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In this Issue

THEY SAID IT

But the experience of the twentieth century indicates that self-imposed restraints by a civilized power are worse than useless. They are interpreted by friend and foe alike as evidence, not of humanity, but of guilt and lack of righteous conviction.

--Paul Johnson, *Modern Times*, 1983.

The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury. It is a shame that we must continue to use a worthless system because it was good a thousand years ago. In this age, when a gentleman of high social standing, intelligence, and probity, swears that testimony given under solemn oath will outweigh, with him, street talk and newspaper reports based upon mere hearsay, he is worth a hundred jurymen who will swear to their own ignorance and stupidity, and justice would be far safer in his hands than in theirs. Why could not the jury law be so altered as to give men of brains and honesty an equal chance with fools and miscreants?"

--Mark Twain, *Roughing It*, 1891.

TREAD LIGHTLY ON ME.

We were intrigued last week by an op-ed piece in the *Wall Street Journal* by Shelby Steele, entitled "White Guilt and the Western Past." The purpose of the article was to offer an explanation for why, in Steele's words, "it is now unimaginable that we would use anything approaching the full measure of our military power (the nuclear options aside) in the wars we fight."

Our interest stemmed from the fact that we have mentioned this curious reticence numerous times in these pages. The first was in August 2004 in a piece entitled "Victory? How Will It Look?" We put it this way.

> It is not just unusual but possibly unique in the entire sweep of human history for a nation like the United States, which has overwhelming military power, to engage in endless hand wringing over whether it is using this power justly against self described enemies, and whether it is magnanimous enough toward its defeated foes.

The second was in August 2005 in a piece entitled "Whither Terrorism?" It went like this.

> Islamic terrorists attack something somewhere and those countries that feel threatened by Islamic terrorism and have chosen to fight back escalate their collective commitment to the conflict, but always in proportion to the severity of attack that was suffered . . .
>
> This is, of course, an amazingly stupid way of conducting a war against an enemy that recognizes no moral or practical restraints whatsoever and has openly declared that it will eventually do something that is truly horrendous. I mean, while I am no expert on warfare, I have read Sun Tzu's *The Art of War,* closely perused Clausewitz's *On War,* and watched America fight numerous wars throughout my life, and I have never heard or read of anyone who knows anything about the subject who has a kind word to say about the use of the doctrine of proportional response in modern warfare
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> This may be a civilized and even a just way to deal with street criminals, i.e., you don't hang a waif for stealing a "pocket-handkerchief," as was done in Oliver Twist's day. But allowing militant Islam to set the intensity level in a hot war is insane. Not only does it put thousands of innocent people at risk based on a morally suspect bow to political correctness, but it also provides an enormous edge to the bad guys. If it were up to me, I would bring on the "Draconian measures" now, before large numbers of people who matter get hurt.

And last month, we noted the following in an article entitled "The Origins of Madness."

> The military power of the United States is almost beyond imagination. If it chose to do so, it could totally destroy any and all of its enemies in a veritable Armageddon of conflagration and terror. In fact, when thinking of the destructive capability of this nation, one wonders if perhaps Zeus was not correct to be angry with Prometheus for giving mankind the gift of fire.
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> If virtually any ancient power had controlled the military might that the United States has today, its enemies would be but a footnote in the history books. Herodotus, Thucydides, and Polybius could have recounted their wonderful epic stories of war and valor in a single line: "They nuked their foes and returned home."

Looking back on these articles, after having read Steele's piece last week, we realized that we have never directly offered an opinion as to why the United States acts this way. Steele's explanation is as follows:

> After World War II, revolutions across the globe, from India to Algeria and from Indonesia to the American civil rights revolution, defeated the authority inherent in white supremacy, if not the idea itself. And this defeat exacted a price: the West was left stigmatized by its sins. Today, the white West – like Germany after the Nazi defeat – lives in a kind of secular penitence in which the slightest echo of past sins brings down withering condemnation. There is now a cloud over white skin where there once was unquestioned authority.
>
> I call this white guilt not because it is a guilt of conscience but because people stigmatized with moral crimes – here racism and imperialism – lack moral authority and so act guiltily whether they feel guilt or not.

Now we are not about to argue with Shelby Steele. He is a brilliant scholar and knows his subject well. What we will do this week is offer an alternative theory, or complementary one if you will, which concentrates on social/economic rather than social/racial considerations. Before beginning we would like to note that this discussion is of more than academic interest, because it could provide some insights into

why the United States is so reluctant to engage Iran militarily, and why it is likely to wait until the material and human costs of doing so is much higher than it would be if done today.

We will begin by noting, as we did last week, that during the 65 years since the beginning of World War II, the United States has grown into a cultural, military, and economic colossus unlike anything the world has ever seen. This modern wonder of social organization is as different from its 1941 counterpart as the 605 horsepower, 6.4 liter, Ford Shelby Cobra V-10 is from the 90 horsepower, 221 cubic inch, 1941 Ford flathead V-8.

The Shelby Cobra is infinitely more powerful and more complex than the flathead Ford. And it doesn't vapor lock and stop dead in front of the Corner Drug Store on Clear Lake's Main Street when you're trying to impress the girls from Mason City who are out front watching you and Jim Knapp drive through town on a hot, summer afternoon trying to looking cool. But then, you can't replace an errant fuel pump on a Shelby Cobra in your garage on a Saturday morning. Or, if the Shelby Cobra breaks down completely, you can't buy a used one from the junkyard in Britt and drop it your ride with a block and tackle hung from a tree in the backyard.

In the same way, the modern U.S. economy is infinitely more powerful and more complex than the pre-World War II one. And it runs more smoothly and is more reliable. But like the Ford Shelby, the economic dream machine requires a cadre of expensive, highly trained experts to keep it running and to fix it when it gets out of whack. In fact, the cost of keeping this modern sensation running is somewhere between 20% and 25% of its entire output, which is so prohibitively high that it requires annual borrowing of billions upon billions of dollars.

In many ways this is marvelous, even magical machine. It has produced such a high degree of security and material wealth that Americans from all economic strata have become convinced that these are not luxuries but "rights" and that any interruption in the output of this great cornucopia is not a natural occurrence resulting from the business cycle or the vicissitudes of human behavior but the direct fault of those who are in charge of operating the machine.

Moreover, unlike the old, pre-war, economic model, this finely tuned engine needs to be kept running at high speed all the time, 24-7 as the saying goes. Depressions are unthinkable. Recessions are to be fought against with a vengeance. Slowdowns are a cause for intense fear. For, as everyone knows, if this precision instrument develops problems or, God forbid, stops running, the Bond Vigilantes will mount up and ride forth like Sauron's dreaded Ringwraiths, spreading panic, economic destruction, and political chaos across the globe, from Washington to London, from Paris to Beijing, from Moscow to Singapore. We described this phenomenon this way last week (with a slight variation in verb tenses).

> America's economic health and prosperity has become highly dependent on steadily increasing economic growth. Like a shark that must keep moving through the water in order to stay alive, the U.S. economy requires continuous growth in order to meet the demands of a citizenry that has become grossly materialistic and self absorbed as a direct result of historically unprecedented prosperity and security. In addition, continued growth is required to keep up the payments on the huge cankers of debt that exist in both the private and public sectors, much of which has been accumulated largely as a means of keeping the shark moving through the water.

And then we added the paragraph that is most pertinent to this week's topic. To wit:

> This economic growth can no longer be assured by a healthy domestic economy, but is absolutely dependent on a vast network of global trade, the maintenance of which is dependent on friendly relations with the large, consuming nations of the world, as well as on continued access to imported fossil fuels. Further complicating this picture is the fact that, because of America's overwhelming

> global economic dominance, any economic slowdown in America would most assuredly prompt a worldwide economic slowdown, which would make the American slowdown worse and make the task of recovering from it more difficult.

In 1941, in the months before the Japanese struck Pearl Harbor and Roosevelt declared war on both Japan and Germany, most Americans were reluctant to get involved in a conflict in Europe and were not at all interested in going to war with Japan. This reluctance centered on the high cost of war and on the question of whether the United States should, to paraphrase Washington, entangle its peace and prosperity in the toils of foreign ambition, rivalship, interest, humor, or caprice.

Trade with other nations was welcome but not crucial to the daily lives of Americans, who collectively produced most of the goods that they collectively consumed. The nation produced a surplus of oil. Most Americans could afford few luxuries. The poor could afford none. Children in both camps did little "consuming" at all. Some American companies had assets abroad but very few were dependent upon them. Neither Kresge's nor Woolworth's had a global chain of lunch counters. Neither Philco nor Crosley purchased key parts for their radios from Asia or anywhere else. As such, when war was no longer avoidable, no one was the least bit concerned that the U.S. economy would suffer if either enemy nation were destroyed, which they subsequently were.

Needless to say, the world is different now. Indeed, the factors involved in deciding whether to go to war and how to fight wars once they have started are as different from these considerations in 1941 as the 605 horsepower, 6.4 liter, Ford Shelby Cobra V-10 is from the 90 horsepower, 221 cubic inch, 1941 Ford flathead V-8.

The cost of fighting a war is no longer a very big deal. It is just added to the tab. And isolationism is not even an option. America needs foreign oil, foreign trade, and foreign lenders today. Its corporations need foreign markets in order to grow and cheap foreign labor in order to compete. America has assets and interests in every corner of the globe. To paraphrase Robert Penn Warren, when a Chinese peasant eats a persimmon in Shanghai a bond trader's teeth are put on edge in Chicago.

The vital interests of big foreign trading partners, big foreign lenders, and big foreign sources of cheap labor must be considered with care. The cultural sensitivities of foreign consumers and potential foreign consumers of a vast array of American goods and services must also be considered with care. Alliances must be nurtured. Potential enemies must be courted and their complaints considered because they are potential consumers also. Democracy and capitalism must be promoted because they are the key to opening new markets for American goods and services and for providing new sources of cheap labor for American manufacturers. And while all these factors are being considered, the need for more and more foreign oil plays in the background like a particularly irritating Barry Manilow song in a crowded elevator.

So this then is my explanation for why, in Shelby Steele's words, "it is now unimaginable that we would use anything approaching the full measure of our military power (the nuclear options aside) in the wars we fight." It is, of course, not the complete explanation. Certainly, the Christian principle that all human life is sacred still plays a vital role in American attitudes toward war and how wars are fought. And it may well be, as Steele maintains, that the feeling of being "stigmatized with moral crimes" acts as a restraint on American military power, although I must assume that this syndrome is most prevalent on the two coasts and among the nation's intelligentsia, since I have never seen any evidence of it at all among the residents of rural Virginia where I live.

This is not all bad, of course. Wars should be entered into only after all other options have been thoroughly explored and rejected. And they should be fought with a proper degree of prudence and restraint lest Americans lose their sense of humanity, as many historians contend happened during World

War II when the United States rained bombs down on Germany's civilian population long after it was necessary to win the war.

On the other hand, it could become extremely dangerous if a nation such as Iran comes to believe that America's ability and willingness to defend its citizens and its global interests by military means has been neutralized by a combination of economic fears, moral doubts, and mental confusion. For, whether the Iranians, or Shelby Steele for that matter, know it or not, the United States is still quite capable of unleashing the full extent of its extraordinary, historically unprecedented military might against any nation that presents a clear and present danger to American citizens or to the marvelous economic machine that is responsible for providing them with unprecedented prosperity.

We put this thought this way almost two years ago in the above-mentioned article "Victory? How Will It Look ?"

> Militant Islam will continue to threaten and continue to strike, and each time it does it will provoke an escalation in the intensity of America's response. Eventually, this response will either force the Muslim world community to take collective action against the radicals in its midst, or much more likely in my opinion, the situation will spin out of control at the urging of the vast majority of Americans, who will abandon their concern about the sensitivities of their nation's friends and enemies and demand that their government use all the force available to protect them
>
> The death toll in this end game will be extremely high, but concentrated among Muslims, and historians will look back and point out that this was avoidable, just as they do today when they note that the conflict with Hitler's Germany could have been little more than a footnote in history instead of one of its greatest tragedies, if only the world had united and destroyed the madman when he was vulnerable rather than reacting to each outrage he perpetrated with a slightly more intense response.

MOUSSAOUI, THE COURTS, AND THE WAR ON TERROR.

The general consensus among conservatives and others who continue to support President Bush's "war on terror" is that the decision last week by an Alexandria, Virginia jury to spare Zacarias Moussaoui the death penalty is a damaging blow to the ongoing effort, signaling both a lack of leadership on the part of our elected officials and a loss of will on the part of the American people. Columnist John Podhoretz called the decision "deeply disheartening." *National Review* regular John Derbyshire declared, "I have never been so embarrassed for my country." Even the usually sanguine Mark Steyn was dismayed by the sentence, seeing it as a reason to fear for the future of the war. Steyn put it thusly:

> "America, you lose," said Zacarias Moussaoui as he was led away from the court last week.
>
> Hard to disagree. Not just because he'll be living a long life at taxpayers' expense. He'd have had a good stretch of that even if he'd been "sentenced to death," which in America means you now spend more years sitting on Death Row exhausting your appeals than the average "life" sentence in Europe. America "lost" for a more basic reason: turning a war into a court case and upgrading the enemy to a defendant ensures you pretty much lose however it turns out. And the notion, peddled by some sappy member of the ghastly 9/11 Commission on one of the cable yakfests last week, that jihadists around the world are

> marveling at the fairness of the U.S. justice system, is preposterous. The leisurely legal process Moussaoui enjoyed lasted longer than America's participation in the Second World War. Around the world, everybody's enjoying a grand old laugh at the U.S. justice system.

Certainly, it is difficult not to be at least a little disappointed and disheartened by the outcome of the Moussaoui trial. Even those opposed to the death penalty would almost certainly agree that there was likely never a man more deserving of it.

At the same time, it is important to remember that this case was not lost last week. The jury handed down the verdict only a few days ago, so the cut seems fresh. But the "loss" represented by this trial is hardly recent and was, in truth, inflicted four-and-a-half years ago when the decision was made to try a terrorist suspect in the criminal court system.

At that point, the entire course of this debacle became utterly predictable. From the interminable delays to the defendant's ranting and raving in open court; from the insistence on the "right" to question other terrorist suspects in open court and thus expose national security-related information to the dismissal of lawyers and Moussaoui's farcical self-representation; from the bumbling prosecutors to the soft psychobabble of the "compassionate" jurors who refused to impose the harshest penalty; from Moussaoui's declaration of victory and predictions of more attacks to come to the judge's final, pathetic "rebuke," all of this was precisely as one would have expected and could have predicted. There were no surprises along the way; merely the ongoing sense that the legal system would be unable to handle this case adequately.

Why was the case so utterly predictable? Andrew McCarthy, the former federal prosecutor who won the convictions of the first World Trade Center bombers, attempted to explain the inescapability of this verdict in a *Wall Street Journal* piece published over the weekend. "Inevitably," McCarthy wrote, "courtroom justice and cosmic justice are sometime strangers. That's how we want it. The judicial process is intentionally skewed against the state. It wears proudly the credo: better for the guilty to go free than risk a single innocent's wrongful conviction."

While there is no question that he is right, there is something more going on here, something McCarthy doesn't address because it distracts from his larger point. The fact of the matter is that the legal system *did not* work exactly as it should have in this case, but it did work exactly as we have come to expect that it would.

According to the jury surveys released by the court, even the jurors should have been surprised that were unable to sentence Moussaoui to death. As Peggy Noonan noted, the jury "did not doubt Moussaoui was guilty of conspiracy. They did not doubt his own testimony as to his guilt. They did not think he was incapable of telling right from wrong. They did not find him insane." Yet they spared him the death penalty. Why? Apparently they felt sorry for him. Again, in the words of Ms. Noonan, "They did believe . . . that he had had an unstable childhood, that his father was abusive and then abandoning, and that as a child, in his native France, he'd suffered the trauma of being exposed to racial slurs."

One might argue that such misdirected "compassion" is itself an inevitable outcome in postmodern, Oprah-fied America, that the Moussaoui verdict is representative of verdicts handed down throughout the country, all of which suggest that it is impossible to get a reasonable jury from an unreasonable jury pool (i.e. the citizens of the United States) and that the jury system is therefore inherently untenable in postmodern America. And that is, we'll concede, entirely possible. Yet it seems just as likely to us that the jury pool itself is not the problem. Rather the problem lies in the manner in which that pool is whittled down to create the final panel that decides guilt or innocence or, in Moussaoui's case, life or death.

Just over three years ago, Walter K. Olson, a senior fellow at the Manhattan Institute and a contributing editor to *Reason* magazine, wrote a book about the disintegration of the American judicial system and the effect that lawyers can play in manipulating the service of justice. That book, *The Rule of Lawyers: How the New Litigation Threatens America's Rule of Law,* was excerpted by *Reason* in a January 2003 piece entitled "Courting Stupidity," which hints at some of the problems facing the judicial system and which may have played a role in the Moussaoui verdict. The problem identified by Olson, which he terms "Jurymandering," doesn't exactly constitute a shocking revelation. But the extent that it is practiced and refined in the pursuit of perverting justice is nevertheless troubling and discouraging. Olson wrote:

> Among the most powerful ways in which American lawyers can shape the outcome of trials is by exercising their rights of juror selection. Typically, they can launch an unlimited number of "for cause" challenges to oust prospective jurors who supposedly cannot approach the case objectively, to which they can add an often substantial number of "peremptory" challenges, which let them dismiss prospective jurors without offering any reasons at all.
>
> The upshot is that jury selection in high-stakes cases has emerged as a protracted and expensive stage of trial in itself, its results often seen by both sides as vital to the outcome. In the O.J. Simpson case, selection alone lasted 10 weeks, which in most countries would be a remarkably long time for an entire murder trial. The Engle tobacco class action in Florida went it one better, with the tweezing and fluffing of the jury pool going on for three months; in the end 800 prospects were sent home in the search for the perfect 18, after having been quizzed on such matters as their reading habits and their views on seemingly unrelated issues such as gun control.

A busy industry of consultants, how-to seminars, and jury selection handbooks offers advice to lawyers on whether or not to boot jurors based on such characteristics as hair style, hobbies, brand of car, and favored kind of reading. The "impartial juror" is just a fiction, declares an ad for a primer that promises to show "how to assemble your winning jury, step-by-step." By the mid-1990s, the jury consulting business was estimated to have passed $200 million in annual revenues, mostly catering to lawyers handling civil cases (that being where the money is).

The whole point of the process, of course, is to engage in discrimination . . .

Although the U.S. Supreme Court lately has instructed lawyers not to employ race (and even more recently sex) as a factor in jury picking, lawyers continue more or less blatantly to engage in "jurymandering" of both sorts. The edicts are difficult to enforce given that lawyers need offer, in the words of Brandeis University politics professor Jeffrey Abramson, "no justification, no spoken word of explanation, no reason at all beyond a hunch, an intuition" for their peremptory challenges . . .

Demography aside, a major goal of the selection process is the removal of any jurors with too strong a base of experience, knowledge, or opinion about the case's subject matter. If a case presents important medical or accounting issues, for example, lawyers on one or both sides probably will want to get rid of jurors with expertise in those areas. Manuals emphasize the importance of excluding potential "opinion leaders" for the other side. "You don't want smart people," says a Philadelphia prosecutor in an old training tape. "[They'll] analyze the hell out of your case." Even

> before selection begins, busy people often have dodged service, leaving a pool comprised disproportionately of retirees, the unemployed, and workers who can be spared from their jobs . . .
>
> Citizens with the "wrong" views can simply be prevented from serving on juries. According to coverage of the Engle trial in the local press, the most frequent reason for dismissing jurors was that they were considered to harbor unacceptable prejudices on the subject of tobacco company liability – apparently typified by a former smoker of three decades who said, "I just think people are and have been well aware of the detriments of smoking . . . To come back after the fact, I find that somewhat ridiculous."

Based on the arguments forwarded by Olson, one would have a hard time concluding anything but that the jury system is flawed. But its flaws are not inherent. They are, rather, the product of a legal culture that allows "officers of the court" great – one might reasonably argue too great – discretion in protecting their clients' interests. And this discretion has, in turn, been used to manipulate the system and to create a sub-species of lawyerly proficiency.

Was the jury manipulated thusly in the Moussaoui case? It's impossible to say for certain, but it seems likely that it was. The aforementioned John Podhoretz suggested last week that someone on the jury had to be unshakably opposed to the death penalty; someone had to believe that "the death penalty is wrong under any and all circumstances." That seems unlikely to us, unless a juror lied. What seems more likely, though, is the line with which Podhoretz concludes this thought. "To imagine that there can be any mitigating circumstance regarding Moussaoui's actual guilt is moral idiocy of the highest order."

It is, in our estimation, likely that when the jury was selected, Moussaoui's lawyers intentionally sought out individuals who would be susceptible to arguments about bad childhoods, mean Frenchmen, and deadbeat dads, people who are, to use Podhoretz's parlance, moral idiots. Podhoretz may not want to believe that such people exist, but idiots, who would think that being called a few names makes it okay to conspire to knock down the World Trade Center, are probably more common than any of us would care to know. The key for Moussaoui was being lucky enough – or, more likely, to have skilled enough lawyers – to ensure that at least one or two of those simpletons ended up on his jury. He was. They did. And that's that.

Fortunately, there is an upside to this verdict. The flaws in jury trials for accused terrorists are now too obvious for any but the most hard-headed, closed-minded opponent of the war on terror to deny. Podhoretz, Derbyshire, Steyn, and McCarthy are right. Allowing the criminal justice system to get involved is, in fact, "no way to run a war." But thanks to the joke that was the Moussaoui trial, it is less likely that the war will be fought that way going forward.

John Derbyshire said he was embarrassed for his country. Peggy Noonan wrote that she has the "sense that many good people in our country, normal modest folk who used to be forced to endure being patronized and instructed by the elites of all spheres," are bound to be frustrated by last week's verdict. Good.

Andrew McCarthy argues quite persuasively that the problem with the Moussaoui case was that it was handled within the legal system, rather than outside of the system as would befit an enemy combatant in the middle of a war. He's right, of course. And the spectacle of the trial, the ridiculousness of the hoops jumped through, and the moral idiocy of the verdict all serve to ensure that in the future such cases are far more likely to be brought outside of the criminal justice system.

There is no question that President Bush thinks that a criminal trial in open court for a suspected terrorist is a stupid idea. He has spent considerable political capital fighting for the right to pursue the war vigorously and to keep spectacles such as the Moussaoui trial from being replayed over and over

again. But this war will almost certainly not be finished on Bush's watch, and so the real question is whether the next guy (or gal) will be willing to follow through on these plans.

As recently as two years ago, the presidential nominee of one of the two major parties maintained publicly that the war should be handled more as a matter of law enforcement, which would all but guarantee that such farcical trials would be the rule in the future rather than the exception. Fortunately he lost. And thanks in part to that loss and in part to the public outrage that has greeted the Moussaoui verdict, it is unlikely that any other major candidate will make that mistake again.

Mark Steyn and the rest may be right that we risk losing our collective will in this fight and that such a failure of will is the only thing that will allow the terrorists to win. Certainly, there is something to this argument, as we ourselves have written before.

That said, the Moussaoui trial and verdict should hardly be seen as evidence of such weakening. The real mistake in the case was made in December 2001, and given the state of the judicial system there was no way to fix the problem once that fateful decision had been made. If anything, the outrage at the verdict could serve to bolster waning wills. At least we can hope that it will.