desperate attempt to save his wife against all odds.<sup>19</sup> But he should not expect others—who lack his commitment—to do the same. Yet this is precisely what fundamentalism (at least in its more messianic, politicized versions) expects, indeed demands. One of the latest communications from Al

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15. Andrew Sullivan, *This Is a Religious War*, N.Y. TIMES, Oct. 7, 2001, § 6 (Magazine), at 44.

16. IAN T. RAMSEY, RELIGIOUS LANGUAGE: AN EMPIRICAL PLACING OF THEOLOGICAL PHRASES 18 (Macmillan Paperbacks ed. 1963) (1957).

17. *Id.* at 16.

18. *Id.* at 19.

19. *Id.* at 17-19.

Qaeda, for example, threatens further terrorist attacks unless (among other things) "all Americans . . . convert to Islam."<sup>20</sup>

Leading scholars of Islamic religion and politics have not failed to make this connection between fundamentalism and terrorism. "It is the hallmark of unsettled societies to believe in the man on horseback," observes Fouad Ajami, "in millennial and sudden redemption, in the pretender who would transform and empower a broken world, but without labor and effort and empirical work."<sup>21</sup> Both fundamentalism and terrorism offer those who "flock[] to their banners an absolution from responsibility, and a dream of revenge."<sup>22</sup> A modern-day miracle has indeed been served up for the masses, but they would not have seen it with their own eyes if they had not believed it.

Bernard Lewis, exploring "what went wrong" in the Islamic world since the Middle Ages, points out that "[s]ince the state was Islamic . . . [t]he state was the church and the church was the state . . . ."<sup>23</sup> And when the states in question amount to "a string of shabby tyrannies, ranging from traditional autocracies to new-style dictatorships, modern only in their apparatus of repression and indoctrination,"<sup>24</sup> the connection with terrorism becomes more than just coincidental as its attraction becomes more than just theoretical.

Samuel Huntington goes beyond the position advanced here in singling out religion (not just religious fundamentalism) as the main source of the world's problems. Religion is "the

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20. Craig S. Smith, *Kuwait Says a Senior Qaeda Member Has Confessed to Planning 2 Attacks in Yemen*, N.Y. TIMES, Nov. 17, 2002, § 1, at 20; accord LEWIS, *supra* note 5, at 31-32 ("The presumption is that the duty of jihad will continue, interrupted only by truces, until all the world either adopts the Muslim faith or submits to Muslim rule."); Steven Erlanger, *Fox News Journalists Free After Declaring Conversion on Tape*, N.Y. TIMES, Aug. 28, 2006, at A3; *Qaeda Video Demands Conversion to Islam*, N.Y. TIMES, Sept. 3, 2006, §1, at 8.

21. Fouad Ajami, Op-Ed., *Two Faces, One Terror*, WALL ST. J., Nov. 11, 2002, at A12.

22. *Id.*

23. LEWIS, *supra* note 9, at 101.

24. *Id.* at 151.



principal defining characteristic of civilizations,”<sup>25</sup> he argues, and “possibly the most profound difference that can exist between people.”<sup>26</sup> Based in part on Muslims’ greatly disproportionate involvement in violent conflict around the world, particularly along “Islam’s bloody borders,”<sup>27</sup> Huntington concludes that “[t]he underlying problem for the West is not Islamic fundamentalism. It is Islam, a different civilization whose people are convinced of the superiority of their culture and are obsessed with the inferiority of their power.”<sup>28</sup> Whatever the merits of Huntington’s specific analysis, one can easily see in religion the defining conditions of fundamentalism (strongly held beliefs that no amount of empirical evidence can prove or disprove);<sup>29</sup> and these “profound differences” in belief serve in turn as the ideological basis for terrorism.

In this context Huntington’s broader point about “religion as the problem” assumes added importance. The relevant “clash” need not be styled as one solely between Islam and the West. There are plenty of works studiously tracing the contemporary Sunni–Shiite split back to conflicts in the seventh century A.D.<sup>30</sup> But the idea that it could possibly matter now who was *really* the rightful heir to the caliphate in 632, or 658, or 680, and that (depending on which sect one happened to be raised in) this provides a reason or basis for killing believers in the other doctrine (as in present-day Iraq), is absurd at best. As Karl Popper once recalled (in a different but related context):

These theories appeared to be able to explain practically everything . . . . The study of any of them seemed to have the effect of an intellectual conversion or revelation, opening your eyes to a new truth hidden from those not yet initiated. Once your eyes

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25. SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 253 (1996).

26. *Id.* at 254.

27. *Id.*

28. *Id.* at 217; *cf. id.* at 254–58 (documenting “[t]he Muslim propensity toward violent conflict”).

29. *See generally* KARL POPPER, *CONJECTURES AND REFUTATIONS*, 33–65 (5th ed. 1989) (describing falsifiability as a fundamental criterion of scientific knowledge).

30. *See, e.g.,* VALI NASR, *THE SHIA REVIVAL: HOW CONFLICTS WITHIN ISLAM WILL SHAPE THE FUTURE* (2006).

were thus opened you saw confirming instances everywhere: the world was full of *verifications* of the theory. Whatever happened always confirmed it. Thus its truth appeared manifest; and unbelievers were clearly people who did not want to see the manifest truth . . . .<sup>31</sup>

Among true believers, there is nothing that would count as a disproof of God's existence;<sup>32</sup> and if a belief cannot in principle be disproved, then it cannot meaningfully be proved either (or empirically confirmed or disconfirmed).<sup>33</sup>

I would be content to rest my case here were it not for the constitutional provisions barring Congress (and, as judicially extended, the states) from "establishing" religion or prohibiting its free exercise.<sup>34</sup> How should fundamentalism, as the intersection of religion and terrorism, be plotted on the charts of constitutional law? What are the constitutional limits of religious extremism?

Justice Frankfurter once remarked that "the safeguards of liberty have frequently been forged in controversies involving not very nice people."<sup>35</sup> Certainly, terrorists and other religious extremists are right at the top of the list of "not very nice people," and it is a fair question whether constitutional rights should extend to them at all. But the possibility that fundamentalism and religious extremism might merit constitutional protection cannot be dismissed out of hand, given the "preferred position" of religion in

31. POPPER, *supra* note 29, at 34-35.

32. See, e.g., Alexei Barrionuevo, *2 Enron Chiefs Are Convicted in Fraud and Conspiracy Trial*, N.Y. TIMES, May 26, 2006, at A1 (quoting Kenneth L. Lay, upon being convicted of conspiracy, securities fraud, wire fraud, bank fraud, and false statements, as saying: "We believe that God in fact is in control and indeed he does work all things for good for those who love the Lord."). A few weeks later, Mr. Lay was dead.

33. This is a very brief version of a very complex subject; for a longer version, see Imre Lakatos, *Falsification and the Methodology of Scientific Research Programmes*, in CRITICISM AND THE GROWTH OF KNOWLEDGE 91 (Imre Lakatos & Alan Musgrave eds., 1970).

34. U.S. CONST. amend. I.

35. *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting), *overruled in part by* *Chimel v. California*, 395 U.S. 752 (1969); *cf.* STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH—AND IT'S A GOOD THING, TOO* 102 (1994) ("Nowadays the First Amendment is the First Refuge of Scoundrels.").

American law.<sup>36</sup> In order to effect the constitutional purposes of the religion clauses, *religion* has been defined very broadly, generously, and expansively. Indeed, inquiries into the truth or plausibility of religious claims are (supposed to be) off-limits for courts and juries.

These principles are most clearly on display in the case of *United States v. Ballard*.<sup>37</sup> There, the U.S. Supreme Court ruled, in effect, that what would otherwise be a clear case of fraud might yet be protected activity, if the content of the fraud was religious doctrine. The Ballards consulted regularly with all manner of departed and reincarnated souls, including Jesus, George Washington, and a seventeenth century occultist named St. Germain des Pres. On the basis of their extensive contacts in the afterworld and their stellar qualifications as "ascended masters," the Ballards offered to heal those afflicted with otherwise incurable diseases and solicited money for that purpose—hence the charge of mail fraud.

The trial court ruled that "the religious beliefs of these defendants cannot be an issue in this court."<sup>38</sup> Instead, the court substituted a different issue: "Did these defendants honestly and in good faith believe those things? If they did, they should be acquitted."<sup>39</sup> The Supreme Court agreed with this statement of the law, noting that "[m]en may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others."<sup>40</sup>

In effect, both courts defended a view of religion much like Ramsey's notion of a *commitment* that "goes beyond rational considerations."<sup>41</sup> As the trial court put it, "[s]ome of the teachings of the defendants . . . might seem extremely improbable to a great many people. For instance . . . shaking hands with Jesus, to some people that might seem

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36. See *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) ("Freedom of press, freedom of speech, freedom of religion are in a preferred position.").

37. 322 U.S. 78 (1944).

38. *Id.* at 81.

39. *Id.*

40. *Id.* at 86.

41. RAMSEY, *supra* note 16, at 19.

highly improbable”<sup>42</sup>—if, in Ramsey’s sense, they did not share the defendants’ non-rational or even irrational “commitments.”<sup>43</sup>

Normally, you and I do not believe highly improbable things, and we assume others do not either; if they claim to, we suspect they are insincere (or mentally unbalanced).<sup>44</sup> In *Ballard*, the court disallowed this normal process of reasoning and thereby carved out a realm of belief (called “religion”) wherein people may believe whatever they like, without fear of any official contradiction based solely on the implausibility of their beliefs. For legal purposes, the only touchstone of religion consistent with “the widest possible toleration of conflicting views”<sup>45</sup> is Ramsey’s “commitment” or William James’s “seriousness” or Matthew Arnold’s “high seriousness which comes from absolute sincerity.”<sup>46</sup> The *truth* of religious belief is not justiciable, only its *genuineness*. “The judges honored the First Amendment by not putting religious truth on trial,” concludes Judge Noonan.<sup>47</sup> “Silently they incorporated in their decisions the cultural, American, Jamesian preference for judging not the content of the belief but the manner in which the belief was held by an individual.”<sup>48</sup>

The *Ballard* doctrine grants a kind of free pass to religion, including fundamentalism of all sorts. Subjecting religious doctrines to constitutional review would present enormous practical difficulties, so the plausibility of those doctrines—not to mention their truth or falsity, or even their proper interpretation—is taken off the table. Thus, the constitutional protection of whatever claims to be

42. *Ballard*, 322 U.S. at 81.

43. RAMSEY, *supra* note 16, at 19.

44. See generally PSYCHOSIS AND SPIRITUALITY: EXPLORING THE NEW FRONTIER 191-207 (Isabel Clarke ed., 2001) (discussing religious and delusional beliefs); DANIEL A. FARBER, THE FIRST AMENDMENT 257 (2d ed. 2003) (discussing “religion as madness” in law).

45. *Ballard*, 322 U.S. at 87.

46. JOHN T. NOONAN, JR. & EDWARD MCGLYNN GAFFNEY, JR., RELIGIOUS FREEDOM 566 (2001) (quoting Noonan’s discussion of William James and Matthew Arnold in JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY 168-69 (1998) [hereinafter NOONAN, LUSTRE]).

47. NOONAN, LUSTRE, *supra* note 46, at 168-69.

48. *Id.*

"religion" is in no sense a warrant of its rationality, but almost the very opposite. Those seeking a reasoned critique of the conceptual steps leading from religion to fundamentalism to terrorism must look elsewhere.

## II. TERRORISM AND THE PROBLEM OF THE PAST

Perhaps most characteristic of today's terrorists is their urge to rewrite history. In this way they imperfectly assimilate another defining aspect of legal modernity: the common law.

The emergence of the common law is not a recent development; given its nature, it could not be a recent development. The common law is based fundamentally on the recognition that historical claims carry their own sort of legitimacy, authority, and validity.<sup>49</sup> Today's terrorists have a long list of grievances, some of which date back decades, even centuries. The common law provides an intellectual basis for putting those grievances in historical perspective. A claim that was at one time arguable may nevertheless be overtaken by the course of history. Conversely, even if a claim was originally dubious—morally, legally, logically, etc.—it may yet pass the test of time, eventually. Those who deny altogether the claims of history pattern their response on Lewis Carroll's Humpty Dumpty: "When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'"<sup>50</sup>

But no one can choose what the words of a language mean—in the past, the present, or the future. Language is the affair of everyone, hence the property of no one. To an extent unparalleled in other social institutions, everyone participates in language, which is why it is constantly being influenced by all. Only the community is able to establish a linguistic system—i.e., to institute values whose sole *raison d'être* lies in common usage and consent—and even it can do so only over time.

Language always presents itself to the individual (and to the community at any given time) as an already

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49. See generally Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771.

50. LEWIS CARROLL, *THROUGH THE LOOKING-GLASS* 70 (Alfred A. Knopf, Inc. 1986) (1872).

established system, articulated in a traditional fashion that transcends the will of the individual, even that of the community at any particular time. "At any given period, however far back in time we go, a language is always an inheritance from the past . . . . In fact, no society has ever known its language to be anything other than something inherited from previous generations, which it has no choice but to accept."<sup>51</sup> Thus the notion of a linguistic tradition is logically incompatible with the possibility of deliberate enactment or human choice. Still, it is clear that languages do change, even if no one in particular is capable of changing them.<sup>52</sup> "Rules acquire and lose the status of traditions by growing, being practised, ceasing to be practised, and decaying; and rules brought into being or eliminated otherwise than by these slow, involuntary processes could not thereby acquire or lose the status of tradition."<sup>53</sup> At this point the theory of language development begins to resemble the theory of the common law.

Sir William Blackstone, writing in the eighteenth century, explained the common law as essentially the ratification of custom. Custom has a normative basis, though this is not always immediately evident. Usually the explanation that "It's just our custom" is sufficient (for example, the custom that men remove their hats in church). Someone who persisted and inquired "Well, why have that custom?" would have deeply misunderstood the nature of custom.<sup>54</sup>

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51. FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 71, 72 (Charles Bally et al. eds., Roy Harris trans., Open Court 1986) (1916).

52. The only way to preserve the "purity" of a language, remarks Saussure, would be to remove it from circulation. If a speaking populace actually took up an artificial language like Esperanto, it too would immediately be out of the control of its inventors and would change like any other language; it would then be "impossible to turn the clock back." *Id.* at 76.

53. H.L.A. HART, *THE CONCEPT OF LAW* 176 (2d ed. 1994) ("The story, perhaps apocryphal, that the headmaster of a new English public school announced that, as from the beginning of the next term, it would be a tradition of the school that senior boys should wear a certain dress, depends for its comic effect wholly on the logical incompatibility of the notion of a tradition with that of deliberate enactment and choice.").

54. *See, e.g.,* SAUSSURE, *supra* note 51, at 74 ("[T]o say that a language is a product of social forces does not automatically explain why it comes to be constrained in the way it is. Bearing in mind that a language is always an

The common law consists of legal maxims and customs that are, according to Blackstone, "of higher antiquity than memory or history can reach: nothing being more difficult than to ascertain the precise beginning and first spring of an ancient and long established custom."<sup>55</sup> To our usual way of thinking, this "difficulty" would seem to count against the authority of a custom whose origins are so murky; but Blackstone draws exactly the opposite conclusion in his next sentence. "Whence it is" (implying that what comes next follows logically) "that in our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority."<sup>56</sup>

A normative premise seems to be implied here: these maxims and customs have been observed for so long (so long that "the memory of man runneth not to the contrary") that they now ought to be—deserve to be—observed. In this sense it is neither circular nor paradoxical to assert that "the only method of proving, that this or that maxim is a rule of the common law, is by showing that it hath been always the custom to observe it."<sup>57</sup>

In a slightly different formulation Blackstone says elsewhere that these legal maxims and customs "receive their binding power, and the force of laws . . . by their universal reception throughout the kingdom."<sup>58</sup> That last phrase is amplified as follows: "the authority of these maxims rests entirely upon general reception and usage . . ."<sup>59</sup> Here the emphasis is on breadth of acceptance, which

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inheritance from the past, one must add that the social forces in question act over a period of time. If stability is a characteristic of languages, it is not only because languages are anchored in the community. They are also anchored in time. The two facts are inseparable. Continuity with the past constantly restricts freedom of choice. . . . Ultimately there is a connexion between these two opposing factors: the arbitrary convention which allows free choice, and the passage of time, which fixes that choice."); *see also id.* at 76-77 (explaining that languages or language rules adopted by deliberate enactment are still subject to historical change).

55. WILLIAM BLACKSTONE, 1 COMMENTARIES \*67.

56. *Id.*

57. *Id.* at \*68.

58. *Id.* at \*64.

59. *Id.* at \*68.

implies a second normative premise: these maxims and customs have been observed so widely and universally that they ought to be observed here too. The common law is in this sense "a law *common* to all the realm, the *jus commune*."<sup>60</sup>

These principles and normative assumptions of the common law may be clarified by means of an example. Suppose you own a tract of land that lies between my home and my favorite fishing pond. You have every legal right to exclude me from your property—e.g., by building a wall, a moat, an electrified fence; placing warning signs ("No Trespassing"), armed guards, and watch towers around the perimeter. Corresponding to your absolute legal right to exclude me is my absolute lack of any legal right to enter upon your property (disregarding a few exceptions not applicable here). If I do, you may have me arrested and prosecuted for trespass.

But suppose I enter upon your land anyway (taking a

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60. *Id.* at \*67. An implied argument for these two normative premises of the common law can also be reconstructed. The older and more widely accepted the custom, so goes the argument, the more it represents the objective, accumulated wisdom of the ages, and the less it represents someone's (anyone's) subjective, personal choice. Legal and political legitimacy are classically tied to "the consent of the governed," but universal suffrage is not the only way that consent can be expressed. "For where is the difference," asks the Emperor Julian, "whether the people declare their assent to a law by suffrage, or by a uniform course of acting accordingly?" *Id.* at \*73-74 (citing DIG. 1.3.32 (Julian, Digest 84)); see also 25 Hen. 8, c. 21 (1533) (Eng.), an Act for the exoneration from exactions paid to the See of Rome:

[T]his your grace's realm, recognizing no superior under God but only your grace, has been and is free from subjection to any man's laws, but only to such as have been devised, made, and ordained *within* this realm for the wealth of the same; or to such other as, by sufferance of your grace and your progenitors, the people of this your realm have taken at their free liberty, by their own consent, to be used among them; and have bound themselves by long use and custom to the observance of the same; not as to the observance of the laws of any foreign prince, potentate, or prelate; but as to the *customed* and ancient laws of this realm, originally established as laws of the same, by the said sufferance, consents, and custom; and none otherwise.

DAVID LITTLE, RELIGION, ORDER, AND LAW 181 (1984) (translating the Act into modern English).

In this sense the common law has been, as Sir Edward Coke put it, "*prooued and approued* by continuall experience to be good and profitable for the common wealth." SIR EDWARD COKE, LE QUART PART DES REPORTES B2 (1604) (emphasis added).



shortcut to my fishing pond). Suppose I do so in broad daylight, "openly and notoriously," every day for twenty years, and you do nothing about it. Now, according to the law of prescriptive easements, I have a legal right to do what I previously had no right to do at all; and you now have no legal right to exclude me from "my" shortcut any more.

How did that happen? Was it through the mere passage of time? No; during that time a number of relevant things were happening (e.g., the "trespasser" was acting as an owner), and other relevant things were conspicuously *not* happening (e.g., the actual owner was not acting as an owner). The result ordained by the law of prescriptive easements simply ratifies this trend of actual historical usage and custom.<sup>61</sup>

The historical claims of modern-day terrorism should be considered in this context of customary law. There is undoubtedly much about the past few centuries that terrorists—and the Islamic Middle East generally—would

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61. A number of public policies could be invoked to explain this legal result (for example, the policy against tying up land for long periods of time, making it useless to anyone). See, e.g., RICHARD H. CHUSED, *CASES, MATERIALS AND PROBLEMS IN PROPERTY* 87-90 (2d ed. 1999) (discussing "community expectations"); William W. Fisher III, *The Law of the Land: An Intellectual History of American Property Doctrines 1776-1880*, in *PROPERTY: LAND OWNERSHIP AND USE* 506, 506-11 (Curtis J. Berger & Joan C. Williams eds., 4th ed. 1997). But a better explanation may be simply that "custom is good." (For Blackstone, judicial precedents that result in absurd or unjust decisions are not "*bad law*," they are "*not law*; that is . . . not the established custom of the realm." 1 BLACKSTONE, *supra* note 55, at \*70.).

Customary law embodies the actual historical norms of those who practice it, and reflects their implied consent as it ratifies the normative implications of history and custom. See, e.g., *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969) (discussing prescriptive easements but applying customary law in upholding public access to Oregon's beaches). The law of prescriptive easements is still alive and well. For an interesting case upholding prescriptive rights to pasture, firewood, and timber—partly on the basis of Mexican custom and settlement tradition—see *Lobato v. Taylor*, 71 P.3d 938 (Colo. 2002).

"Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890). "[T]he beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature." *Id.* at 195; see also Charles W. Collier, *Law As Interpretation*, 76 CHI.-KENT L. REV. 779, 802-07 (2000) (legal innovation in the common law).

wish to change. Lewis's list of "what went wrong" is lengthy and sobering: "By all the standards that matter in the modern world—economic development and job creation, literacy and educational and scientific achievement, political freedom and respect for human rights—what was once a mighty civilization has indeed fallen low."<sup>62</sup> The traditional, fundamentalist response has always been: "let us go back to our roots, to the good old ways, to the true faith, to the word of God."<sup>63</sup> This is of course a religious response, but it is also, perhaps more fundamentally, a deeply *ahistorical* response.<sup>64</sup> It implies that the present situation is not determined in any important ways by the past, that the creeping claims of custom, usage, convention, and tradition (like the legal claims of adverse possession and easements by prescription) are as nothing, to be swept aside in an inspired flourish. It implies, most of all, that we *can* in fact return to "the good old ways" with no material readjustment, as if nothing relevant had happened during the intervening centuries, as if the good old ways could simply be reinstated just as they were in the good old days. This is, properly speaking, the stuff of myth (with a touch of science fiction).<sup>65</sup>

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62. LEWIS, *supra* note 9, at 152.

63. *Id.* at 45; cf. GOODMAN, *supra* note 10, at 211 (quoting Qur'an 48:23, 33:62: "This is God's way, established of old. Thou wilt never find change in God's way.").

64. See, e.g., TARIF KHALIDI, ARABIC HISTORICAL THOUGHT IN THE CLASSICAL PERIOD 8 (1994) ("[T]he Qur'an pans over a landscape where time is less a chronology than a continuum, where Abraham, Moses, Jesus and Muhammad are all described in a grammatical tense which one is tempted to call the eternal present.").

For a chilling example at the level of personal history, see Jay Solomon & Karby Leggett, *Amid Ties to Iran, Hezbollah Builds Its Own Identity*, WALL ST. J., July 21, 2006, at A1 ("Mr. Nasrallah, Hezbollah's secretary general . . . was held in even higher esteem when, upon viewing the bodies of the dead fighters, he didn't linger any longer over his own son's body than over the others.").

65. See, e.g., H.G. WELLS, THE TIME MACHINE (1895); Scott, *supra* note 5, at 19 ("Islam has a loyalty to every word of the Koran, but its history has unfolded in different ways in different social climates. The fundamentalist, however, says there was a moment in history when a particular book, leader and original social community was perfect . . . and in their selective retrieval they go back to that perfect moment.").

## III. THE MYTHICAL WORLD-VIEW

The further back we trace the origins of symbols, the clearer their meaning becomes. It may not be an exaggeration to say that, for primitive man, the whole world is symbolic. What we would consider actual historical persons, places, and events are all assimilated in primitive thought to timeless religious dramas and underlying mythical archetypes. Even today, in the "Holy Land" of the Middle East, otherwise barren, desolate patches of dusty desert land are thought to be "sacred" because something of religious significance supposedly happened there hundreds, even thousands, of years ago. Evidently, for the true believer, these are *more* than just patches of land; they point beyond themselves, they represent something more important. But to the disinterested observer, the "sacred" land looks just like all the other land. Why should it matter if something important happened there many years ago?

"If we observe the general behavior of archaic man," writes Mircea Eliade,

we are struck by the following fact: neither the objects of the external world nor human acts, properly speaking, have any autonomous intrinsic value. Objects or acts acquire a value, and in so doing become real, because they participate, after one fashion or another, in a reality that transcends them . . . [E]verything which lacks an exemplary model is "meaningless," i.e., it lacks reality.<sup>66</sup>

For primitive man the world itself is defined in terms of meaningfulness. It consists of the populated and cultivated regions, the navigable rivers, the charted seas, the mountains that have been climbed—in other words, "the world that surrounds us . . . the world in which the presence and the work of man are felt."<sup>67</sup> This world is meaningful because every aspect of it has a corresponding place in the parallel world of myth and religion, beginning with the myth of creation.

A certain plant, for example, might be highly valued not because it is precious in itself but because it refers back to

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66. MIRCEA ELIADE, *THE MYTH OF THE ETERNAL RETURN* 3-4, 34 (Willard R. Trask trans., 1965) (1949).

67. *Id.* at 9.

the mythical, timeless past—perhaps it was first gathered by a god.<sup>68</sup> “[F]or the traditional societies, all the important acts of life were revealed *ab origine* by gods or heroes.”<sup>69</sup> This means that “all the important acts of life” are symbolic, in the sense that they merely represent and repeat episodes from a kind of master plan. In and of themselves, and without supporting references to that master script, they have no meaning or value.

Beyond the boundaries of the meaningful world lie desert regions inhabited by monsters, uncultivated lands, uncharted waters, and unclimbed mountains. These are all fittingly designated *terra incognita* on the ancient maps. In mythology they are assimilated to chaos, the formless void prior to creation. Here there are no rituals for erecting temples or blessing the first crops, for the simple reason that there are no temples and no crops. Paraphrasing Wittgenstein, we might say that for primitive man “the limits of my symbolism are the limits of my world.”<sup>70</sup>

The main function of mythology is to provide a satisfactory explanation for events which (if they happened at all) occurred so long ago that—as with ancient custom—“the memory of man runneth not to the contrary.” But whereas custom and history merge into a continuously evolving present, myth remains permanently stuck in that remote, timeless, and unchanging past. In studying primitive societies “one characteristic has especially struck us,” relates Eliade: “it is their revolt against concrete, historical time, their nostalgia for a periodical return to the mythical time of the beginning of things.”<sup>71</sup> Myths of creation, of course, refer back explicitly to events *in illo tempore* or *ab origine*. But all myths, says Eliade, are based on standard archetypes derived from that sacred time before history; in retelling the myth we simply repeat what happened “when the ritual was performed for the first time by a god, an ancestor, or a hero.”<sup>72</sup>

68. See *id.* at 30.

69. *Id.* at 32.

70. LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS ¶ 5.6, at 115 (Ted Honderich ed., D.F. Pears & B.F. McGuinness trans., 1963) (“*The limits of my language mean the limits of my world.*”).

71. ELIADE, *supra* note 66, at ix.

72. *Id.* at 21.

Eliade also describes the process by which actual historical events and persons become assimilated to mythical archetypes. In general, "[a] series of contemporary events is given an articulation and an interpretation that conform with the atemporal model of the heroic myth."<sup>73</sup> Sometimes this process is so foreshortened that the conversion of historical fact into myth takes place within a single generation. Eliade recounts the story of a Romanian folk ballad in which a young suitor was bewitched by a mountain fairy; a few days before he was to be married, the jealous fairy flung him from a cliff to his death. This was said to be a very old story about things from "long ago." Upon investigation, it turned out that the underlying events had occurred not quite forty years earlier; the principal witnesses still lived in the same village, and the young man had simply slipped and fallen over a cliff.<sup>74</sup>

Nevertheless, it was the mythical version that persisted among the villagers.

[T]he authentic historical fact . . . as such, could not satisfy them: the tragic death of a young man on the eve of his marriage was something different from a simple death by accident . . . Besides, was not the myth truer by the fact that it made the real story yield a deeper and richer meaning, revealing a tragic destiny?<sup>75</sup>

#### IV. THE FRAGILITY OF CULTURE AND CIVILIZATION

For events of comparable resonance with today's terrorists one would probably have to turn to the partition of Kashmir, the wars in Iraq and Afghanistan, or the establishment of a Jewish state within the territory of Palestine. The saga of the Palestinian homeland, in particular, undoubtedly owes its powerful grip on the popular imagination to its association with the myth of

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73. *Id.* at 38.

74. *See id.* at 44-45.

75. *Id.* at 45-46; *cf.* GOODMAN, *supra* note 10, at 163 ("History needs diachronic time just as astronomy needs parallax, to objectify distance and distinguish real from apparent magnitude. Without a firm chronology, the recent past rapidly sinks into the deeper abyss. Social memory, without some transgenerational ordering principle, merges the doings of the last generation with archaic antiquity—as witness the primal myths that some island folklores have attached to events as recent as the crash landing of a World War II airplane.").

paradise. That vision is prevalent among "three generations of refugees who are trapped by poverty, political calculation and their own longing for plots of the land in what is now Israel."<sup>76</sup>

With a dreamer's smile and one word, Muhammad Aziz summed up his vision of home: "Paradise."

....  
That home has been gone for more than half a century, more than twice as long as Mr. Aziz, 24, has been alive. He has never seen Simsim, but he has heard his father describe it so often he sees it in his dreams. He means to return home, God willing, one day.

There are millions of Palestinians like Mr. Aziz, yearning to go home, to places where they have never lived.

....  
It is their vision of earthly paradise lost . . . that motivates them, said Dr. Nizar Rayan, a leader here of the Islamic group Hamas.

....  
Iyad Sarraj, a psychiatrist and refugee in Gaza City, referring to the ache for lost homes, said: "There is a lot of fiction surrounding this, of course. It becomes mythological. But I tell you, it is the most important element of the Palestinian psyche, if you want to understand it."<sup>77</sup>

Every people has its myths, however, and more often than not they are incompatible. (The article quoted above, for example, notes that "in coming to Israel many Jews say they are returning to their biblical homeland.")<sup>78</sup> This is why the great majority of the world's inhabitants are skeptical of mythological solutions to the world's problems. Instead, they have opted for the kind of hard-nosed, empirical, historical approach that does not contemplate undoing fifty years of intractable practice in the twinkling of an eye.<sup>79</sup>

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76. James Bennet, *In Camps, Arabs Cling to Dream of Long Ago*, N.Y. TIMES, Mar. 10, 2002, at A22.

77. *Id.*

78. *Id.*

79. See, e.g., *Arkansas v. Tennessee*, 310 U.S. 563, 570 (1940) (prescription in international law refers to "the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order" (quoting LASSA OPPENHEIM, INTERNATIONAL LAW § 242 (5th

One of the defining features of modernity is its adoption of a linear, directional, *irrevocable* conception of time, history, and eschatology in place of the cyclical time of myth.<sup>80</sup> For modern man, there is no “eternal return” to the beginnings, no “starting over” whenever things go badly; instead, the actual historical past is the indispensable condition for the present, the lens through which alone it can be viewed, the paradigm in terms of which alone it makes sense. Modern man’s past is world history, not the timeless world of myth; the actual historical development of civilization is meaningful, in and of itself.

In the civilized world, however, the impact of terrorism is greatly magnified by an inherent asymmetry between the difficulty of creation and the ease of destruction. It is always harder to gather up stones and form a monument than to knock them all down.<sup>81</sup> Civilization is synonymous with creation; our civilized societies are all situated on the vulnerable side of that unequal relation. In essence, terrorism consists in the exploitation of this fundamental asymmetry at the expense of the civilized world and the historically settled expectations of the community of nations.

The saga of “the Buddhas of Bamiyan” is a case in point. The ancient Afghan city of Bamiyan lies in a high mountain valley along the famed “Silk Road,” the original trade route from China to Rome. A great Buddhist monastic center thrived in Bamiyan more than 1,500 years ago; its most notable achievement was to carve in deep relief—directly from the rock face of the immense surrounding cliffs—the world’s two largest figures of the standing Buddha. The Chinese pilgrim Hsün Tsang described the magnificent Buddhas in 632, and ever since then Bamiyan

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ed. 1937)); Michael I. Krauss & J. Peter Pham, *Why Israel Is Free to Set Its Own Borders*, COMMENT., July-Aug. 2006, at 29, 32 (“Israel’s legal claim to the West Bank is . . . supported by the principle of prescription.”).

80. “[P]rimitive societies . . . still live in the paradise of archetypes . . . for whom time is recorded only biologically without being allowed to become ‘history’—that is, without its corrosive action being able to exert itself upon consciousness by revealing the irreversibility of events.” ELIADE, *supra* note 66, at 74-75. See generally *id.* 139-162; KARL LÖWITZ, MEANING IN HISTORY (1949).

81. See, e.g., *Haslem v. Lockwood*, 37 Conn. 500, 506 (1871) (finding a right to property in horse manure plaintiff piled up beside a road; plaintiff “changed its original condition and greatly enhanced its value by his labor”).

has been considered one of the most important sites of Buddhist art in all the world.<sup>82</sup> To scholars of Asian art, “[a]part from Bamiyan’s rarity as one of the few examples of monumental Buddhist sculpture, it holds a key to countless questions about how Buddhism developed internally and shaped or inflected virtually every culture in Asia.”<sup>83</sup>

The Buddhas of Bamiyan withstood attacks on them by the Mongol conqueror Genghis Khan in 1222. They survived similar attacks by the Moghul emperor Aurangzeb in the seventeenth century. In light of this history, it is an acute embarrassment to report that only in our time—on our watch, so to speak—were the Buddhas finally destroyed. Only in our advanced, “postmodern” era was the blind zeal of fundamentalism finally complemented by the requisite technological advances in heavy explosives.

On February 26, 2001, Mullah Muhammad Omar, supreme leader of the Taliban, ordered the destruction of all statues in Afghanistan, including pre-Islamic statues like the giant Buddhas at Bamiyan. “All the statues in the country should be destroyed,” his decree said, “because these statues have been used as idols and deities by the nonbelievers before.”<sup>84</sup> Worldwide protests quickly ensued. Taking this as a sign that they were on the right track, the Taliban proceeded to carry out the decree with brutal efficiency. As international condemnation mounted, a Taliban spokesman cheerily reported at one point that the work of destruction was going well: “There is only a small amount left, and we will destroy that soon.”<sup>85</sup> The Taliban minister of “information and culture” was equally confident of success, since “[i]t is easier to destroy than to build.”<sup>86</sup> In little more than a week, the ancient Buddhas (along with all the statues in the Kabul Museum, one of Asia’s most

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82. See Karen Armstrong, Op-Ed., *Breaking the Sacred*, N.Y. TIMES, Mar. 11, 2001, § 4 (Week in Review), at 15.

83. Holland Cotter, *Buddhas of Bamiyan: Keys to Asian History*, N.Y. TIMES, Mar. 3, 2001, at A3.

84. *Taliban Decree Orders Statues Destroyed*, N.Y. TIMES, Feb. 27, 2001, at A4.

85. *Taliban Says Statues Are Nearly Destroyed*, N.Y. TIMES, Mar. 11, 2001, at A20.

86. Barry Bearak, *Over World Protests, Taliban Are Destroying Ancient Buddhas*, N.Y. TIMES, Mar. 4, 2001, at A10.



important collections) were gone forever.<sup>87</sup>

Civilization is hard-earned, precarious, and subject to ruin. The arts and sciences we take for granted today were preceded and prepared by an almost unimaginably long process of historical and prehistorical development. "To get the matter clearly before one," suggests James Harvey Robinson:

[L]et us imagine . . . that 500,000 years of developing culture were compressed into 50 years. On this scale mankind would have required 49 years to learn enough to desert here and there his inveterate hunting habits and settle down in villages. Half through the 50th year writing was discovered and practised within a very limited area, thus supplying one of the chief means for perpetuating and spreading culture. The achievements of the Greeks would be but three months back, the prevailing of Christianity, two; the printing press would be a fortnight old and man would have been using steam for hardly a week. The peculiar conditions under which we live did not come about until Dec. 31 of the 50th year.<sup>88</sup>

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87. In the wake of the Bamiyan debacle, archaeologists and art historians had to reexamine their longstanding assumption that artwork of historical significance should always remain in its country of origin. See, e.g., John Tierney, Op-Ed., *Did Lord Elgin Do Something Right?*, N.Y. TIMES, Apr. 20, 2003, § 4 (Week in Review), at 10 ("His methods were crude by modern standards, but with his interest in history, he was a dedicated preservationist compared with the officials and soldiers in 19th-century Athens and modern Baghdad."). More recently, the directors of the world's leading art museums have issued a joint *Declaration on the Importance and Value of Universal Museums*, which states in part that:

[O]bjects acquired in earlier times must be viewed in the light of different sensitivities and values, reflective of that earlier era . . . conditions that are not comparable with current ones.

Over time, objects so acquired—whether by purchase, gift, or partage—have become part of the museums that have cared for them, and by extension part of the heritage of the nations which house them.

....

[M]useums serve not just the citizens of one nation but the people of every nation. Museums are agents in the development of culture, whose mission is to foster knowledge by a continuous process of reinterpretation.

Press Release, Cleveland Museum of Art, *Declaration on the Importance and Value of Universal Museums* (Dec. 11, 2002), available at [http://www.clevelandart.org/museum/info/CMA206\\_Mar7\\_03.pdf](http://www.clevelandart.org/museum/info/CMA206_Mar7_03.pdf).

88. James Harvey Robinson, *Civilization and Culture*, in 5 *ENCYCLOPEDIA*

This entire heritage we call "civilization" owes its continuity wholly to cultural—as opposed to biological or hereditary—transmission.<sup>89</sup> If even a single generation were to pass without the transmission of this cultural heritage, civilization as we know it would cease to exist, as surely as if it had never existed at all. The accomplishments of civilization thus resemble an inverted pyramid balanced precariously on a few basic arts and crafts, which required a wholly disproportionate amount of humanity's time and effort to perfect, but which would vanish in a generation if not propagated and disseminated in a receptive cultural medium.<sup>90</sup> Robinson suggests an alternative, somewhat grisly scenario (of which terrorists will want to take note) that falls short of total cultural amnesia:

Were a few thousand carefully selected infants in the various progressive countries of the world to be strangled at birth not only would advances in industry, arts and letters cease but a decline would set in owing to the lack of those to make the essential readjustments in our industries and their financing; to keep up laboratories and books at their present standards.<sup>91</sup>

The true targets at Bamiyan were not figures carved in stone but the culture and civilization that made them possible.<sup>92</sup> "The Buddhist art of China, Korea and Japan is inconceivable without evidence provided by the Afghan workshops," observes Michael Barry, a scholar of Afghan culture.<sup>93</sup> "Which means that the destruction of the evidence is not only an aesthetic crime, but also a scientific crime as ghastly as destroying paleontological evidence for

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BRITANNICA 824, 827 (14th ed. 1973) (1929).

89. See, e.g., RUTH BENEDICT, *PATTERNS OF CULTURE* 27 (New Am. Library 1959) (1946) ("The human cultural heritage, for better or for worse, is not biologically transmitted.").

90. See generally Charles Collier, *History, Culture, and Communication*, 20 *HIST. & THEORY* 150 (1981).

91. Robinson, *supra* note 88, at 828.

92. Cf. GOODMAN, *supra* note 10, at 18-19 ("With the help of hindsight, we can now see that the shelling and smashing of sandstone in March 2001 was the *Kristallnacht* of the Taliban. . . . The images targeted stood for our common humanity, and when spring had changed to fall, humanity itself became the target, on a more global scale.").

93. Barbara Crossette, *U.N.*, in *Shift, Moves to Save Art for Afghans*, N.Y. TIMES, Mar. 31, 2001, at A1.

certain steps in the formation of humanity itself.”<sup>94</sup>

Iconoclasm is not terrorism as such, but it might be considered the cultural equivalent of terrorism. The true target of contemporary terrorism is Western civilization and the cultural heritage and intellectual traditions that define it, support it, and make it possible. When terrorists destroyed the World Trade Center they unraveled the work, not merely of a decade, but literally of millennia. In this sense, terrorism should be viewed as an assault not merely on the present but also on the past. Those who would undo our present social, political, and cultural institutions target a civilization deeply rooted in history, custom, and tradition, whose institutions are defined, prepared, and made possible by their own past. “Men make their own history,” Marx famously remarked, “but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly found, given and transmitted from the past.”<sup>95</sup>

Concepts of history, custom, culture, and civilization must thus be invoked to convey the true nature and gravity of the threat posed by terrorism. They suggest, also, that our response should be proportional to the threat that the work of centuries might be undone at a moment's notice, at the whim of those who have in no relevant way participated in the difficult work of history. Those ahistorical forces of destruction should receive no more consideration than if they had just arrived at our shores from some distant, alien, ill-starred galaxy.

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94. *Id.*

95. Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte*, in THE MARX-ENGELS READER 594, 595 (Robert C. Tucker ed., W.W. Norton & Co. 2d ed. 1978) (1852).