

## Isaac Marks Memorial Lecture

# IN-LAWS AND OUTLAWS

Patricia Williams\*

Thank you so much for that very warm welcome. It is a delight and a pleasure to be here, particularly because I hear it's snowing in New York. I want to thank Dean Toni Massaro, to thank in particular the Marks family, and in particular Mrs. Selma Marks, who has sent me the nicest handwritten notes that have sort of gone out of fashion. They made me feel much, much more welcome and warmly received than I have in many more institutional and academic settings. She also went to the trouble of calling me way after midnight—this morning actually—when my plane finally came in, and it was that tremendous extra thoughtfulness that I am deeply grateful for, in addition to the honor of this lecture.

Now I want to tell you a little more about my trip here. I left out of Newark Airport on America West Airlines, and when we got to the airport I had my son with me, who is ten years old. When I went up to get the tickets, the ticket agent said that she couldn't seat him. And I couldn't figure out what that was about, and she fussed back and forth, and she went in back and then she said, "We need some ID for him." And I said, "But, he's ten," and I produced his library card. I took it back—that wasn't good enough. They really needed some ID. I said, "Why can't you seat him?" "Well, there's apparently some sort of mix-up."

And it went back and forth, and finally I was going through everything, trying to figure out what kind of ID you have for a ten-year old. My son is one of the few lucky human beings, you know, to have a passport. I actually had his passport in the back of my wallet, so I produced the passport. They took his passport and they disappeared for about twenty-five minutes. I was standing at the counter. And when they came back—luckily, I'm sort of, I'm a Virgo, I get very early to the airport, I wasn't too worried yet, but I thought this was kind of unusual—they told me that he had the same name as somebody who was on a list. Now, again, my name is Williams. It must be a very long list, narrowed not at all apparently by the ten-year-old subcategory. But finally when they came back they

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said they had to run a thorough security check on him, and that in the future, when I flew America West, what they were doing was they were putting an “X” in front of his name, and when I called in I should give that “X” so that he didn’t have to go through that whole procedure all over again. Now, I was curious because we fly a lot and this has never happened. We’ve been searched and, you know, the whole thing, but this has never happened. I was just curious about it. But I want to come back to it. For me it sort of set the stage for my own consideration of what I had previously written for the purpose of this lecture, “In-Laws and Outlaws”—of thinking about the point at which we’ve come to, this unfortunate point in the world. I started writing this quite some time ago. It was a question of divided communities, particularly along racial and class lines, in cities. But I’ve come, at this particular point in time speaking also I suppose about divided worlds, about divided cultures, divided nations, divided hemispheres, a divided globe.

We seem divided, without and within, in goodness and evil. We are sort of like the pilgrim in his progress, trying to find our way from the city of destruction to the celestial city on the gleaming hill. But how we get there is the challenge. And, I come to you from the city of New York, which has become the epicenter, at least symbolically, of a certain amount of this quest. A city divided within, attacked from without. A city that is simultaneously strong and at peace with this, even as it is also a city of differences, of violent clashes, of the vibrant clashes, of meldings that are, on balance, more constructive than destructive. And so I’d like to try to extrapolate from the complication of New York to the thing that we face more broadly as citizens of the world.

There was a joke circulating on the Internet not so long ago about a grandmother who heard her five-year-old granddaughter playing wedding, and the wedding vows went like this: “You have the right to remain silent. Anything you say may be held against you. You have the right to have an attorney present. You may kiss the bride.” And I love this joke, because I think it so brilliantly expresses the degree to which the assertion of rights is after all one of the paramount rituals of American life. Yes, it’s a parody of the supposed litigiousness of American society, a tweak at the litany that every schoolchild learns, not in school, but probably more likely from police television dramas, but still, it captures the symbolic centrality of the freedoms and the protections guaranteed by our Constitution. And we Americans have all grown up with the catechism: ask for a lawyer immediately upon your arrest. The information card that the American Civil Liberties Union hands out to citizens is entitled: “What to do if you are stopped by the police.” It’s a list of rights we have long taken for granted, with advice about how to behave in a manner consistent with expectations of minimal due process. “Try to find witnesses,” it continues. “Ask if you are under arrest. If you are, you have a right to know why.”

Unfortunately, that litany is facing some serious ridicule in some quarters of late, scoffed at as antiquated, in comparison to shiny new notions that promised fast-track delivery of expedited justice. And so the assumption of innocence until proved guilty is under attack as inefficient in an era of terrorism. The right to a lawyer, so essential in holding the state to its duty of proof, is under attack as an indulgent frill subsidized by the terminally naïve. Even the very option of a trial is being questioned as many Americans have begun to reconfigure all criminality as a

species of active warfare. But to a large extent I appreciate that this new cynicism is driven by deep fear. It is understandable, given our newly heightened sense of an embattled world. But that's what our Constitution has always been there for, to act as a buffer in times when we are driven by fear, too tempted by the easy promise of rough-and-ready justice. Moreover, those constitutional safeguards embody the best traditions of Anglo-American jurisprudence: habeas corpus, due process, the body of civil rights and, by extension, human rights. I do not need to tell you, these represent the very core of our shared values, the bedrock of our democratic leanings.

And so, I would like to speak to you today about my great concern that some part of that tradition is endangered by the panic of these times. I am aware that we sit on the verge of war, that it is a wild and dangerous world. But I'm also afraid that we'll lose what is most precious in our democracy if we allow the balance between freedom and security to tip too far toward the latter. I offer these thoughts because I'm alarmed by some of the overly broad provisions of the new anti-terrorism laws that have become enacted on both federal and local levels. I offer these words in hope that they will be of some use in our shared debate about the nature of any emergency we face and about the range of legitimate concerns to be pursued by our besieged leaders.

Let me start with a recent court case that you're probably familiar with. On January 8th of this year, a judge sitting in the Fourth Circuit Court of Appeals ruled that Yassir Hamdi, an American citizen captured in Afghanistan, could be held indefinitely, without a charge, without access to a lawyer.<sup>1</sup> The judge in the case ruled that, "The courts are ill-positioned to police the military's distinction between those in the arena of combat, and who should be detained, and those who should not be."<sup>2</sup> While the court's ruling explicitly applies to "enemy combatants," captured in the "theater of war," it also limits the scope of judicial inquiry as to precisely what those terms might mean. In other words, not only can Hamdi have no lawyer, he cannot challenge his designation as enemy soldier, nor even whether the war was, or is, still going on. Such a determination, said the court, is solely within the discretion of the president and his military advisors.

The Fourth Circuit's decision came on the heels of a case brought by Jose Padilla, another American citizen, captured not on the battlefield, but in O'Hare Airport in Chicago, Illinois. Padilla has been in a military brig for, I guess it's ten months now, without any formal charge, although John Ashcroft's Justice Department has publicized its conviction that he was planning to detonate a so-called "dirty bomb." Padilla also challenged his designation as an "enemy combatant," and early last December, a district court judge held that Padilla's need to consult a lawyer is "obvious."<sup>3</sup> That ruling, however, which was widely interpreted as one protecting the law and Padilla's due process, still leaves him

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1. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003).

2. *Id.* at 475-76 ("For the same reason that courts are ill-positioned to review the military's distinction between those who should or should not be detained in an arena of combat, courts are not in the position to overturn the military's decision to detain those persons in one location or another.").

3. Padilla ex rel. Newman v. Bush, 233 F.Supp.2d 564, 602 (S.D.N.Y. 2002).

without the right to a lawyer present during interrogation. And it is during interrogation, according to some very disquieting reports in the last two months in both *The Economist* and *The Washington Post*, that so-called “low-level” forms of torture are sometimes being deployed, like sleep deprivation, “mild roughing up” and then deportation to countries like Egypt and Morocco, where so-called “real torture” is used.

Now ultimately, the courts will have to chart some more consistent course in the cases now cropping up since September 11th. After all, a third man, John Walker Lindh, was also an American citizen, he also was captured on a battlefield in Afghanistan in the heat of fire. But he was tried in U.S. courts. His case was attended by a near universal public sense that for purposes of his situation, the war had ended in Afghanistan when Hamid Karzai took power.

So what is at least as worrisome as the inconsistency is that the Bush Administration has repeatedly defended its power to detain enemy combatants not simply in the war in Afghanistan, and not simply in the war against Al-Qaeda, or Iraq, or North Korea, but, as it says time and again, in this War on Terrorism. This phrasing means that war is suddenly a much broader concept than we have ever known before. For example, take the sniper shootings that paralyzed Washington, Maryland and Virginia last fall. Two citizens were captured, as you recall, a juvenile and his abusive, reclusive stepfather. There seems to be no question that they acted alone, and for deeply idiosyncratic, dare I say crazy reasons, rather than for any political end. Yet prosecutors have been wrestling with the propriety of charging the juvenile, John Lee Malvo, under an anti-terrorism statute. Does this mean that Malvo’s quite terrifying but wholly domestic crimes have the potential to turn suburban Washington, D.C. into a theater of war?

The fact is the United States hasn’t officially declared war against anyone. The Bush Administration’s commitment to end terror is a good thing. But terror is neither a three-dimensional enemy nor a clearly defined legal concept. It is more like a poison leaching from a deep well. The clean-up, as everyone has expressed, could take decades. Identifying the source and composition is likely to be a nightmare that may never be satisfactorily or completely resolved. Terror defies scientific description. Surely we ought to have, we must have, some more refined legal reference point than that.

In Padilla’s case, moreover, we are dealing with someone who was planning to act, who had not yet acted. Without evidence sufficient to file charges, therefore—and if there is such evidence, no one has yet produced it—the government has moved well into the area of prior restraint. And this policy of detention, based on John Ashcroft’s or Donald Rumsfeld’s secret convictions about guilt, rather than conviction by some accountable procedure like a trial. Even if that trial is not entirely public, this, I think, is a dangerous course. This strategy, I worry, moreover, is the logical if monstrous offspring of suspect profiling, which, when unsustained by evidence, is nothing less than a substitution of a presumption of guilt for the presumption of innocence. Without the legal counsel historically guaranteed, yes, even in military tribunals heretofore, we as citizens are licensing a shadow intelligence force that can hold people until they literally rot in jail or can

somehow prove themselves innocent without the “coaching” of lawyers, as I heard somebody on the Fox channel call it.

In President Bush’s January 28th State of the Union speech,<sup>4</sup> he directly addressed this new, expedited status of the presumptively guilty suspect. “All tolled,” he said, “more than 3,000 terrorists have been arrested in many countries. Many others have met a different fate. Let’s just put it this way: They are no longer a problem to the United States and our friends and allies.”<sup>5</sup> And it’s elusive, this reference to “a different fate,” as he put it, this past tense of “no longer a problem.” Perhaps the President forgot he was talking about “suspected terrorists,” as he described them, not convicted war criminals. Maybe he meant not suspects but actual soldiers killed in combat, or caught in the cross-fire. Maybe that’s what he meant. It’s not what he said. But maybe he meant that they were active soldiers who met the sort of fate that is meted out on battlefields.

But his elusiveness certainly suggests more. It suggests the logic of guerilla warfare applied to suspected enemies: Eliminate the enemy, and don’t let even the associates or families escape because you can’t trust anyone. But it is immensely careless in its sweep, too terribly capacious in its indictments. It is premised on a cost-benefit analysis that rationalizes the sacrifice of the few to save the many. But this logic, when practiced outside of situations of extreme and immediate emergency, licenses behavior that squanders the goodwill of whole populations. There is no shortcut to justice.

To go back to the question of in-laws and outlaws, it’s why African-Americans, who would love good policing in their neighborhoods, frequently end up ascribing to the police attributes of the neighborhood thugs. And I think it’s why polls in South Korea, our close friend and ally, suddenly and sadly indicate more fear of the United States than of North Korea. This is astounding. Indeed, a recent human rights report says that the global campaign against terrorism is weakening because of the Bush Administration’s own human rights abuses, as well as its willingness to selectively overlook the abuses of its allies. The message that human rights are dispensable in the name of fighting terrorism is, according to some analysts, actually fueling anti-American sentiment. And I am so worried that this path will cost us more than it gains. It can lead to nothing but more sadness, and yet more paradox.

Let me return to the complications raised by President Bush’s expedited fate for suspected terrorists. A recent letter to the editor of the *New York Times* focused on this part of Bush’s speech, on his seeming “implication that the murder of suspects in such circumstances is not only allowable but a thing to be proud of.” “What would happen,” asked the letter, “to the police chief of a large city if he declared that suspected terrorists were being dispatched in such a manner?”<sup>6</sup> And

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4. President George W. Bush, State of the Union Address (January 28, 2003), available at <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>.

5. *Id.*

6. Andrew Sutherland, *The State of the Union: Resolve and Doubt; A Disturbing Tone*, N.Y. TIMES, Jan. 30, 2003, at A22, available at <http://query.nytimes.com/gst/fullpage.html?res=9F0CE0DC1F39F933A05752C0A9659C8B63>.

it's a good question, really. What, indeed, would happen, if the police disposed of suspected criminals with a cryptic "Let's just say they're no longer a problem"?

But the practices of overzealous policing and quickie back-room punishment meted out by police and police alone, in a way, is part of what was at stake in the civil rights movement in the United States. There was a long history in the segregated South of police departments that looked the other way when the local bully boys decided that this or that black or Jewish or Catholic miscreant had looked the wrong way at a white woman, or stolen a chicken, or otherwise threatened the social order. In the last thirty or forty years, as the cities of America have become more polarized around race and class, overzealous policing and carelessly employed lethal force have become pivotal elements in understanding why we have had so many urban riots at a certain point in our history, and why we continue to struggle with a range of very troubling scandals today. Just within the last week I was looking through the newspapers—scandals in New York, Los Angeles, Cincinnati, San Francisco, Baltimore, Miami. That's just the news at this moment.

And this temptation to string up bedevils law enforcement, I think, in any culture, in any context. And in the United States, it has been an unfortunately racialized struggle, given the sad history of segregation—segregation itself yet another grand idea purporting to serve or preserve the social order. And so we've had hearing after hearing in city after city, and the funny thing is that we do know how to fix it, if only we have the will. With greater accountability, with better training, more respect, and most of all the appropriate administration of due process, with all of that has come greater peace, better relations, more trust, if on an up-and-down basis.

But efficiency without careful investigation and balancing of evidence is inherently prone to mistake. Efficiency alone is inherently prone to bias, inherently short-sighted, and corruptive. Yet knowing this, we seem intent on tightening the overlap between the tactics of outright war and the practices of urban policing. During the search for the Washington, D.C.-area sniper, the FBI called in Army reconnaissance planes to try to find him. This was touted as a fair response under the circumstances. But in the process, we Americans quietly witnessed the ultimate conflation of Army and police. Again, given the reorganization of police power

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To the Editor:

In his State of the Union address, President Bush declared: 'All told, more than 3,000 suspected terrorists have been arrested in many countries. Many others have met a different fate. Let's put it this way, they are no longer a problem to the United States and our friends and allies' (transcript, Jan. 29).

I was distressed by the tone with which that line was delivered. I am even more distressed with the implication that the murder of suspects in such circumstances is not only allowable but a thing to be proud of.

What would happen to the police chief of a large city if he declared that 'suspected terrorists' were being dispatched in such a manner?

*Id.*

over the last year, that particular gesture seems almost anti-climatic, reasonable, even desirable. I remember sharing a sense of relief; my sister lives in the Washington, D.C. area.

Given the urgency of current events, we seem to have abandoned all other thought of less constraining alternatives. Who needs gun control, goes the popular logic, when we have the glorious and panoptic control of the military aerially surveilling suburban shopping malls? And, people ask, is it really so different from those surveillance cameras that former New York City mayor Rudolph Giuliani's administration installed all over Manhattan? Now, as an aside, it must be noted that Mayor Giuliani himself has been traveling around the world coaching urban police departments in ways to reduce crime. So our urban police tactics are now really becoming part of the global vocabulary. Most recently, he was hired by Mexico City, where he plans to use the same formula as he used in New York, targeting certain neighborhoods and arresting every violator, no matter how minor, on the supposition that petty criminals are predisposed to larger crimes.

And it will be interesting to see how this works in Mexico City, so much of whose population is desperately poor, and so many of whom beg illegally. It will be interesting to see how much of the population ends up behind bars before some kind of crisis erupts. But I don't want to be a naysayer. And certainly Mexico City's leaders are so filled with bright hope about the possibility of a turn-around that they have recently decided to outfit their street cops like cowboys, complete with large sombreros. But the image of police as urban, global cowboys is no laughing matter. It was a self-described team of urban police "cowboys" who shot Amadou Diallo after all.<sup>7</sup> Diallo, if you remember, was an unarmed West African immigrant living in the Bronx. He had just emerged from the front door of his house, and was standing on the top step of his house, when he was felled with a rain of forty-one bullets. The police were scared, it was later said. He moved the wrong way, perhaps reaching to get his wallet. They really didn't mean it.

It was the "teach 'em a lesson" justice of the Wild West that motivated officers to assault Abner Louima, a Haitian immigrant living in Brooklyn, who was mistaken for someone who had instigated a barroom brawl.<sup>8</sup> Louima was taken to the police precinct house and brutally assaulted by officers, who rammed a broom handle up his rectum. In the light of breaking news, the officers were charged and convicted in that case. And that is as it should be. But I'm worried. I cannot say with certainty that we would even have known about Louima, particularly given his status as a non-citizen, if it would happen today. With broad, new discretionary powers of all branches of law enforcement to arrest and detain suspects secretly and indefinitely, particularly non-citizens, there might never have been that public cleansing and outcry. We might never have known of that secret sadism committed in our names.

But the need for openness, however messy, is not limited to the extremes of misbehavior. Informed public accountability, as opposed to ill-informed media

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7. Greg Gittrich, *City Blaming Diallo in Death*, N.Y. DAILY NEWS, Mar. 18, 2003, at 8.

8. Leslie Casimir & Leo Standora, *Thugs Rob Louima on Visit to His Homeland*, N.Y. DAILY NEWS, Feb. 28, 2004, at 2.

entertainment, keeps us informed of our fallibilities, keeps us cautious and humble in the endeavor of presuming to know it all. It was a street crimes unit under intense, at times hysterical, public pressure to make New York safe for tourism that led to the arrest and conviction of five young men in the so-called Central Park jogger case.<sup>9</sup> In 1991, a young stockbroker, as you recall, was jogging in Central Park about nine o'clock at night. Brutally beaten and raped, she very nearly died. The jogger remembered nothing. And the police arrested five African-American teenagers, some as young as fourteen, who had been in the park at some point within twelve hours of the assault. Police obtained confessions from four out of the five, although there was no other evidence to place them at what was an extremely bloody crime scene.

All the young men were convicted, and their obligingly sullen faces were melded with a notion coined on the spot, a notion of "wilding," that is, of rampaging so-called young black males. That's really the point at which that vocabulary became part of our national discourse. And these young black males were taking over the city. And that picture in turn justified a degree of racial profiling on an unprecedented and now national scale. Only in the last two months has it come to public light that DNA evidence implicates a serial rapist who has confessed to committing the crime alone. The police department hastily countered, insisting that the original jogger defendants must have been involved in something, some place, some time. But the police department's belief, however sincere, is no substitute for hard evidence. Their belief, however sincere, is why we keep things public, put things to the test in a court of law, however imperfect.

And perhaps this is not an apt analogy to what is going on at the global level. But I am nagged by the question as posed in the letters section of the *New York Times*, of what happens if police act as though they are at war. Or when the executive branch of the most powerful nation on earth begins to employ the tactics of what we had, until very recently, agreed were corrupt back-room tactics of overly stressed urban police. Perhaps it is not an apt analogy. I am not an expert in international affairs. But let me offer it anyway. We seem to be on the verge of what I fear will be a terribly war-prone era. And this is all I have to offer as a cautionary tale.

So allow me to spend just a moment more speaking about why I think the Central Park jogger case is an instructive object lesson. First, the defendants didn't have adequate representation. I actually sat in on that trial. The defense attorneys were as incompetent as any I have ever seen in my entire career, almost comically so. At one point, one of the defense attorneys objected to himself. But their competency was challenged far too late, in a hearing on appeal. And in military tribunals, as far as I have been able to determine given the secrecy and uncertainty, or the new military tribunals anyway, to the extent lawyers are available they will be chosen by the military, that is, by the prosecution, rather than the defendant himself. I think this is a serious compromise of the notion that one's lawyer is one's mouthpiece, a fiduciary, an extension of oneself.

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9. *People v. Wise*, 752 N.Y.S.2d 837 (N.Y. Sup. Ct. 2002).



Secondly, the defendants in the Central Park jogger case never should have been tried together in the same trial to begin with. They were too easily depicted as a unit: The Wilders, a singular pack, five individuals melded into one hyper-horrific presumptively suspect profile. And if we think such imagery will not be a factor in military tribunals, where access to counsel of one's choice is not provided, we are naïve indeed.

Thirdly, the confessions were questionable, and no one seemed to care at that time. The confessions were preceded by eighteen to thirty hours of nonstop custody without parents and sometimes under quite unorthodox circumstances. For example, one fourteen-year-old was put in the back of a police car and driven around the park in the middle of the night, asked questions, and even driven to the crime scene to ask questions. Police didn't feel it necessary to translate any question into Spanish for the family of another for fear that it was "going to take us all day."

The confessions themselves were filled with inconsistencies, obvious factual errors that no one began to take seriously until now. Most troubling, the first handwritten draft of the confessions were police-speak—what was publicized were the actual videotaped confessions, in which they were reading from these confessions—but the handwritten confessions were written in, the first draft, were written in police-speak. It seems that one detective wrote three out of the four incriminating confessions before they were videotaped. And my notes of the detective's testimony reveal that he didn't know, "if I substituted Ramone's words for my own, but I wrote down what I recall. Well, how about, 'the male, black.' Did he really say that? Well, those were probably my words. How about, 'the female, white?' He probably said white female or white girl. 'Had sex?' I don't recall if those were his words or mine." Nor was the statement exactly the same order that he told me. Again, if we think that such practices will not be a far greater problem in interrogations of enemy combatants with no review at all, we are doubly naïve.

Fourthly, there was no physical evidence. Indeed, aside from the confessions, there was no evidence of any sort. This was an extraordinarily bloody crime. I'm sorry to go into the gruesome details, but the jogger lost about three-quarters of the blood in her body. And the scene was a particularly muddy one. There was no blood on any of the accused, no fingernail scrapings, nor were there any footprints found at the scene. Soil traces in their sneakers had a mineral content consistent with the ground in the entire upper half of Manhattan, but the prosecution maintained that that proved they were in the park that night. I guess there's no earth anywhere else in the rest of New York City. But while the district attorney in her final argument maintained that the hairs from the jogger were found on two of the defendants, the actual testimony of the forensic analyst was never so conclusive. Rather, he said the hairs were more consistent with Caucasian hair than African-American hair, but this point sailed over the heads of many in the courtroom.

And so when I hear that many New Yorkers are still maintaining that these five young men were somehow involved in some criminal activity somewhere in the park that night, I hear the same sort of rationalizing that has fed

such apathy to the more thoughtless of our anti-terrorism policies. In this, as in all cases, if there is evidence of criminality, we should prosecute. But if there is no evidence, our suspicions, fears and insinuations are no substitute. I appreciate the need to balance security against freedom. But in such cases, I worry that unlimited secret and unreviewed detentions are extremely short-sighted, self-serving, and in the long term as dangerous to democracy as terrorism itself, and I do not say that lightly. In the Central Park jogger case, the prosecutors were scared, the police were scared, the public felt terrorized. Going back over some of the headlines of that time, they said that over and over again: "Terrorized by crime in New York City." But in addressing it, something awful happened. Police started picking up anyone who frightened them. A majority of the public called for tough laws with fewer protections for defendants. Racial profiling told us who to be afraid of before they did anything. There was a vast public acceptance of bad police practices rendered by stressed, frightened, and badly trained officers, and that's before we get to the rogue, bad apple, openly-corrupt policemen who have been the subject of scandals. The result is a deep, racial, cultural and class divide, particularly between black and white, both sides wanting protection, only one getting it. And then, September 11th, and suddenly the fear spreads past Harlem, past South Central, past the south side of Chicago. "Round 'em up" goes global.

It's such a scary new world right now, such wars of careless words, such panic on every breeze. If Eskimos have a hundred words for snow, we've let bloom a thousand words for fear. What bitter tests between power and the ideal, what very options for doom. Loss of freedom versus loss of security. Osama bin Laden versus the CIA. Global warming versus economic collapse. Small pox versus man-made strains of polio. Mad cow versus West Nile virus. With such endless possibilities, we fear everything that moves. There is an inevitable trail of paranoia that fills the wake of great disaster. *New York Times* columnist Clyde Haberman recently wrote about a couple who took a dinner cruise around Manhattan. They became unnerved by a woman seated at the next table because she was by herself and extremely overdressed and seemed to be a foreigner and kept checking her watch and carried a black canvas bag. The couple called the boat's manager, to report her as suspicious, and to have that bag investigated. Nothing was out of order, and the couple's concern dismissed as overwrought. But Haberman ended his column with all the dark drama of a mystery novel: This time, it was a collection of random facts that added up to nothing. Still . . .

And it is that ominous "still. . ." that hangs over us all like a sickness. Haberman's case at least did not end like the debacle in Florida where a Shoney's waitress overheard three Muslim-looking men discussing their plans to bring down something, so she assumed they meant civilization, or at least a few buildings. Police closed off a major highway for seventeen hours, and blew up their knapsacks before it was learned that the men were only talking about bringing their car down from Florida. And I think that such great edginess eats away at our capacity to reason. A friend who was an educator says that one of the questions they ask children on IQ tests is what they would do with a wallet if they found it on the street. And the high-scoring answer is that you would find a police officer and hand it over. But black children, especially boys, never say that. They'd take it to their mothers, or other female relative, to have them hand it over. They tend to

avoid police officers, and try not to have their names or that of any man they know in public agencies' files, especially police. But taking the wallet to your mother, in the race-blind context of standardized tests, is a sign of immaturity. Little boys run to their mothers. Big, smart, fearless boys take things directly to men in charge.

And I think that it's thus that common sense exists in very complicated relation to value systems of coded fear and cryptic credibility. And as the fear that has gripped our nation metastasizes beyond the profile that has so constrained ghetto life, and spreads to women who eat alone in public places while checking their watches, I worry that we are all at risk of becoming more childlike, more intimidated, less able to deal straightforwardly with the big man in charge. It's not just my own son. I feel this new tentativeness every time I fly.

I flew to Philadelphia recently, and went through all the abasements of airport security, ritual cleansings of the sort that until recently were practiced only at the gates of maximum-security prisons. I removed my shoes. "Take off your coat," they instructed. I held out my arms. We know there was good reason for it. We were polite. A guard in a rakish blue beret bestowed apologies like a rain of blessings as she wanded my armpits. "Do you have an under wire in your bra?" she asks. "Do you mind if I feel?" And it is extremely hard to be responsive to such a prayer with any due reprise. It is ceremonial, I know. But, I do mind. Yet I know I'll end up in strip-search hell if I go down that road. I was polite. I obeyed. "Not at all," I intoned, as though singing in Latin.

Over at another table, another agent was going through my bags. He removed my nail clippers from the intimacy of my makeup pouch and discarded them in a large vat filled with what seemed to be hundreds of small nail clippers. A proper sacrifice, I thought. I imagine they will distribute them to the poor. The agent put on rubber gloves, opened my stainless steel Thermos and swirled the coffee around, peering into it with narrowed eyes. He removed the contents of my purse; he spread it out, asked me to turn on my Palm Pilot. Then he picked up my leather-bound diary and flipped slowly through the pages. And at that point, a balloon of irreligiosity exploded at the back of my head, and I could feel my hair rise up as it does sometimes, getting militant despite my best prostrations of mousse. "My diary, my diary," I said, as evenly as I could. "This is getting to be like the old Soviet Union." "So . . . you visited the old Soviet Union?"

Anyway, I finally got to where I was going, and on my way back from Philadelphia I wasn't searched at all. They stopped a woman just in front of me, though, and she stood there shoeless and coatless, with the tampons from her purse emptied upon the altar of a plastic tray. Once on the plane, she and I commiserated. And then the oddest thing happened. Others around us joined in about how invaded and humiliated they felt. The conversation spread across the aisle, then to the seat in front, the row in back. It grew to about five rows of people, all angry at the overseers, all suspicious, all disgruntled, and afraid. And I was, I admit, strangely relieved to see that we were not all black or brown, we are men and women, white and Asian, young kids, old, designer suits. There was a weird, sad kind of unity in our vulnerability, this helplessness of ours. But there was a scary, emotional edge to it, too, to the complaining, a kind of heresy, that flickered through it. What a baffled little coterie we were.

And so I worry about what goes into my trash bins. I reviewed my notes for this speech, I combed through my words about how much I wish we could avoid war with Iraq, so that they cannot be interpreted as an attempt to unduly influence U.S. policy sufficient to get me surveilled under Section 802 of the USA Patriot Act,<sup>10</sup> which includes in its definition of domestic terrorism activities that appear to be intended to influence the policy of the government by intimidation or coercion.<sup>11</sup> You have to be careful because just about everybody is feeling intimidated by something these days.

I have a friend who is a social worker, who works with battered women. And she observes that there's a syndrome among some of them in which they actually provoke their abusers into hitting them. Legally, of course, this does not make them less victims, or the abusers less at fault. But as a psychological matter, I found it very interesting. However patently self-destructive, instigating a fight is an attempt to control the terms of abuse. People who have been consistently battered suffer not only the injury of the actual beating but extreme stress from not knowing when the next blow will fall. As irrational as it may seem from the outside, such provocation relieves that stress. My friend the social worker said that she herself was feeling something like that urge in weeks since the anniversary of September 11th. Indeed, she attributed much of the American public's enthusiasm for war to this traumatized emotionalism, this hunger for catharsis. She acknowledged feeling much the same herself as this intolerable sense that the other shoe is about to drop grows and grows and grows. "I just want it to be over with," she exclaimed in frustration, and loudly enough that a few heads turned in the restaurant where we were having lunch. "Shut up or they'll presumptively, preemptively blow up that Prada bag of yours," I said.

And nothing happened. Everyone went on eating, perhaps recognizing that this was just a momentary lapse from civil society, the sort of thing that's bound to happen when we suffer our lives to be underwritten by the imagined worst, or the worst imaginable. Still . . .

Sometimes things get so crazy that people simply cannot hear that the mass-driven fear of the moment. And if I'm right that we're in for a long stretch of backlash and entrenchment, what will matter most is the ability to endure with the long-term powerlessness. What will matter now is how to be resilient, persistent, even when reform is not likely to come about for decades. For example, I would guess that my son's and my experiences related to a controversial, not-yet-enacted computer system called Total Information Awareness. It hasn't yet been enacted, but recently I think it was just a few days ago in the *New York Times*, it apparently seems to have been handed over to private industry as a concept. DARPA, the Defense Advanced Research Projects Agency,<sup>12</sup> has been mulling plans to profile

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10. Pub. L. No. 107-56, § 802(a), 15 Stat. 272, 275 (2001) (codified at 18 U.S.C. § 2331 (2003)).

11. *Id.*

12. "The Defense Advanced Research Projects Agency ("DARPA") is the central research and development organization for the Department of Defense ("DoD"). It manages and directs selected basic and applied research and development projects for DoD, and pursues research and technology where risk and payoff are both very high and where

loads more Americans than just young black men. And apparently the airlines now have an industrial system of coding passengers so that they mark you red, orange or green. So when they finally let my son get on the plane, they told me that they put an “X” in front of his name and they told him anytime he was to fly, he should give this code now, having been cleared. So, this system, however, has the capacity to scan without search warrant our emails, credit card and banking statements, medical records, travel records. It is said to be searching for patterns that suggest terrorist activity, a description that does not adequately convey the fear we ought to feel now that citizens are about to be surveilled not for law-enforcement purposes, but for military ends, and not just by military ends, but through private industry, by which we are surrounded in every detail of our lives. Bear in mind that these computer search engines are very much like spell-checkers, if you’ve ever had the joy of working with a spell-checker, in their search for a pattern. So recently I happened to type in the name Amanda in an email I was sending, and the spell checker wanted to know if I didn’t mean “armadillo.” Now, I worry that the military’s spell-checker will want to know if I really didn’t mean “armada.”

But we must not make the mistake of spending more time watching our words than those of our elected representatives, our leaders, our guardians. I’m not so cynical as to doubt that our leaders are doing any less than what they feel best in the midst of this ungodly, global mess. I’m not so naïve as to assume, either, that my few words are much more than a vain murmur in the face of events so overwhelming. But again I speak not in vanity, but because I feel I must as a deep believer in the obligations of citizenship, as one who is committed to the fundamental values of democracy.

I began with the question of how you proceed from a city of destruction to something like the city on the hill. If you recall in John Bunyan’s *The Pilgrim’s Progress*,<sup>13</sup> there was a man that the pilgrim encounters along the way, whom God has placed in an iron cage because he departed from the straight and narrow path, both as to the letter of the law, and as to the spirit of grace. Asks the pilgrim, “Is there no hope but that you must be kept in the iron cage of despair?” “No, not at all,” answered the man. “I have shut myself out of all promise, and there now remains to me nothing but threatenings, fearful threatenings, of certain judgment, and [fire] indignation, which shall devour me as an adversary.”<sup>14</sup>

Let me end with playwright Arthur Miller’s warning that we not turn our civic engagement into a crucible, where political policy is equated with moral right, and opposition to it as diabolical irreverence. Because once such an equation is effectively made, society becomes a coterie of plots and counterplots, and the main role of government changes from that of the arbiter to that of the scourge of God.<sup>15</sup> Thank you.

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success may provide dramatic advances for traditional military roles and missions.” For information about DARPA, see the DARPA homepage, at <http://www.darpa.mil/>.

13. JOHN BUNYAN, *THE PILGRIM’S PROMISE* (1728).

14. *Id.*

15. ARTHUR MILLER, *THE CRUCIBLE* (1953).