



WHY DO THE NON-HEATHENS RAGE?*

by

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Book: *The Tyranny of Good Intentions*
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INTRODUCTION AND OVERVIEW

The Tyranny of Good Intentions discusses, or at least alludes to, some of the most important issues about democracy. The authors' different perspectives could add important insights to these subjects. The lead author, Paul Craig Roberts, is an economist who was trained in public choice theory, served in the Reagan administration as an Assistant Secretary of the Treasury, and was a leading "supply sider" instrumental in shaping the 1981 Tax Act. Mr. Stratton is a lawyer. Together, they could have created a synthesis of law and public choice theory that would improve our understanding of how *well*-intentioned officials could produce tyranny. The questions they raise (albeit, often only implicitly) are the right ones:

- How can nations that value liberty so highly engage in tyranny?¹
- What groups are most at risk of being tyrannized?
- How are acts of tyranny ended?
- Do perverse incentives lead prosecutors and regulators to act like tyrants?
- Can ethical public sector leadership prevent, or at least reduce, tyranny?

Public choice theory could provide a useful lens to view these issues. Economics is famous for suggesting that public policy has unintended (usually negative) consequences. The last question raises one of the most interesting topics that a host of different academic fields are struggling with. The general topic is *trust*. Public policy, evolutionary biology, economics, and management theorists, as well as ethicists, are all coming to appreciate that one of the most critical factors in a community is the degree of trust among its members. Altruism turns out to be common in many facets of life. When trust is eroded, whether by corruption or fraud, the social and political ties weaken and politics and business suffer. Moreover, as the authors' note, the ethical tone a leader sets is disproportionately powerful in influencing the behavior of subordinates. As they assert, when the leader is corrupt or fraudulent, it is likely that many followers will also [end page 225] be

corrupt or fraudulent. Similarly, the authors are correct that ethical leadership and ethical training can constrain people from acting on the basis of perverse incentives.² It is a revolutionary change for public choice theorists to modify their models (which assume that public sector employees simply maximize their self-interest) and include concepts of altruism, ethical leadership, professional mores, and agency culture. Thus, the book could have advanced not only our understanding of tyranny, but also been a breakthrough in advancing the public choice literature.

The jacket has an eye-catching collection of blurbs, with Milton Friedman in the lead, Alan Dershowitz arguing that the book shows that "government oppression is not a right-left issue," and G. Gordon Liddy (with no sense of irony, despite his active role as a tiny tyrant) decrying the "steady erosion of the rights of U.S. citizens."

I agree with the authors' *nominal* thesis that denying groups civil liberties and a meaningful franchise leads to tyranny. Paternalism has nearly always failed to prevent tyranny.

So, I found myself reading a book I thought was raising many of the most important questions, written by authors who seemed to be well placed to make a dramatic fusion of old-style public choice theory with the modern findings about trust, and sounding a clarion call for liberty, which is my favorite overture. The literary theme they adopted, *A Man for All Seasons*, based on the life of Sir Thomas More, is one that I use in teaching. I begin my public management class with the classic film, and use it to introduce the topic of ethics. I should love the authors' book. Instead, I found myself ever more mystified. The first problem was the title; the authors aren't serious about the phrase "good intentions." Their opponents are villains, "evil incarnate."

The second problem also involves the title; there is little or nothing worthy of the label "tyranny" discussed here. Overwhelmingly, the book protests white-collar crime cases against super elite Americans, environmental regulations, and the civil rights laws.

The third problem is that the book ignores all of the difficult issues because it assumes away all the tensions and tradeoffs in public policy. There are no real issues. All our decisions are easy. The book is of a *genre* that I didn't know existed until I began teaching at the University of Texas. Austin has public access channels on cable TV dominated by hard right programs. One variant attacks non-Protestant faiths. The other is militia programming. The authors' message is the militia's message. Regulations and laws can be done away with because they accomplish "little of value" (*Id.*, 32). White-collar crime prosecutions can be eviscerated because they do not involve "real" crimes (*Id.*, 93). Clean up of toxic waste sites can be ended because such sites pose no risk to health, the contrary view is "hysteria" (*Id.*, 79). Anti-discrimination laws can be ended [end page 226] because racism never existed. Slavery had nothing to do with racism. The KGB is to blame for the belief that Americans were racists (No, I am not making this up -- Mr. Roberts is.³). The risk that private criminals, left unchecked, could reduce the society's liberty is ignored, as is the possibility of someone like Bill Gates acting like a private tyrant.

The biggest problem, however, is that the authors systematically remove from English and U.S. history all major acts of tyranny. Implicitly, the authors illustrate one of the principal means by which tyrannical systems were sustained by these two nations most famous for prizing liberty – by studiously ignoring the victims. The authors go far back into English history to assert the critical importance of "the Rights of Englishmen" (which became the source of the rights in our Constitution and our Bill of Rights protecting criminal defendants). Because they argue that denying these rights leads to tyranny, I waited for them to describe any of the four classic proofs from English history of this thesis. England tyrannized blacks, Irish Catholics, colonial natives, and

the poor, and paternalism was the pretext. These groups became "the other," defined as outside the full protection of the dominant society. An explosive mixture of hate, bigotry, and fear led to periodic savagery and pervasive malign neglect and exploitation. Millions of people died and hundreds of millions of people lost their liberties due to these acts of tyranny. The authors say not a word about them.

As with England, the classic acts of tyranny in America (e.g., slavery) do not warrant mention. Why the same failure to use these terrible acts by America, which show that a denial of individual rights leads to tyranny? Their inclusion would falsify the authors' *real* views, that our super elites (who are exemplary) are tyrannized while "the other" is the problem. As with many anti-evolutionists,⁴ Mr. Roberts is a fervent believer in *social Darwinism*. The irony is that this book teaches us almost nothing about tyranny through what it says, but much about tyranny through what it omits. England and the U.S. prove that nations can value freedom while enslaving others. It was not an accident that the word "slave" was not in our Constitution. The exclusion of the victim from the document made it easier to continue to tyrannize blacks. Similarly, English law simply ignored slavery in the colonies.⁵ Roberts and Stratton have unintentionally illustrated how *real* tyrannies are maintained. The victims disappear from the tyrants' histories.

The fifth problem is that the book does *not* show that tyranny, in Professor Dershowitz's phrase, "is not a left-right issue." The authors' villains are on the left, their heroes on the right. The heroic protector of civil liberties was – J. Edgar Hoover. Franklin Roosevelt and Chief Justice Warren are villains. The book is wholly one-sided in other ways. For example, prosecutors are evil. Conclusory statements by defense counsel are treated not as advocacy, but as ultimate fact (requiring neither supporting analysis nor citation). There are no complex human beings in this book, only cartoon caricatures drawn with chunky crayons.⁶ **[end page 227]**

So, how well do they deal with the important questions their book at least implicitly raises? As I will show, very poorly by any standard of scholarship. They aren't clear in their analysis, or rigorous, and they are relentlessly one-sided. Many of their facts are wrong and they rarely provide citations. They rely on *ad hominem* attacks on their foes and rhetoric replaces reason. Government workers do not have good intentions; the authors repeatedly liken them to Nazis.

Thus, the book implicitly raises another question. Why, at their very moment of triumph, is the raging right becoming overtly hostile to our nation's government? *Why do the non-heathens rage?* Ironically, Mr. Roberts used to claim that the *central* problem in America was such pessimism and hostility towards America on the part of leftist elites (a "denunciatory ethic"⁷).

The claim that the government is filled with Nazis is important. Attitudes like this lead to disturbed persons deciding that it would be a good thing to murder a couple hundred strangers, including their children in a day care center, because they work for the federal government in Oklahoma City. Instead of wanting to *build* trust between the public and government workers, the authors believe that the only hope for escape from our tyrannical government is the complete destruction of such trust. As the saying goes, if we believe absurdities, we will commit atrocities.

ENGLAND AND "THE RIGHTS OF ENGLISHMEN"

The Authors' Focus on English Elites

The authors' chapter on English history is meant to convey three central ideas. First, England was exceptional among all other nations in providing such individual rights; therefore, it alone

escaped tyranny.⁸ Second, these rights were won by the heroic sacrifice of her elites. Third, Blackstone was the great expositor of these individual rights, Bentham their great enemy.

The two victims of tyranny the authors discuss were contemporaries, Sir Edward Coke and Sir Walter Raleigh (Raleigh). The authors neglect to inform the reader that Raleigh's tyrannical prosecutor was – Sir Coke! Raleigh, like Coke, was persecuted for being on the losing end of a power struggle. Raleigh was himself a tyrant, as the historian Paul Johnson (1997:13) explained:

[T]he English ... passed a series of laws, in the 14th century, known as the Statutes of Kilkenny, which constituted an early form of apartheid. *** [E]ven so English settlers continued to "degenerate" and intermarry with the Irish and become Irish themselves.... Raleigh [took] a ruthless part in suppressing [an uprising in 1580]. [end page 228] He had killed hundreds of "Irish savages," as he termed them, and hanged scores more for treason, and had been handsomely rewarded with confiscated Irish lands which he was engaged in "planting."

"Planting" meant settling Protestants in Ireland as colonialists on the confiscated lands. Sirs Coke and Raleigh illustrate how willing elite Englishmen who cherished (their own) liberty were to deny liberty to others. Coke and Raleigh were characteristic of English elites in this regard. By presenting Coke and Raleigh as their only examples of victims of English tyranny and as champions of liberty, the authors demonstrate either their lack of knowledge about English history, or their willingness to distort it.

England and Slavery

One of England's most popular songs, "Rule, Britannia!," makes clear the abhorrence of slavery felt by this liberty-loving people: "Britains never, never, never will be slaves!" But this was sung on England's slave ships and on its West Indies slave plantations. A million Africans may have died at English hands through the slave trade. Bizarrely, Blackstone's *Commentaries* cited a case holding that if a slave were brought to England the slave must be freed, as a testament to the English love of liberty (see [Boorstin 1996: 208 n. 111](#)). This right was, obviously, meaningless to English slaves. Slavery was highly profitable to England ([Foner 1998: 32](#)).

Ireland, England's First Colony

The Irish are a classic example of how easy it is to justify tyranny. For the English, the Irish were literally and figuratively "beyond the Pale."⁹ The authors argue that property rights and the right to bear arms are critical to the protection of civil liberties. Ireland is the best example I know to support this argument. For centuries, England had a deliberate policy of trying to end Irish ownership of land and other productive resources. The policy took time, but was spectacularly successful. The Penal Laws reduced Irish Catholic land ownership to roughly five percent by the mid-19th century. The Penal Laws also forbade Irish Catholics to own weapons.¹⁰

For *centuries*, the English viewed Africans and the Irish as subhuman. Thomas Cahill (1995: 7) explains:

To an educated Englishman of the last century, for instance, the Irish were by their very nature incapable of civilization. "The Irish" proclaimed

Benjamin Disraeli, Queen Victoria's beloved Prime Minister, "hate our order, our civilization, our enterprising industry, our pure religion.... This wild, reckless, indolent, uncertain and superstitious race have no sympathy with the English character. Their ideal of human felicity is an alternation of clannish broils and [end page 229] coarse idolatry [i.e., Catholicism]. Their history describes an unbroken circle of bigotry [!] and blood." The venomous racism and knuckle-headed prejudice of this ... simply passed for indisputable truth.

Indeed, some English writers made the blacks=Irish=apes equation explicit. Cahill (1995: 6) quotes the historian Charles Kinglsey's response to *post-famine* Ireland:

I am daunted by the human chimpanzees I saw along that hundred miles of horrible country. *I don't believe they are our fault* [Cahill's emphasis]. I believe that there are not only many more of them than of old, but that they are happier, better and more comfortably fed and lodged under our rule than they ever were. But to see white chimpanzees is dreadful; if they were black, one would not feel it so much, but their skins, except where tanned by exposure are as white as ours.

The Irish were routinely portrayed as drunken simians in English political cartoons. The Penal Laws made mass starvation of Irish Catholics inevitable by taking away virtually all of their land and dividing the meager remains into tiny plots that could (economically) grow only the potato – known to be subject to periodic blight (Foster 1989: 201). Roughly a million Irish died in *An Gorta Mor* (Gaelic for "The Great Hunger") and well over a million emigrated to escape starvation (many dying in the effort on the "coffin ships").¹¹ The English response was shaped by bigotry, a religious devotion to *laissez faire*¹² and the desire to receive rents from the "planted" Protestant landowners. While Marie Antoinette never said "let them eat cake," a *London Times* editorial essentially said: let them eat steak.

We have great faith in the virtues of good food. Without attributing the splendid qualities of the British Lion wholly to ... beef steaks, we may [say] that a people ... reared on solid edibles will struggle long and hard against the degradation of a poorer sustenance....

For our parts, we regard the potato blight as a blessing. When the Celts once cease to be potatophagi, they must become carnivorous. With the taste of meats will grow the appetite for them. With this will come steadiness, regularity, and perseverance; unless indeed the growth of these qualities be impeded by ... Government benevolence.¹³

Tens of thousands of Irish were already near starvation by the time of this September 22, 1846, editorial. The editorial reflected English ideology and policies.¹⁴ Ireland's tenant farmers produced large amounts of meat, eggs, etc. for their Protestant landlords, who in turn often rented the land from absentee English owners. England's policy, even when several thousand Irish were dying from starvation every day, was to continue to export [end page 230] these foods to England to pay the rents (*Id.*, 5). Ireland was a net *exporter* of food during much of the blight. Public choice theory's favorite chastisement is to complain that individuals engage in "rent-seeking behavior," but Ireland in the great starvation is the ultimate example of rent-seeking behavior gone wrong.

England's Practice of Tyranny in its Colonies

As badly as the Irish fared, some colonial native populations suffered far more. Australian aborigines were hunted for sport and for bounty payments to the brink of extinction. Torture and rape were common before murder. The usual virulent racism prevailed.¹⁵

Even where the natives were Aryans, as in the Punjab, and even into the 20th century, the English resorted to tyranny. Four hundred peaceful, unarmed protestors (ironically, protesting the denial of the normal rights of a fair trial) were murdered at the order of General Dyer in Jallianwala Bagh, India, on April 13, 1919 (you may remember the scene in the movie *Gandhi* – it was not exaggerated). Many hundreds more were left by Dyer, without medical aid, to die of their wounds. The massacre only stopped because Dyer's troops ran short on ammunition. Dyer's infamous explanation for his actions was: "I fired and continued to fire ... it was no longer a question of merely dispersing the crowd, but one of producing a sufficient moral effect...."¹⁶

English Tyranny at Home

Poor Anglican Englishmen were also subject to tyranny. Thousands of poor Englishmen were executed for trivial crimes under the infamous Waltham-Black Act, hundreds of thousands imprisoned (for the crime of being poor) in workhouses and debtors' prisons. Thousands more were press-ganged into the Royal Navy in circumstances that carried the certainty of being brutalized and an exceptionally high risk of death. Tens of thousands were transported to distant colonies. At the time Blackstone wrote, roughly *five percent* of adult Anglican males could vote. The vagrancy laws were used to arrest the poor. Labor contract breaches by workers were crimes. It was a capital crime for a bankrupt to conceal assets. Intense labor by poor children, particularly orphans, as young as eight years old was common. The kids worked more than sixty hours a week and were frequently whipped. Sexual abuse of the young girls by the managers was a recurrent problem. Young children worked and died in the coal mines. Only well to do males could serve on juries.¹⁷

The Authors' Thesis that Formal Legal Rights Equalize Power and Insure Fairness

These four areas of English tyranny would clinch the authors' historical case. **[end page 231]** None of them is mentioned. To the authors, England, after the "Glorious Revolution," was just how Blackstone pictured it in his *Commentaries*, a legal Eden in which the rights of Englishmen made all English equal. The authors phrase it this way:

Throughout the ages government rested on power. After centuries of struggle, culminating in 1688 with the Glorious Revolution in England, government was relocated in the will of the people (*Id.*, xi-xii).

Before the Rights of Englishmen empowered people, the source of an individual's power was the number of armed men he could rally, or the difficulty of subduing a castle or keep. Because power was unequal, rights were unequal. The Rights of Englishmen ended the idea that might makes right. Until then ... [n]othing but the king's good nature prevented law from being a means of oppression (*Id.*, 19).

When law resides in the will of the people, the elites, who wish to proclaim their will from on high, lack power (*Id.*, 37).

I will discuss only three major flaws in the authors' historical vision. First, the Glorious Revolution did not make power equal. The authors think that power did not depend on force after the Dutch Prince was put on the English throne. Try telling that to blacks, Irish Catholics, the Scots, any native people colonized by the English or poor Englishmen and women (or *Americans* – note the Declaration of Independence and the Revolutionary War). *All of the English abuses intensified after the Glorious Revolution.*

Second, it is naive to believe that force will not be used because it is "disallowed." This point has two parts. Force will *not* be disallowed against "the other." I have cited examples of such use of force. Further, even if force is *formally* disallowed, private or public enforcers may have *de facto* immunity from prosecution as long as they direct their force against "the other." Murder was a crime in the United States, but blacks were lynched with impunity.

Third, it is illogical to think that power must be equal if force is disallowed. The claim that English "elites" "lack[ed] power" after the Glorious Revolution is staggering. No country approaches England's fame for its class distinctions. The English are obsessed with the role of their elites; the BBC exports watched here often make class distinctions a key plot element.

Obviously, the King and the House of Lords were elites with considerable power [end page 232] in Blackstone's day. The "House of Commons" has been a misnomer through most of its history. The members were invariably from the elites in the time period the authors focus on. As Barbara Tuchman (1984: 134) explained, the Common's leadership was the province of nobility in Blackstone's day:¹⁸

This was the pattern of the British minister. They came from some 200 families inclusive of 174 peerages in 1760, knew each other from school and university, were related through chains of cousins, in-laws, stepparents and siblings of second and third marriages, married each other's sisters, daughters and widows and consistently exchanged mistresses.... Of some 27 persons who filled high office in the period 1760-80, twenty had attended either Eton or Westminster, went on either to Christ Church or Trinity College at Oxford or to Trinity or Kings at Cambridge.... Two of the 27 were dukes, two marquises, ten earls, one a Scottish and one an Irish peer; six were younger sons of peers and only five were commoners [including] three who through the avenue of law became Lords Chancellor.

The "new blood" in the House of Commons was pure blue:

In the election of 1761, 23 eldest sons of peers entered the House of Commons at their first opportunity after reaching 21.... (*Id.*, 135)

Nor was democracy a remotely accurate description for the selection of members of the House:

It had settled into a ... static body of members who owed their seats to "connexions" and family-controlled "rotten" boroughs and bought

elections, and gave their votes in return for ... positions, favors and direct money payments (*Id.*, 140).

As I have noted, only about five percent of adult males could vote, but that greatly *overstates* the scope of democracy because rural gerrymandering meant that rural lords had vastly more representation in parliament than did urban residents (*Id.*, 141). This is the system in which the authors assert the elites had no power. Blackstone, who was elitist and proud of it, would have been horrified by a system in which the elites lacked all power ([Boorstin 1996: 178-79](#))

The Authors' Confusion about the Roles and Views of Blackstone and Bentham

Another major flaw lies in the authors' lack of understanding of why these forms of English tyranny eventually declined, albeit, not until well after the Glorious Revolution. Among those most responsible for reducing that tyranny is Jeremy Bentham, [**end page 233**] who provided the intellectual impetus to the reform movement. Their attack on Bentham gets the facts exactly reversed:

Young Jeremy Bentham wanted to remake the world. Sitting in Blackstone's Oxford classroom he quickly grasped that English law was a barrier. Liberty – what Blackstonian law secured – has always been a barrier to those who want to remake society. When law resides in the will of the people, the elites, who wish to proclaim their will from on high, lack power (*Id.*, 37).

But, *law did not reside in the will of the people* in Blackstone and Bentham's day. The people did not elect Parliament. Blackstone, in his *Commentaries*, supported denying the right to vote to all but the elites ([Boorstin 1996: 160](#))¹⁹, and all non-Anglicans (*Id.*, 78-79). As a member of the House of Commons, he voted to exclude the reformer John Wilkes from Parliament ([Boorstin 1996: xiv](#)). Power also resided in the King, and Blackstone's views on kings are one of the reasons Bentham dismissed him as intellectually dishonest. Blackstone argued that the law provided a remedy for every legal wrong. Faced with the problem that, due to sovereign immunity, there was no remedy against the King, Blackstone claimed that the King could do no wrong, and went on to rhapsodize about how the King could not even be imperfect in his thoughts (*Id.*, 125). Blackstone, of course, knew this was absurd. Perhaps fortunately, King George III did not. He read Blackstone's *Commentaries* on royal rights while still in manuscript, which helped shape his determination to *rule* England and its colonies ([Smith 1966: 467-68](#)). He ruled so poorly that America declared its independence. Blackstone also gave a nudge toward our revolution by voting with fellow Tory hard-liners *against* repeal of the Stamp Act.

Bentham, by contrast, pushed reform bills to extend the right to vote to non-elites and non-Anglicans and opposed colonialism. His influence on Prime Minister Peel led to a dramatic reduction in crimes calling for capital punishment (*Id.*, 553, 594, 564). Bentham's policies changed over time, and were often complex, but the authors' disdain for him seems particularly strange given the fact that Bentham generally *opposed* governmental intervention in the markets ([Rodgers 1987: 22-23](#)).

Further, most law in that era was not made by Parliament, but by judges. This "common law" was the focus of the *Commentaries*. English judges of that era were elites and they assuredly did not reflect "the will of the people." Blackstone argued that Parliament (which the authors implicitly assume *did* reflect that will) should virtually never change the common law ([Boorstin 1996: 71, 74](#),

83, 105), while Bentham called for Parliament to pass statutes establishing the law.

So, if the authors support systems of government that insure that law reflects the will of the people, Bentham should be their patron saint. Blackstone's efforts to portray an undemocratic, religiously prejudiced system as an Eden and to keep the formulation [end page 234] of law wholly within the power of English elites should be repugnant to the authors.

AMERICAN HISTORY AND TYRANNY

Having ignored or reversed the facts of English history, the authors turn to Eden II, America. The story on this side of the Atlantic is that we inherited "the Rights of Englishmen" and became the only other non-tyrannical nation in the world. Bentham's poison, however, the willingness to limit individual rights for some public official's notion of the greater good, slowly eroded those rights until our Constitution became as "dead as a doornail" and our nation a tyranny (*Id.*, 180).

The authors follow the same pattern in eliminating from U.S. history every major act of tyranny, even though each act would provide superb support for their purported thesis that denial of individual rights leads to tyranny. While it is possible that the authors simply did not know that England had frequently acted tyrannically after the Glorious Revolution, no adult American is unaware of slavery, and Mr. Roberts lived during the time period when several of these acts of American tyranny occurred. Thus, the exclusion of these acts from the book was intentional.

After reading a large number of Mr. Roberts' "e" columns, three reasons for excluding the major acts of American tyranny emerged, which I summarize here and then discuss briefly below. First, as with the English examples of tyranny, including the major examples of American tyranny would ruin the authors' timeline. America is supposed to begin as a bastion of liberty and only succumb to tyranny after Bentham's evil influence slowly erodes respect for individual rights. In fact, the worst forms of tyranny, against blacks and Native Americans, occurred earlier in our history.

Second, discussing the major acts of tyranny would turn the authors' purported hero, J. Edgar Hoover, into a villain and one of their major villains, Chief Justice Warren, into a (flawed) hero. Worse, many conservative politicians (e.g., Nixon and McCarthy) contributed to tyranny.

The principal reason for excluding the real acts of tyranny, however, is that the victims are politically incorrect from the authors' perspective. No one, I had thought, disputed that various minorities had been the primary victims of American tyranny. The authors not only dispute that; they view such minorities as the *problem* and "white, heterosexual, able-bodied males (WHAMs) as the real victims in our society. Indeed, the most oppressed people in America are overwhelmingly WHAMs – they are the richest people in America." [end page 235]

A Timeline of Major American Acts of Tyranny

Your list will differ from mine, but I'm confident that we would have a broad overlap on the key aspects of tyranny in the United States.²⁰ Most of us would start with the treatment of Native Americans and slavery, including the horrific Fugitive Slave Acts, which sought to force the entire nation to assist slavers. These were the earliest in time, longest lasting and most violent forms of tyranny. Then, in rough historical order:

1. The Alien and Sedition Acts of John Adam's presidency. The latter made virtually any criticism of the government a crime (Foner 1998: 43).

2. Barring Asian-Americans from citizenship and land ownership, and periodic pogroms
3. Civil War suspensions (by both the Union and the Confederacy) of *habeas corpus* and arrests (in the Confederacy, even summary execution) for public dissent (Foner 1998: 98)
4. General Forrest's massacre of black POWs after the surrender of Fort Pillow
5. The "Black Codes" (which essentially sought to recreate slavery)
6. The KKK's reign of terror that was so instrumental in bringing an end to Reconstruction
7. "Jim Crow" laws, lynching, and disenfranchisement of blacks in the South
8. The public and "privatized" war against unions²¹
9. The tactics used by the U.S. in fighting the Philippine guerillas (Zinn 1995: 305-13)
10. The World War I Sedition Act and the mass street sweep arrests in search of draft "slackers"
11. Attorney General Palmer's raids and the "Red Scare"
12. The compelled sterilization of roughly 60,000 Americans (Associated Press 2001)
13. The internment of Japanese-Americans during World War II
14. McCarthyism
15. Hoover's files on government officials and COINTELPRO. The acronym stood for "Counter Intelligence Program" (the series of illegal FBI operations to destroy the effectiveness of groups that Hoover hated, mostly leftist, but also the KKK and civil rights leaders such as the Reverend Martin Luther King, Jr.) (Gentry 1993)
16. Nixon's presidency. The "enemies list," the "Plumbers," Watergate, the Huston Plan, the use of the IRS against political enemies (*Id.*).

The authors note only, and very briefly, that the FBI "infiltrated" the KKK and "wiretapped" Reverend King and that Palmer's raids were criticized (*Id.*, 145-46). The context is an effort to establish FBI Director J. Edgar Hoover as the 20th Century's greatest protector of civil liberties. [end page 236]

Ideological Selectivity in Identifying Villains and Heroes

Mr. Roberts regularly denounces "political correctness" and claims that liberals won't criticize other liberals. "What's important to a liberal depends on whose ox is being gored."²² Mr. Roberts also emphasizes how critical it is to hold government officials accountable for their misdeeds.²³

In *The Tyranny of Good Intentions*, however, the authors show a slavish adherence to political correctness. Their heroes can commit horrific acts of tyranny without accountability. Only a left-leaning ox (a "lox"?) is in danger of being gored. The authors discuss Mr. Hoover under the subtitle: "The Lost Ethics of J. Edgar Hoover."²⁴ They say that Hoover had a "firm rule against practices that might taint law enforcement with unscrupulous behavior" (*Id.*, 145). What they don't tell the reader is that the firm rule was a cynical cover. Yes, Hoover, at various times, had many written rules about unscrupulous practices, and his publicity machine pointed out those rules. However, Hoover also routinely ordered his agents to break those rules and engage not simply in "unscrupulous" but outright illegal practices (Gentry 1993). The authors also leave the impression that Hoover opposed the Palmer raids and wanted to ensure that the bureau never again engaged in such abuses (*Id.*, 145-46). In fact, Hoover was an active supporter of the Palmer raids and an advocate of mass arrests (Gentry 1993: 95-102). The authors then cite a 1932 memorandum from Hoover opposing the investigation of the communists. Hoover hated communists, investigated them continuously, saturated the party with informers, bugged and wiretapped them and their friends, families and acquaintances, and had a COINTELPRO program of illegal tactics devoted to communists for well over a decade (*Id.*, 442). He also constantly smeared people who were not communists by asserting they were communists. The memorandum the authors cite does show how Hoover's written positions often failed to reflect his real views and practices.

While omitting any express reference to COINTELPRO, the authors do obliquely mention two examples of such efforts, those against the KKK and Reverend King. The FBI finally took on the Klan, at the insistence of the Kennedy Administration, in the wake of the murder of three civil rights workers. Hoover was a racist, and ignored Klan murders for decades (*Id.*, 441-42). In Hoover's case, the authors cite good intentions as an excuse for tyranny:

The FBI's wiretaps of Martin Luther King, Jr., and infiltration of the ... Klan ... tainted Hoover's reputation with civil libertarians. *** [T]he ... Klan was suspected of being capable of organizing violent acts against civil rights agitators, and Martin Luther King, Jr., was suspected of having communist ties. These suspicions may have been poorly based, but they do not appear to have been concocted in order to target anyone (*Id.*, 145).
[end page 237]

Really? The Klan was not "suspected" of "being capable" of "violent acts." The Klan was known to engage in terror and murder. Who, but these authors, would write a sentence today that termed civil rights workers as "agitators?" Who but these authors could write that the "suspicion" that the Klan was violent towards "agitators" "may have been poorly based?"

Now take the case of Reverend King. The claims of communist "influence" most assuredly were "concocted in order to target" him. The illegal "investigation" of Dr. King had no pretense of being related to a crime. He was targeted because Hoover was a racist and viewed Dr. King as the strongest black leader. The FBI's express goal was to remove King from leadership. Its tactics were reprehensible. Perhaps most revealing, however, is the FBI's reaction to King's "I Have a Dream" speech. This famous exhortation of love and patriotism sent shock waves through the FBI's senior leadership precisely because it was so effective, convincing Hoover to spur his illegal efforts to smear King and get him to resign or commit suicide (*Id.*, 527-29).

The authors' best lines on Hoover, however, (indeed, the funniest lines in the whole book) are:

The purpose of Hoover's files on politicians was to protect the bureau from political misuse. The files were a defensive weapon (*Id.*, 145).

This remarkable claim is made without any supporting citation. The logic is fascinating. Yes, Hoover kept voluminous, secret files on politicians' sex lives, personal habits, and disreputable associates. Yes, Hoover made it known to politicians that he had dirt on them (a defensive weapon is no good as a deterrent if no one knows you have it – as we know from *Dr. Strangelove*). But Hoover broke the law with good intentions. Untrue, Hoover used the files as blackmail to ensure generous appropriations, life tenure, and to intimidate critics ([Gentry 1993](#)).

Mr. Roberts is quick to rely on good intentions as an excuse for tyranny by folks who share his ideology or fight his ideological foes. Where would a defender of the absolute right to individual liberty and the sanctity of democracy stand on Pinochet's coup against Chile's democratically elected president, Salvador Allende, and the subsequent disappearances, tortures, and murders of leftists? Pinochet is dear to Mr. Roberts' heart because he placed "Chicago school" economists in charge of the economy and fought communists. Therefore, Pinochet is not a tyrant, but a hero, and those trying to bring him to trial are – tyrants!²⁵

Or take Kosovo, the Albanians are Moslems, the Serbs are Christians. In the midst of the Serb campaign of "ethnic cleansing" (via mass rape and murder) of these Moslems, Mr. Roberts

claimed: "The Albanians in Kosovo brought their suffering on [end page 238] themselves." In the context of *whites*, Mr. Roberts warned that "once a race or class is assigned collective guilt, all protections fall away."²⁶ Yet, he claims that Albanian females "brought [rape] on themselves."

Similarly, Nixon, our President who was most eager to deny rights to anyone not on the right, gets a pass (Kutler 1997). Watergate, the Plumbers, the enemies list, the use of the IRS to attack political opponents, and the Huston plan authorizing illegal break-ins, none of this is worthy of mention in a book about American tyranny.²⁷

In addition to their heroes getting a pass on their acts of tyranny, the authors' villains get their positive contributions to liberty scrubbed from history. Chief Justice Warren increased liberty. The authors laud the right against self-incrimination, but before *Escobedo v Illinois* and *Miranda v Arizona*, poor defendants' rights were ignored. The authors praise the right to counsel, but poor people had no meaningful right to counsel before *Gideon v. Wainwright*. The Warren Court made America far more democratic by insisting on "one man, one vote" in *Baker v Carr and Reynolds v Sims*. Warren expanded rights against unreasonable searches, particularly bugging. Indeed, conservatives abused him because he expanded liberty.

Viewing Minorities as the Problem, Not the Victim

Mr. Roberts' "e" columns, and a prior book by the authors attacking the *Brown v Board of Education* decision, provide the principal reason for their otherwise inexplicable failure to discuss any of the worst acts of American tyranny. These acts would prove the authors' nominal thesis, that denial of liberty leads to tyranny, and would also allow far more effective attacks on the authors' villains (i.e., FDR and Earl Warren's culpability for the internment of Japanese-Americans²⁸). The problem is that the examples would undercut the author's real thesis, that rich, white American elites are the primary victim of tyranny.

Mr. Roberts's most intense views come in describing the contribution he believes the civil rights laws and immigration of non-Europeans make to tyranny. First, it is critical to understand his starting position (which also appears to be shared by his co-author): slavery had nothing to do with racism, and the Civil War had nothing to do with slavery. Indeed, the belief that white racism was ever common in the United States is a product of a successful KGB disinformation campaign and bias against the South.²⁹ In a May 10, 2000, column entitled "Anti-South Prejudice," Mr. Roberts argued:

The South wanted out of the Union because [of] tariffs.... [end page 239]

Our education system has produced a generation of students who believe that slavery was invented by Southern racists for no other reason than to deny blacks self-esteem.

For their self-esteem, blacks need to understand that every race has been held in slavery.

Slavery in the Southern colonies was not born of racial animosities but of the need for a work force. It was an economic institution that provided labor so that land could be exploited where there was no indigenous population. Slavery was on its way out in the South as population density increased and a free labor market developed.

Slaves happened to be black in that historical period because it was black slavers who were the suppliers of slaves. *** Black political activists should get their own history straight and stop trying to rewrite the South's.³⁰

This quotation is remarkable for many reasons, but four stand out. First, black slavery is justified on the astonishing grounds that our genocidal impact on Native Americans was so great that there was "no indigenous population" (to enslave??). Second, every factual assertion, other than the fact that every race has known slavery, is false.³¹ Third, Mr. Roberts doesn't think that the two *southern* "black political activists" he criticizes in the column are part of "the South's" history – they should "get their own history straight." Fourth, the passages are also eerily similar to one of the most infamous Supreme Court decisions, *Plessy v Ferguson* (upholding segregation of rail cars). Kluger quotes the passage from *Plessy* in his book, *Simple Justice*:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.

Kluger (1976: 80) then comments:

Of all the words ever written in assessment of the *Plessy* opinion, none have been more withering than those ... [of] Yale law professor Charles L. Black, Jr., who [said that in] ... the two sentences... "The curves of callousness and stupidity intersect at their respective maxima. [end page 240]

It is clear from their prior book that the authors of *The Tyranny of Good Intentions* think that *Plessy* was properly decided – which makes them very close to unique.³²

Second, Mr. Roberts believes that non-whites and non-Christians endanger our country. In "Giving the Gift of Christ," a December 17, 1999, editorial in the *Naples Daily News*, he wrote:

There is plenty of room for cultural diversity in the world, but not within a single country. ... A hodgepodge of cultural and religious values provides no basis for law – except the raw power of the pre-Christian past.³³

Mr. Roberts has written that whites are being "ethnically cleansed" by non-white immigrants:

When I first came to Washington, D.C., 25 years ago, the only international-looking people one saw were in the diplomatic community. Now, it is every third person. *** In 1965, the Democrats, who lost the

South, changed the immigration rules in order to build African, Asian, and Hispanic constituencies that would vote Democratic. *** The formerly all-white ... Cupertino, Calif., [was] ... overrun by Chinese immigrants... ³⁴

It's not clear what an "international-looking" person is, but having lived in the Washington, D.C., area for many years, I can confirm that few residents are Native Americans. I now live near Cupertino; its web site shows that as of 1990, roughly one-quarter of its citizens are of Asian origins. It remains a wealthy Silicon Valley community. In another part of this same column, he bemoans fights between Arab-Americans and European-Americans in Dearborn, Michigan – the town I grew up in. It is a very small, but diverse, world. The Democratic Party, which Mr. Roberts refers to as "aka the Nazi party" (*Id.*), is bad because (unlike the Nazi party!) it has diverse supporters. Mr. Roberts' April 24, 2000, column "Genocide in the Classroom" states:

Whatever the Democratic Party has become, it is no Camelot. Voter profiles show that essentially 100 percent of homosexuals,³⁵ lesbians, feminists, and class action lawyers vote Democrat, as do 90 percent of professors, media, Hollywood, public employee unions and handicapped persons, 85 percent of blacks, 70 percent of Hispanics, and businessmen seeking protection against a government shakedown. It is a party of disgruntled intellectuals, victims groups, thugs, haters, and crass opportunists who are united by a shared sense of moral superiority.³⁶

The recent vote for Gore confirms the Democratic party's ethnic ties:

A map ... of the vote by county shows a tiny Gore presence. Gore's vote is **[end page 241]** confined to Hispanic counties in the Southwest, the California coastal counties, Portland, Oregon, the counties bordering Puget Sound in Washington, Minnesota and urban areas of Great Lakes states, Jewish counties in Florida, heavily black counties in the Southeast and heavily urbanized areas of the Northeast...

The Democratic Party is a ... revolutionary party, committed to overthrowing ... traditional American morality, principles, institutions and people.

Democrats favor open borders because the millions of Third World immigrants pouring into the United States have no tradition of constitutional government and a rule of law.

The longer the borders stay open, the sooner the country will be lost.³⁷

Then, reminiscent of Disraeli's attack on the Irish as being "bigoted," and with a similar lack of self-examination or irony, Roberts says "Democrats have the advantage of the fanatic's belief in the moral righteousness of their issues. Like Communists, Democrats can muster the power of hate."³⁸

Elsewhere, he complains of "white genocide" through immigration in Europe and the United States. He asks the following question:

Our current immigration policy means that by the year 2050 Americans of

European descent, a group that comprised 90 percent of the population in 1960, will be in the minority and will have lost control over their political destiny.

How does this differ from being overrun by the Chinese Army?³⁹

I will leave the reader to answer this question.

He believes that non-European immigrants offer only one advantage – they are corrupt. "In the end, the live-and-let-live Third World culture of bribery might be what saves us from intrusive government."⁴⁰ (Putting aside the accuracy of the assumption that bribery is a universal attribute of the third world, Mr. Roberts has not experienced pervasive corruption if he thinks it makes government better. In fact, economic theory suggests that corrupt government officials would deliberately make government *unresponsive* in order to increase opportunities to extort bribes.)

The Real Victims of U.S. Tyranny: Elite Whites

"Tyranny" takes four forms: progressive taxation, regulation that interferes with property interests, anti-discrimination laws and affirmative action, and white-collar crime [end page 242] prosecutions. According to Mr. Roberts, the 1990s were a period of utmost repression of super elite Americans.

"In our time hatred of 'the rich' is a political phenomenon, much like hatred of the Jews in National Socialist Germany...." "We crush the rich with taxation because of envy. Government is our instrument for oppressing the rich."⁴¹ (The April 15 crush produces such rich white whines!). Roberts continues:

Successful Americans are chattel of government. They are required to deliver between one-third and one-half of their annual incomes to government as the price for not being hauled off to prison. [They are like] feudal serfs and 19th century slaves. Successful Americans are among the most exploited people in world history, and the demagoguery they endure is endless⁴²

Regulation compounds the oppression of taxation. Mr. Roberts states that:

Americans loathe their government – federal, state, and local, legislative, regulatory and judicial – for many reasons. No aspect of our lives has escaped assault by government determined to force ideological doctrines down our throats. *** The Constitution of the United States has been reduced to a scrap of paper.

The regulatory bureaucracies have amassed [sic] unimaginable powers, ... and these powers are used to serve ideologies at the expense of the people just as happened in [Nazi] Germany and Communist Russia. (*Id.*)

Not all whites are equally under assault. Straight, white males are the principal victims of bias:

If you are a white heterosexual able-bodied male (WHAM), you need to

understand that affirmative action is not about leveling a playing field. It is about leveling you.

Homosexual and disabled white males also vote against you. The latter have achieved preferred status and homosexuals are demanding it.

Feminists have split many white heterosexual women from you. It has become dangerous for a WHAM to marry. You can be blameless, but your wife can walk away with another man, your children, half of your property and pension and a good chunk of your earning for many years to come. If you resist, your wife may hit you with child abuse charges. You will not get a fair trial.

You are losing the ability to reproduce as your women influenced by feminists [**end page 243**] increasingly eschew procreation.⁴³

White males who try to fight back at their loss of power are demonized:

You have no leaders, no organization, and no spokesmen. Anyone who attempts to rouse you immediately becomes an outcast. They are slandered and called names. They lose their job and their voice. You have nowhere to go and no way of protecting yourself from the vicious propaganda that is targeted against you. You are too politically weak to cap the immigration that is making you into a minority in your homeland.⁴⁴

This phenomenon exists throughout Europe:

The European political establishment has dealt with the problem by attempting to brand anyone who raises the immigration question a Nazi. England's Enoch Powell, Denmark's Pia Kjaersgaard, Austria's Jorge Haider, France's ... Le Pen have each suffered this fate.⁴⁵

The problem is not that "the other" (e.g., blacks) is abused; the problem is that modern Americans worry *too much* about others. In an April 26, 2000, article entitled "Welfare State Causes Genocide in Europe," Mr. Roberts said:

The "compassionate" welfare state is proving to be an effective method of exterminating European peoples and their cultures. *** This has become a political question that scares the politicians who have chosen welfare over cultural integrity. *** So much is in the way: sexual promiscuity, the feminist pursuit of a masculine role for women, the security of an old age provided by taxpayers, and an "other-directedness" that diverts attention away from family toward the unfortunate. In small towns in the South of the United States, high school students are bagging groceries for donations to finance their travel to distant towns where, they explain, they are going "to build houses for the poor." Shouldn't these kids be painting their grandmother's house or helping an aunt with a garden? But this is not seen as rewarding. Our "other-directed" culture teaches them that their duties are to unknown persons in far away locations. This is not a culture built to

last.⁴⁶

Mr. Roberts appears to be attacking the efforts of a fellow Georgia native, former President Carter's "Habitat for Humanity" program. A culture that teaches its children to help the stranger and the poor cannot last? Coming from one who stresses his Christianity, this seems heretical. Perhaps I misconstrue the parable of the Good Samaritan (*Luke* 10: 25-37). [end page 244]

These writings make clear why the authors of *The Tyranny of Good Intentions* ignore acts of tyranny against "the other," indeed, deny that such acts occurred. It also becomes clear why their examples of tyranny will overwhelmingly focus on the super elite.

WHITE-COLLAR PROSECUTIONS AS TYRANNY

The authors do not expressly limit themselves to elites; there are some examples of non-elites' persecution in the book. However, by weight and passion, the book focuses on super elites: the cases against Microsoft and Archer-Daniels-Midland (ADM), Michael Milken (Drexel's "junk bond king"), Charles Keating (of Lincoln Savings & Loan) and a related case against one of Lincoln's myriad law firms (known as "Kaye, Scholer").

I have some personal knowledge of the cases against Charles Keating, Kaye, Scholer, and Milken (though my personal knowledge of the latter is tangential) because I served in several different, fairly senior capacities in the agencies that regulated S&Ls. Milken had substantial involvement with roughly ten S&Ls, and Lincoln Savings was one of them.⁴⁷

In their prior book, *The New Color Line*, the authors (1995: 143) complained that:

The increased emphasis on prosecuting nebulous "white-collar" crime, rather than following criminal evidence wherever it leads, reflects a growing pressure for racial balance in criminal prosecutions.

Race goes virtually unmentioned in *The Tyranny of Good Intentions*. The book complains that "inner city" juries are letting (black) criminals off (*Id.*, x). It also complains about a movie on Rubin ("Hurricane") Carter's legal problems:

This movie provided an opportunity to educate the public about corruption in the criminal justice system, but in our politically correct era most viewers will conclude that Hurricane Carter was the victim of racism. The emphasis on racist "white justice" – as if whites are any safer – blinds the public to the real problem with the criminal justice system: the erosion of the Rights of Englishmen....(*Id.*, 173).

But, whites are safer; they do not get stopped for "driving while white," they are less likely to be assaulted by police, and even if they are druggies they are less likely to be arrested and to do hard time than is the case for Latinos and blacks. Moreover, there is compelling evidence that Carter's legal problems were partially due to his race (*Hirsch* 2000: 54-55, 114-17, 126, 147-51, 264-73). In sum, the authors' strong views on race underlie their skepticism of white-collar crime cases. [end page 245]

The authors' sentence about white-collar crime in their prior book also provides evidence of the "priors" they brought to the book I am reviewing. White-collar crime goes in quotation marks,

suggesting it is a misnomer. White-collar crime is "nebulous." They do *not* believe that white-collar, as opposed to blue-collar, crime investigations come from "following criminal evidence wherever it leads." Unfortunately, the authors do not acknowledge their priors.

Microsoft

The authors' treatment of the antitrust case against Microsoft is illustrative of the way the authors try to make their case. It is one (very large) part *ad hominem* attack on political opponents, one part conservative "law and economics" theory, and one Emeril Lagasse-like "BAM!!!!" of rhetoric hurled onto the tyranny *de jour*.⁴⁸ The personal nasties start in the third sentence of the authors' complaints about the Microsoft case. We are told that the Assistant Attorney General in charge of the Antitrust Division was "ambitious and previously unknown" (*Id.*, 174). Putting aside the fact that these authors normally think ambition is a virtue, how do the authors know this? They present no examples, no citations. Joel Klein is simply declared guilty of bringing a baseless case because he was a nonentity who wanted fame. As Mr. Roberts phrases it in an "e" column (which calls for Klein to be "impeached" because he sued Microsoft):

Ayn Rand is scathing in her comparisons of the government class with the entrepreneurial class. She could rewrite her story today using real characters.

Microsoft's Bill Gates, a genius who has done more good for mankind than any government ever has; Bill Clinton, a scumbag...; Assistant Attorney General Joel Klein, a third-rate bureaucrat who advances his lackluster career by attacking America's most famous businessman; Judge Penfield Jackson, a disgraceful tool who issues whatever rulings the government needs to attack Microsoft.⁴⁹

If Roberts is correct that Klein is a "third-rate bureaucrat," then we have the most extraordinary public servants in history. I don't know Joel Klein, but I took an hour on the web to find out about him. He was born in Queens into a working-class family and grew up in public housing. He graduated from Harvard Law School. He did so well there that he made law review, went on to clerk for a famous federal appellate judge, then for Supreme Court Justice Powell. This means that he was one of the smartest lawyers of his generation.

Many smart people make poor lawyers. So, what kind of a lawyer is Klein? A hedge fund analyst wrote an "e" column that proved prescient. He warned that "the Street" characteristically underestimated government lawyers: **[end page 246]**

When I was in law school at Harvard, I would hear periodically about how the smartest guys at the school were trying to work for this red-hot boutique firm in Washington with a lead litigator who had a record for brilliance in front of the Supremes.⁵⁰

The litigator was Klein. So, if he's third-rate, our public sector "A" team must be awesome. You know what really happened though; the authors do not know Klein and made no effort to learn about him. He brought the antitrust case they didn't like, and he worked for the government. It followed inexorably that Klein must be incompetent. Further, because it is inconceivable to the authors that people who take actions they oppose could be motivated by "good intentions," it also follows that Klein must be acting improperly. Because Klein won, it follows that the government

lawyers and judge must have been abusive. Facts cannot penetrate these ideological givens.⁵¹

Far from being some antitrust tyrant, cloture had to be invoked to break a filibuster against Klein's nomination to head the Antitrust Division. His opponents were concerned that he was too *weak* in enforcing the antitrust laws. Once he brought the action against Microsoft, its political supporters bragged to Mr. Gate's local paper how they had sent a message to Klein to back off the case by attacking the Antitrust Division's budgetary request ([Grimaldi 1998](#)).

The authors' smear of Klein isn't even internally coherent. It requires Klein, for the purpose of *aiding* his reputation, to *knowingly* bring a *baseless* lawsuit in front of a conservative judge appointed by *Reagan*. Bringing a baseless lawsuit in front of a judge who is likely to be hostile to your position is a great way to destroy your reputation.⁵²

The attack on Judge Jackson is equally incoherent. *Why* has this conservative, Republican Reagan-appointee ruled against Microsoft? Even the authors' penchant for conspiracy theories fails them at this point, so they substitute pure bile – the judge is a "disgraceful tool" of Klein.

But Klein is only an appetizer; David Boies is the main course. One would think Boies would present a few problems for the authors; he is widely considered the best civil trial lawyer in the country and Klein (the ambitious) had Boies (a private lawyer) take the lead and gain the extraordinarily favorable publicity. Moreover, why did Boies get such favorable publicity? Because he greatly out-lawyered Microsoft's counsel and repeatedly destroyed the credibility of Microsoft's witnesses and counsel. This is how the authors deal with these facts:

[Boies is] famous for eating with his hands in Washington, D.C., restaurants and gambling in Las Vegas. Boies's legal hallmark is an ability to manipulate **[end page 247]** witnesses and lure them into indefensible positions.

... Boies recognized that Microsoft was a high-profile case that could be tried in the media and that Bill Gate's childlike personality would make him a poor witness (*Id.*, 175).

With defenders like this, Gates needs no enemies. The first quoted sentence is typical of the *ad hominem* attack the authors launch on anyone they oppose. It is also characteristic in terms of quality; they get an "A" for rancor, but they don't have any good dirt on the people they hate.

The second sentence is equally silly. Remember that the authors stressed in their discussion of Sir Walter Raleigh's prosecution (on the basis of a written statement) that the outrage was the denial of the right to "confront" (cross-examine) the witness. Suddenly, cross-examination becomes "manipulat[ion]" if conducted by a lawyer they oppose. Honest witnesses do not get "lure[d]" into "indefensible positions." Boies destroyed the credibility of a whole series of Microsoft witnesses because they decided, in consultation with their counsel, to stake out indefensible positions that were contradicted by their own records.

But the argument becomes a self-parody in the second quoted paragraph. Gates did destroy his credibility in his deposition. This happened not because he was "childlike" (unless the authors mean what most of us have seen as parents when our four year old tries to tell a fib, but does it so badly that you have to suppress the urge to laugh). Gates got in trouble for the most common reason any adult witness looks bad – trying to be too clever by half. He couldn't understand

common questions; he couldn't remember things no trier of fact would believe he couldn't remember. He ended up looking evasive. He was snide, even rude. Adam Liptak's (2001) recent review of the two books out on the trial⁵³ notes that they show that:

Bill Gate's disastrous deposition, which played a central role in the trial, was a comic masterpiece of evasion and obfuscation.

The side dish of law and economics theory comes in this passage:

Microsoft was hauled into court because defeated competitors sought to regain through ... campaign contributions and government lobbying what they had lost in the marketplace. The political agitation against Microsoft created Klein's opportunity (*Id.*, 175).

This claim that the Justice Department brought the case because of "political contributions" is not supported by any citation or example. While some of the victims of [end page 248] anticompetitive actions by Microsoft did urge suit, their *substantive* arguments in an excellent legal memorandum were what proved influential within the government.⁵⁴

The authors' treatment of the merits of the case is wholly one-sided and often inaccurate in such fundamental ways as to undercut their credibility. For example, they lament that the substantive issues in the case were over the head of the "jurors, reporters, and the judge himself" (*Id.*, 176). But there were no jurors; the case was tried to the Judge Jackson. The authors' claim that the Jackson's action in bringing Judge Posner into the settlement discussions proves that the case was over his head is nonsensical. If anything, using a more senior judge to seek a settlement is the mark of a self-confident trial judge.

The rhetoric of tyranny comes in the final paragraph of the authors' section on Microsoft:

Klein and Boies succeeded with their plan to substitute a personal attack on Bill Gates in the place of anticompetitive conduct by Microsoft. Their success, in full view of the public and the legal profession, in using law as a weapon against Microsoft is a clear indication that our legal system has degenerated into tyranny (*Id.*, 176).

I think what has degenerated is our use of terms for terrible acts. We devalue words like tyranny, and real victims of tyranny, when we apply it to acts we simply disapprove of. Deposing a witness (particularly a brilliant one represented by able counsel) is not "tyranny." It is an utterly normal, proper action. The credibility of the lead witness for a party is often decisive, and those who come off looking evasive have, for thousands of years, lost credibility. But it is good to know that the authors disapprove of personal attacks.

Michael Milken

Another super elite victim of tyranny is Michael Milken, the former "junk bond king" who brought Drexel, Burnham Lambert from raglan to riches to rags. The recipe is the same: smear the prosecutor, explain why the defendant is a candidate for sainthood, throw in a dash of law and economics, and finish with a jolt of rhetoric about tyranny. Milken's prosecutor was Mr. Giuliani:

One of the masters of this art [of plea-bargaining], Rudolph Giuliani, rode

it to the mayoralty of New York City. *** While U.S. Attorney ... he boasted ... that in his experience the major difference between so-called white-collar criminals and real ones is that the former "roll a lot easier." The criminal charges create "a conflict between what they appear to families, friends, co-workers, and what they're doing in the secret part of their life. It tends to move them toward confessing, putting it [end page 249] all behind them."

Giuliani's chilling words echo the belief of Cesare Beccaria ... that torture measures an individual's sensitivity to pain, not his guilt. Just as a medieval torturer assessed "the muscular force and nervous sensibility of an innocent person" in order to "find the degree of pain that will make him confess himself guilty of a given crime," the modern prosecutor wields the instrument of psychological torture (*Id.*, 93).

Think how much fun a deconstructionist could have with these two paragraphs of bile. First note the words that the authors put in Giuliani's testimony: "so-called white-collar criminals and real ones." No, they didn't put that phrase in quotation marks, but they tried to give readers the impression that this was the substance of Giuliani's testimony. Giuliani did *not* testify that "so-called" white-collar criminals are not "real" criminals. What the authors reveal, unintentionally, is their *own* view – a hidden presumption that underlies their book.

Giuliani's analysis of why such criminals might plea bargain is coherent and unobjectionable. The second paragraph is so over the top that it again undercuts the authors' credibility. This is their "logical" chain: Giuliani believes that *guilty* white-collar defendants feel a psychological conflict that pushes them to confess, medieval torturers were expert at getting *innocent* people to confess, therefore, Giuliani is like a medieval torturer. Q.E.D.?!?

Next, Milken as hero. "Milken was a hugely successful innovator who single-handedly revolutionized financial markets" (*Id.*, 94). He was a "genius" with "extraordinary vision" (*Id.*, 94, 99). He was dedicated to his family and "philanthropy" (*Id.*, 95). The authors neither inform the reader that other writers have much more negative views of Milken's skills and character nor do they respond to these critics.⁵⁵

The law and economics spin to Milken is brought in by the authors' reliance on Dean Fischel's (1995) book *Payback: The Conspiracy to Destroy Michael Milken and his Financial Revolution*. The title shows the passion he feels about the downfall of his former client. Dean Fischel is a leading conservative law and economics scholar. He is skeptical that insider trading should be criminal. He acknowledges several of Milken's violations the law, but views them as "technical." The authors do not tell the reader that Milken was Fischel's client. Rather than discussing the merits of the case, they simply rely on Fischel's conclusion that Milken was a hero.

The authors do make an interesting point about the prosecution's tactics in an attempt to explain away the fact that Michael Milken, despite hiring some of the world's best criminal lawyers and being confronted with what the authors claim was zero [end page 250] evidence of criminality, decided to plead guilty to a whole range of felonies. The irony is that the explanation underscores their unwillingness to inform the readers about cases that would better prove their point, but which they find politically incorrect because the facts would harm their ideological allies:

Resorting to a tactic that has never been approved by the U.S. Supreme

Court, [they] threatened to indict Milken's ... brother Lowell unless Milken pled guilty (*Id.*, 97-98).

The phrase "never been approved by the U.S. Supreme Court" is an interesting one. It is crafted to make it appear that the Court does not approve of such tactics. In fact, the Supreme Court has permitted a mother of two small children to be *executed* when the *sole purpose* of charging her with crimes was to put pressure on her husband to confess. The name of the mother, of course, was Ethel Rosenberg. Worse, the decision to prosecute Ethel was made at a time when the government had no evidence she had committed any crime, much less treason. Moreover, the trial denied them "the Rights of Englishmen." Among the abuses was a series of *ex parte* meetings between the trial judge and the prosecutors as to whether both Ethel and Julius should receive the death penalty. The case rested entirely on co-conspirator testimony secured by plea-bargaining. Prior inconsistent statements by these witnesses were suppressed. Eventually (and contrary to their earlier sworn testimony), these witnesses would claim that Ethel had served as Julius' typist. The FBI sent three agents to Sing Sing the day of the execution in the hopes that Julius would crack. They had prepared questions to interrogate Julius:

In the thirteen pages of questions [the FBI] had intended to ask Julius Rosenberg, only one concerned Ethel. Yet nothing more chillingly sums up the Bureau's whole case than that single query: "Was your wife cognizant of your activities?" ([Gentry 1991: 429](#)).

Thus were two young kids orphaned.

By way of contrast, Lowell was Michael's right hand man at Drexel, and the prosecutors could prove he was intimately involved in Michael's felonies. Still, I disagree with such tactics. Both the left and the right have a tendency to overlook prosecutorial overcharging when the victim is a political opponent. If we want to build liberty, we need to provide it to our political foes.

The rhetoric about tyranny in the Milken case is unintentionally revealing:

If government coercion can "roll" a billionaire, Democrat, Jewish financier who was one of the country's most productive economic resources, what *can't* it do to a poor, black, inner-city youth or a middle-class citizen (*Id.*, 99)? [**end page 251**]

Why is it relevant that Milken was a "Democrat" and "Jewish?" The implication is that it was harder *under the Reagan administration* (the entity that investigated and secured a guilty plea from Milken) to prosecute Milken because he was a Democrat and Jewish. The only logical inference is that the authors think that Jews are less likely to be prosecuted for white-collar crimes than non-Jews. This puts them at odds with Dean Fishcel ([1995: 5, 184](#)), who hints that Milken may have been prosecuted *because* he was Jewish. There is no evidence that Giuliani's decision to prosecute Milken had anything to do with his religious or party affiliation. Once more, I think the case for "tyranny" against Milken is nonexistent. Plea-bargaining is not like medieval torture.

ADM -- Price Fixer to the World

The antitrust case against ADM is perhaps the most bizarre antitrust case in history, but the authors' formula remains the same. The authors complain of "the government's own dirty hands in fabricating a case" (*Id.*, 102). But the authors present no evidence that the government sought to

"fabricat[e]" a case against ADM. Characteristically, they ignore the evidence, though there is an unusually good public record of the facts in the white-collar cases they label tyrannical.

The authors then cite law and economics theory to suggest that ADM couldn't have been engaged in effective price-fixing because the price of its products fell. Further, as a low-cost producer it would have been unprofitable for ADM to limit its market share, which is what the antitrust suit alleged. "Facts, however, had nothing to do with the case" (*Id.*, 101). But this is really bad economics. The fact that prices for ADM's products were (at times) falling and that it faced buyers with substantial monopsony power would provide a powerful incentive to restrict quantity ([Simpson & Piquero 2000: 177](#)). ADM had an incentive to restrict quantity because that was the only way to get its rivals to agree to do the same. In *fact*, as tapes prove, ADM agreed with its competitors to restrict output for the purposes of raising prices. Further, the cartel did restrict supply and raise prices ([Eichenwald 2000: 266-67](#)).

What is bizarre about the case is Mark Whitacre, a senior ADM official, who told the FBI that ADM was engaged in price fixing and who became an undercover agent for the FBI, taping a series of price fixing meetings. Whitacre was a liar and a thief. He lied to the FBI on many occasions, and he embezzled substantial amounts of money from ADM while he was secretly working for the FBI. In short, he was an FBI agent's and prosecutor's worst nightmare. At the very moment when they intended to bring down a massive, international price fixing conspiracy, their star witness turned out to be a liar and an active thief. The prosecutors had to revoke his immunity agreement and prosecute him, which they did successfully (he received a much more severe sentence than the more senior ADM executives who were caught on tape negotiating the cartel's terms). **[end page 252]** Whitacre's worthlessness as a witness doubtless greatly diminished the size of the fine ultimately negotiated with ADM for its antitrust violations. The fact that it still ended up as one of the largest in history, \$100 million, gives a former litigator like me good evidence of the strength of the case against ADM (as did reading extensive excerpts from the tapes in Eichenwald's book). The tapes also make clear that Whitacre did not create the cartels. Instead, they were ADM's customary means of doing business in product lines Whitacre had no control over. Indeed, the international cartel Whitacre was involved in, lysine, was formed years before Whitacre joined ADM. In fact, the conspiracy was formed before either ADM or Whitacre was involved in lysine production (*Id.*, 76-78, 108-111, 243-45). Further, the ADM investigation led to the discovery of massive price fixing in other areas, particularly vitamins, which were costing consumers hundreds of millions of dollars (*Id.*, 559).

The authors conclude: "With the ubiquitous plea bargain, prosecutors have reinvented torture" (*Id.*, 104). The facts of the case show that ADM pleaded guilty to real crimes it committed.

Charles Keating and Lincoln Savings

The authors discuss what was admittedly the weakest case against Charles Keating, California's prosecution of him for aiding and abetting securities fraud. They ignore the stronger cases in which Keating's direct, personal culpability was established. Keating ultimately pleaded guilty in the federal case. The *state* case against Keating was controversial among prosecutors. It occurred because the L.A. District Attorney wanted to get credit for being the first to indict the most notorious felon in the S&L debacle. The U.S. Attorney was opposed to the state case going forward, afraid that it would interfere with his prosecution (he proved correct). The authors' factual presentation about Keating is fictional.

They picture Keating as the owner of a "prosperous" real estate company (ACC) whose purchase of Lincoln Savings was supported with "favorable financial terms" by the federal

regulatory agency (the "Bank Board"). This is not accurate. ACC was a deeply troubled company when it acquired Lincoln Savings. Further, Keating did not receive any support, financial or otherwise, from the government in acquiring Lincoln Savings ([Black 1989](#)).

Keating did not put up a penny of his own money to buy Lincoln Savings – his purchase was funded entirely by Milken. Characteristically, Milken caused ACC to issue many more junk bonds than were necessary to buy Lincoln Savings. This met three of Milken's goals simultaneously. It maximized Drexel's fees for both issuance and sale. It left ACC grotesquely overleveraged (fancy words for being deeply in debt), which meant that Milken had great leverage over Keating. Most importantly, it turned Lincoln Savings [**end page 253**] into what became known in the trade as a "captive." Soon, Lincoln Savings would buy a billion dollars in junk bonds (overwhelmingly from Drexel). Milken "churned" the junk bond pool to build fees. When junk bonds began to lose value, Milken increasingly stuffed Lincoln Savings with the junkiest of the junk bond issues, magnifying losses to the taxpayers. Milken had direct control over Lincoln's junk bond portfolio, trading it at will. Lincoln Savings learned at the end of each day in a telex from Drexel what bonds it now owned, and at what price it had sold prior bonds. Having captives like Lincoln Savings allowed Drexel to manipulate its reported default rate and sustain junk bond prices at an artificially high level.⁵⁶

Lincoln Savings was a nest of nepotism, and the high salaries were paid primarily by ACC, not Lincoln Savings. This posed two problems for Keating and family. ACC, on a stand-alone basis, was insolvent and losing money. ACC lost money because it was not a good home builder, it had enormous interest expense due to the very high cost junk bonds it had issued, and the Keating family salaries were exorbitant (*Id*; [Black 1989](#); [Mayer 1990: 172-73](#)).

All of this meant that Lincoln Savings's strategic plan under Keating was always quite simple: it had to funnel large amounts of cash up to ACC to forestall ACC's bankruptcy and maintain the Keating family's lavish life style. Keating used three tactics to fulfill that strategic plan. First, he used fraud to create fictional profits at Lincoln Savings, which were used to justify making dividend payment to ACC. When the Bank Board ordered an end to the dividend payments, he continued to use fraud to create fictional profits, then used fictional income tax liability to upstream roughly \$100 million to ACC. When the Bank Board discovered the tax scam and ordered it halted, Keating ordered ACC to do the thing that finally made an arcane S&L crisis into a national scandal: he had ACC sell *uninsured* junk bonds to Lincoln Savings depositors, in Lincoln's branch offices.⁵⁷ ACC decided that the best place to sell these bonds was in branches serving retirement communities. Keating had turned from defrauding the federal government generally to defrauding individuals – and the individuals he picked were overwhelmingly *widows*.

For the first time, an S&L failure would leave tens of thousands of victims uninsured, with individual losses totaling \$250 million. The S&L debacle now had a human face – and it was your grandmother's face you saw when you turned on the television. One widow, in her 70s had lost all her savings. It turned out that she was saving to purchase a special van – to transport her quadriplegic daughter. She was the sole means of support for the daughter, who was in her 40s. A widower, distraught at the loss of his savings, committed suicide. As humans, we empathize with the plight of individuals, not statistics.

All truly great disasters involve many factors coming together at the same time, [**end page 254**] and Lincoln Savings fits that pattern. It was the most expensive failure of all time, \$3 billion. Many of the top law firms and audit firms in the country had aided Keating in looting Lincoln Savings. Keating, who had more political muscle than any other CEO, had enlisted five U.S. Senators (the

"Keating Five") to try to get the regulators to go easy on Keating's violations (I took the notes of that meeting that led to the Senate ethics investigation [[Calavita, Pontell, & Tillman 1997: 1996](#)]). Keating had also achieved something unprecedented in U.S. financial regulation; he had used his political muscle and threats to sue the Bank Board to secure the removal of his regulators (me and my colleagues – who were warning of Keating's crimes and the likely, catastrophic failure of Lincoln Savings). Our memoranda were thorough and hard hitting, not bureaucratic mush, and made it clear that the Bank Board's cave-in to Keating was a scandal. We also made powerful witnesses in the congressional hearings after Lincoln Savings's failure (which led to the resignation of the top S&L regulator, Danny Wall [[Black 1993](#)]). Moreover, Lincoln Savings collapsed at the same time as the newly elected Bush Administration finally ended the cover-up of the scale of the debacle and the public began to be told that it would cost the taxpayers well over a hundred billion dollars to fix it. Keating promptly compounded his problems by holding a "press conference" (a misnomer, for Keating read questions *he* had written, read answers to his own questions, and refused to take questions from the press):

One question ... has to do with whether any financial support in any way influenced several political figures to take up my cause. I want to say in the most forceful way I can: I certainly hope so ([Mayer 1990: 221](#)).

The authors ignore the evidence of Keating's fraud, and portray him as a great businessman. "Lincoln, listed by *Forbes* as the nation's second most prosperous thrift in 1987, became the symbol of the S&L crisis two years later" (*Id.*, 52). The type of fraud engaged in by those who controlled S&Ls (what I term "control fraud") routinely created massive fictional profits ([NCFIRRE 1993: 3-4](#); [Black, Calavita & Pontell 1995](#)). Lincoln was already insolvent in 1987, and it continued to lose money until it closed.

Keating is pictured as a scapegoat. "The real estate collapse, which decimated both ACC and Lincoln, was caused by negligent U.S. policymakers. Most economists attribute the fall in real estate values to ill-conceived monetary and tax policies" (*Id.*). Coming from a lead author who was an Assistant Secretary of the Treasury under Reagan, and who claims to have been a "supply side" leader in formulating those "ill-conceived ... tax policies," this argument is surprising. It is certainly correct that the 1981 tax act, which Roberts influenced, created strong economic incentives to make real estate investments that made no economic sense, by creating abusive "tax shelters." These perverse incentives contributed to regional real estate "bubbles." Keating, far from being an innocent victim of the collapse of this bubble, was a leading contributor to it. Lincoln Savings's massive, uneconomic real estate investments in a regional market that was **[end page 255]** already glutted increased real estate losses.⁵⁸ Still, Mr. Roberts is correct that his "negligent" and "ill-conceived" policies did much to harm the economy.⁵⁹

The Kaye, Scholer Case

The authors' discussion of the successful enforcement action brought by the federal S&L regulatory agency, the Office of Thrift Supervision (OTS), against one of Keating's most prominent law firms, Kaye, Scholer, Fierman, Hays & Handler, is full of factual errors. The authors' primary criticism is that the OTS required Kaye, Scholer to inform on its clients. That is false; the OTS position is that Kaye, Scholer made false statements to the regulators on behalf of Charles Keating. The OTS would have *loved* it if Kaye, Scholer had been a "zealous advocate" on behalf of its *client's* interests. Instead, Kaye, Scholer assisted Charles Keating (who was *not* its client) in looting Lincoln Savings (*the client*). The OTS had a very strong case against Kaye, Scholer – which is why it settled the claim for over \$40 million ([Simon 1998: 253](#)).

The authors' secondary criticism is the *way* the OTS brought its action, which is controversial. The authors claim that the OTS "froze" the firm's and the partners' assets. That is not correct. The OTS had extensive settlement discussions with Kaye, Scholer prior to bringing the enforcement action. In those discussions (and in comments its counsel made *after* the OTS brought its action), Kaye, Scholer's position was that bringing suit against it would destroy the firm. Specifically, it claimed that its creditors would refuse to loan it new funds and would demand immediate repayment of existing loans and that many partners would withdraw from the firm and take their capital with them. The result would bankrupt the firm and make it impossible for OTS to collect even if it won a large judgment. That may have been a scare tactic on Kaye, Scholer's part to try to get the OTS to accept a smaller settlement, or it may have been accurate based on the firm's knowledge of its creditors and partners. The impact on the OTS was to spark thought of how to sue Kaye, Scholer without ruining the agency's ability to collect a large judgment. The result was the "asset preservation order" that OTS issued. This deliberately did *not freeze* the firm's or its over one hundred partners' assets. Instead, it prevented abnormal withdrawals of firm *capital* – it allowed normal firm payments to keep it operating.

The non-Draconian nature of the OTS order is what posed the greatest litigation headache for Kaye, Scholer. The statute allows such OTS orders to be issued *ex parte* with no prior notice to the defendant. That is an extraordinary power, and one that can be abused. Recognizing the risk of abuse (or mistake), Congress has provided that the party subjected to such an order can immediately challenge it – not before the OTS, but before an independent entity, a federal district court. Kaye, Scholer could have gotten an immediate hearing before the court attacking the order. Due to the lengthy settlement discussions, in which the OTS had laid out its claims, Kaye, Scholer was prepared to [end page 256] bring such a challenge. Kaye, Scholer even had one of the country's leading legal ethics scholars, Geoffrey Hazard, lined up with a draft opinion. (Characteristically, the authors cite Professor Hazard without informing the reader that he was retained by Kaye, Scholer – or that he authorized release of his opinion without ever reading OTS' complaint!) Kaye, Scholer settled instead of filing because it knew that its legal position was weak.

THE AUTHORS' SUGGESTED REMEDIES

The authors' hearts clearly aren't in their final chapter "What is to be Done?" They say they're including it because "Authors who expose such a deplorable state of affairs are expected to provide proposals for reform" (*Id.*, 176). They approach reforms with the zeal of a dutiful 16-year-old taking calculus (which he detests) because his Dad expects him to do so. The chapter is notable in several respects. First, instead of discussing reforms, much of the chapter presents their claim that Microsoft and tobacco companies are the victims of tyranny, then detours to attack gays. Second, while the book suggests a number of reforms, none is discussed in the final chapter because the "plight of American democracy is beyond the reach of legal reform alone" (*Id.*).

The Reforms that the Authors Raise, but Later Ignore

The reforms suggested by the authors to the criminal justice system would eviscerate white-collar crime prosecutions of elites and reduce blue-collar prosecutions. The authors call for an end to all plea bargaining, all use of "stings," all use of informers and undercover operations, and suggest that prosecutors bear a risk "similar to medical malpractice for bringing unjustified cases" and that juries that acquit defendants should be permitted to *indict* the prosecutor for bringing unjustified cases (*Id.*, 60, 84-85). Street criminals can frequently be caught in the act or identified through witnesses or physical evidence. Non-elite white-collar criminals (e.g., small embezzlers) can be caught by internal firm controls and frequently confess when confronted.

Control frauds, which cause vastly greater losses, involve elite white-collar criminals. They can "turn off" or avoid internal controls and use the firm both as a "weapon" to commit fraud and as a shield against prosecution. They hire the top law firms and auditors in the country with firm resources to "bless" their frauds. Absent cooperating witnesses, which means plea-bargaining, convicting elite white-collar criminals would be extremely unlikely. I can attest from substantial personal experience how reluctant prosecutors are to bring complex fraud cases against control frauds. If the prosecutors could not make plea bargain and faced indictment if they lost a case, elites would be untouchable. Because the authors believe that these elites are the most oppressed Americans, and because they believe white-collar crime is not "real" crime, they view this immunity as desirable. I believe it is the primary goal of these suggested "reforms." [end page 257]

The Authors' Ultimate View -- Only a Revolution will Do

The authors' "one hope" for the ideological revolution they believe essential is "the universal failure of government" (*Id.*, 177). This failure, they hope, could lead people to reject the legitimacy of the U.S. government. "The American republic established by the Founding Fathers is long gone, destroyed by the Civil War and the New Deal" (*Id.*, 182):

Today Americans increasingly feel defenseless in the face of the government that they supposedly control. What was formerly a patriotic, flag-waving element of the population has been organizing itself for the past few years into private militias (*Id.*, 177).

In short, the authors offer a useful insight into the mind of the militia, put into a seemingly respectable book endorsed by Milton Friedman and Alan Dershowitz. Government has never done anything useful; if not hamstrung it will leap into tyranny. The Civil War – which led to constitutional amendments prohibiting slavery, providing the right to due process and equal protection of the law, and granting the right to vote to black males – somehow destroyed the American republic. Apparently the republic, which enslaved blacks, was not tyrannical, while freeing blacks was tyrannical. How the New Deal destroyed the republic is even less clear.

Was the country a republic, and non-tyrannical, when its racist and religious bigots were "patriotic, flag wav[ers]?" The militias do not control government in the United States, which enrages them, but was the nation less tyrannical when their predecessors in the Klan controlled many local governments?

By the close of the book, which you may recall was supposed to be about "good intentions," the authors' have "locked and loaded" and unleash this militia-mode burst at government workers:

Homogenous bureaucracies staffed with ideological zealots will devour the rights of the American people in the name of their causes, just as German Nazis and Soviet communists devoured the rights of their subjects (*Id.*, 176-77).

At a time of surging budget surpluses, full employment, ever lower federal income tax rates for the rich, ever higher percentages of national income and wealth going to the richest of the rich, the turning of the word "liberal" into a label a politician must avoid at all cost, the collapse of communism, the triumph of neo-classical economics, a consensus on the need to "reinvent" government, lower crime rates, and reduced rates of out-of-wedlock births, why has pessimism captured the raging right? Why, with the death of J. Edgar Hoover [end page 258] and the

resignation in disgrace of President Nixon leading to a dramatic *reduction* in abuses by the FBI, does the raging right see "Nazis" (or is it communists?, since we're "homogenous ... ideological zealots," we bureaucrats must all belong to the same dictatorial movement, but which one?) and "black helicopters" (filled with third world UN troops) everywhere?

The ragin' right is living in an America they no longer understand or appreciate. It is no longer a white, Protestant country. It is no longer a country in which men rule absolutely the home, the office, and the government (though men remain extremely dominant in the latter two spheres). Because women normally work outside the home, they have far more independence than at any time in our history. It is no longer a country in which bigotry is respectable. It is no longer a country in which it is fine to despoil nature. Worst of all, the right senses that there is no way to go back. The Republicans can control the Presidency, both houses of Congress and the Supreme Court, but the country will continue to become more diverse and women will not withdraw from the workforce. Because the ragin' right cannot embrace Latinos, they see demographics as destiny and know that things will get (from their perspective) much worse.

ALIENATION AND TRUST

While the authors purport to decry the alienation of Americans from government, they are contributors to that alienation. Indeed, that is reason for the book. They want the reader to believe that government officials are tyrants. They want whites, particularly straight, able-bodied, rich, Republican males to view themselves as being oppressed by the government, feminists, Democrats, and minorities. They routinely demonize their opponents.

All of this is corrosive of what other scholars, of all mainstream ideological varieties, have been arriving at a consensus on – the immense value of trust to civil society.⁶⁰ Adam Smith was half-right about the butcher when he observed that we rely not on his altruism but his self-interest to provide us with good meats. Self-interest is helpful, but insufficient in many instances. What happens when the butcher has sold his business, with the deal closing in two weeks? We want a butcher who will not sell us cheaper, unsafe meats during that two weeks. When we are a stranger passing through a town we will never visit again, we want to be able to go to butcher without being sold unsafe meats. If safety regulations are expensive to comply with and if compliance is hard to observe, and some disreputable butchers violate the rules and gain a competitive advantage, we want our butcher not to cheat, even if he could get away with it and profit. When cheating is widespread and trust erodes, transaction costs go up in the private sector. In the public sector, something far worse happens. When the government responds to widespread cheating with rules designed to prevent abuses, bureaucratic delays to honest citizens increase and trust in the government erodes. The stage is set for **[end page 259]** a perverse spiral. The authors, of course, view Americans' remaining trust in government as misplaced and a problem.

This attack on trust and the U.S. government represents a radical shift in Mr. Roberts' views. He (1984: 255) had identified the *central* U.S. problem as a "denunciatory" ethic on the part of liberal elites. Similarly, in their book attacking the *Brown* decision, civil rights laws, and affirmative action, these co-authors argued that the flaw in all such measures is that they displaced that which was essential to community: "goodwill" (Roberts & Stratton 1995: 170). Now, they relentlessly attack goodwill, arguing that groups they disfavor will destroy America, demonizing all who disagree with them, and conclusively presuming that government actions are evil.

ETHICAL TRAINING, LEADERSHIP AND AGENCY CULTURE

In scattered instances, the authors hint at the importance of ethical training and leadership and professional mores in preventing tyranny. They note that in nations controlled by corrupt leaders, the government is likely to be pervasively corrupt (*Id.*, 140). They argue, though I believe the facts prove the opposite, that J. Edgar Hoover set such a firm moral tone at the FBI that individual agents rarely engaged in abuses (*Id.*, 145). They note that prosecutorial ethics have long required the prosecutor not simply to seek convictions, but to seek justice (*Id.*, 63). They also argue that the rapid expansion of the ranks of prosecutors in response to the war on drugs weakened prosecutorial cultures that emphasized restraint and the importance of seeking justice (*Id.*, 137).

All of these arguments are a cause for joy, for they come from believers in "public choice" theory, which attempts to explain governmental behavior as a simple exercise of maximization of individual self-interest by the governmental decision-makers.⁶¹ Understanding that ethical norms are critical, that the training government officials receive and their ideological views may be decisive, that agencies develop cultures that constrain individual actor's choices – all of these aspects would make public choice theory far more nuanced if the theory were broadened to include them. Unfortunately, the authors do not analyze these issues, and by the time they get to their recommendations chapter, they ignore all of these matters.

Because the book is designed as a collection of purported horror stories, and because they come to bury government, not to praise or save it, the authors do not examine any *success* stories and attempt to explain why they believe a particular agency has not engaged in tyranny. They also ignore agency effectiveness; we need agencies that fulfill their missions effectively, efficiently, and fairly (and those missions have to be appropriate). The failure to examine success stories and agency effectiveness helped produce a book that ends with bile instead of reforms. [end page 260]

WHAT REFORMS FOLLOW FROM THE AUTHORS' LOGIC?

The authors' logic would suggest the need for reforms that are often the opposite of the reforms they actually allude to. For example, their analysis is that it is critical to attract superb individuals to the public service (e.g., they repeatedly decry "third rate" bureaucrats) and train and lead them in a highly ethical fashion. However, one of the reforms they suggest is the reinvigoration of the "delegation" doctrine. Few things would be more effective in maximizing the difficulty of recruiting and retaining the best government officials than the delegation doctrine. Under the delegation doctrine, appointed officials would have very little opportunity to make judgments based on expertise. Their function would be to mechanically implement extraordinarily detailed statutes (because making substantive rules would be largely made illegal). The type of people we want as government officials would not do so if the job were reduced to the level of mindless functionaries who could not even stop clear evasions of such statutes. Some elected officials might welcome the return of the delegation doctrine – until it happened. Then, faced with the need to become experts on exotic details of hundreds of different fields, they would rue the day that the delegation doctrine was reanimated.

What is needed is a fusion of some of the authors' timely emphasis on fairness with the stress on efficiency and effectiveness coming out of the "reinventing" government movement. That movement sees citizens as "customers." That may be a useful conceptualization for many purposes, but it breaks down when applied to involuntary spheres (e.g., prosecutions). Efficiency and effectiveness in the context of criminal justice is not enough; it can come at the expense of fairness, and abuses can cause monstrous harm to individuals and society.

We want something very special from prosecutors, something far different than what their

educational preparation has stressed. Prosecutors are litigators, and the fundamental thing one is taught in litigation is zealous advocacy on behalf of your client. Coupled with the universal desire to win, the need to win to advance in the job, and the fact that the folks one prosecutes are overwhelmingly people who arouse one's disgust rather than compassion, it is not hard to slip from prosecutor to persecutor. It takes a strong ethical culture to counteract these tendencies. Training alone cannot build such a culture; the bosses must demonstrate through their own actions that they are serious that the prosecutor's duty is not simply to win convictions, but to seek justice. This is not a war that can be "won." Rather, it is a process that has to be maintained for all time. There will be lead prosecutors who are unethical or merely pathetic managers. A well-developed ethical culture is the best first line of defense (the courts and legislature are the second and third lines) against such lead prosecutors.

It will never be perfect, but generally speaking, prosecutorial and police abuses in the U.S. are vastly *reduced* from earlier in our history. Prior generations have improved [end page 261] the system greatly, making the "Rights of Englishmen" *effective* for far more people than ever in our history. Each generation has the responsibility to continue that improvement.

I agree with the authors that the drug war, the rapid expansion of criminal justice system personnel, and hysteria are causing serious problems of fairness. Contrary to the authors' position, the burden of the drug war clearly does fall *much* more heavily on blacks and Latinos than whites. There is a strong suspicion that police testimony in drug cases often involves perjury (e.g., about "plain sight"). This is intolerable; it creates a rot that cannot be contained. Similarly, it has now become routine for there to be press leaks from some prosecutors' offices in major cases. This is illegal and unjust. It can only persist in offices where the lead prosecutor permits it to continue. Strong ethical leadership could promptly end most of these abuses.

We should also build trust. The love of liberty is one of the things that many Americans of every political persuasion and background share. As Myrdal (1944) understood, it is our national creed. We often fail to live up to that creed, but our nation has returned over and over to it as we have progressed and realized that none of us is truly free while we deny freedom to others because of our all-too-human flaws. Emphasizing that creed is one way to rebuild trust. Prosecutors who seek to convict the innocent, or are indifferent to whether they convict the innocent, are unethical. This is something all Americans can agree on and work to reduce.

There are practical ways to achieve this goal. We need to be careful in picking our lead prosecutors. We are not. Getting the job of top prosecutor is almost always a product of politics. We need to pick leaders who care passionately about justice as our top prosecutors. They can, and usually will, set and reinforce the proper ethical tone. We also need to preserve the exclusionary rule. Finally, we need to prosecute prosecutors if they do suborn perjury.

CONCLUSION

I noted that the authors implicitly raise five important questions:

- How can nations that value liberty so highly engage in tyranny?
- What groups are most at risk of being tyrannized?
- How are acts of tyranny ended?

- Do perverse incentives lead prosecutors and regulators to act like tyrants?
- Can ethical public sector leadership prevent, or at least reduce, tyranny?

The authors suggest answers to all but the third question. Had they addressed the third question, and examined the history surrounding the first, I think their analysis and recommendations would have changed. We have a long history in the United States, [end page 262] England, and other "Western" (speaking culturally rather than geographically) democracies that were former English colonies with "the Rights of Englishmen." We know how valuable those rights are, and how highly our ancestors' prized them. We also know this paradox; it was precisely that knowledge and appreciation that led to the pervasive denial of such rights to "the other" through much of our collective history. For example, whites knew that these rights were the keys to power, freedom, and safety, which is *why* blacks were stripped of these rights. These acts of tyranny ended because our ancestors gradually defined more and more residents as part of the community: the "us" rather than "the other."

No honest appraisal of our history can make rich, white, straight, able-bodied, Christian males the principal victims of tyranny. The principal victims have been those who look different from the English, believed in a disfavored religion, or opposed the interests of the dominant society (e.g., labor movements and radicals). As bigotry has declined and tolerance increased, tyranny has been greatly reduced. The authors' spread intolerance, a "cure" that makes the disease worse.

ENDNOTES

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1. I use the word in its conventional senses as involving either (or both) exercising pervasive political power by denying any meaningful right of political participation to the polity and using that political power to seriously oppress others through extra legal or sham legal (e.g., "show trials") procedures.

2. [Roberts & Stratton 2000:140, 145.](#)

3. "The GOP and the White Vote" (www.vdare.com/pcr_gop_whitevote.htm; accessed 1/15/01); (www.newsmax.com/commetarchive.shtml?a=2000/5/10/170132; accessed 12/6/00).

4. (<http://www.newsmax.com/commentmax/print.shtml?a=1999/8/18/075417>; accessed 9/9/01)

5. England had widespread slavery ("villeins") for hundreds of years and even penal and gallery slavery for a time in the 16th century, but thereafter, English laws *prohibited* slavery -- even as England became one of the major slave nations in the 18th and 19th centuries ([Bush 1996](#)). English law ignored slavery in the colonies until it first banned [end page 263] the slave trade and then provided compensation to free slaves in the West Indies in the 19th century.

6. And no lavender in that box of crayons! As their score-settling spins out of control, the authors detour to attack gays, who they none too subtly compare to pedophiles and practitioners of bestiality (*Id.*, 180-81). No, it has nothing to do with their thesis, they just wanted to share their

hate with us before closing their book two pages later. The authors' love of liberty doesn't extend to gays. Though they quote with approval the common law's enshrinement of a man's home as his castle (*Id.*, 12), they think it a good thing to arrest gay adults engaging in consensual sex in the privacy of their own homes (*Id.*, 181).

7. [Roberts 1984: 257](#).

8. They adopt the English national myth that they were the new "chosen people," ([Johnson 1997: 19-21](#); Shakespeare, *Richard II*, II.i. ["This other Eden, demi-paradise"]) -- then improve upon it. Eighteenth century England becomes Eden (and Eire is ejected), complete with a serpent (the father of utilitarianism, Jeremy Bentham) and a sage, Sir William Blackstone (author of the *Commentaries on the Laws of England*). The standard English myth embraces the Whig reforms (expanding the franchise, ending slavery, reducing discrimination against non-Anglicans and limiting child labor). The authors ignore those reforms. The authors' views strongly resemble those of 18th century Tories who, like Blackstone, opposed most reforms. The intellectual most identified with these reforms was -- Jeremy Bentham ([Smith 1966: 584](#); [Rodgers 1987: 27](#))!

9. The "Pale" was the area of Ireland (Ulster) under Protestant control.

10. The Penal Laws were an outgrowth of the "Glorious Revolution" (in which English Protestants invited William of Orange to depose the Catholic king of England, James II). Irish Catholics supporting James II were defeated at the Battle of the Boyne. Parliament breached the peace treaty that William signed with the Irish and further suppressed Irish Catholics by means of the Penal Laws. The authors discuss the Glorious Revolution as the culmination of England's road to liberty, ignoring its effects on non-Anglicans. All non-Anglicans were deprived of some critical rights, but the repression of Irish Catholics was much more severe ([Smith 1966: 370-71](#)). Edmund Burke ... described the Penal laws as [being as] "well fitted for the oppression, impoverishment and degradation of a people, and the debasement in them of human nature itself, as ever proceeded from the perverted ingenuity of man." The Lord Chancellor was able to say: "The law does not suppose any such person to exist as an Irish Roman Catholic" ([Irish Famine Curriculum Committee 1998](#)).

11. [Golway & Coffey 1997: 4](#); [Takaki 1993: 143-45](#). [end page 264]

12. Actually, English law limited market rights severely. The infamous "Corn Laws" were one example of this. These laws worked systematically to harm the Irish economy, with the goal of helping the English economy. As with the ability of English and U.S. elites to have slavery and devotion to freedom coexist, many English felt no qualms in insisting on *laissez faire* when it came to responding to mass starvation in Ireland, even though government interference with the markets was decisive in producing that starvation.

13. The editorial also contains these classics:

There was but one way [holding public work wages to subsistence levels] to avoid a calamity [dependency on English relief] compared with which the potato blight is trivial.

[T]he Irish peasant had tasted of famine and found that it was good [because of the dole].

Extended suffrage ... for a peasantry who have for six centuries consented to alternate between starvation on a potato and the dole...! You might as well give them bonbons....

(www.people.Virginia.EDU/~eas5e/Irish/Notfamime.html; accessed 1/25/01).

14. Many English tried to prevent starvation, including Prime Minister Peel, whose efforts cost him control of the government and split the Tory party, and the remarkable Quakers.

15. Some of these atrocities were committed by the Irish. "Transportation" to Australia was a common sentence for both Irish common criminals and political prisoners ([Hughes 1998: 181](#)).

16. *Indian Express Newspapers 1997* (quoting from Dyer's August 25, 1919 report to the General Staff Division). Later, when Gandhi was asked what he thought about "English civilization," he replied that he thought it was a good idea.

17. Executions for minor crimes ([Smith 1966: 563-64](#)); press gangs ([Boorstin 1996: 198 n. 53](#)); transportation ([Hughes 1998](#)); limited franchise ([Tuchman 1984: 141](#)); workhouses and debtors' prisons ([Rooke 1970: 22, 66](#)); child labor ([Smith 1966: 587-88](#); [Rooke 1970: 42-45](#)); property requirements for jurors ([Boorstin 1996: 231 n. 19](#)). [end page 265]

18. And beyond. Things were no better 70 years later ([Smith 1966: 576-77](#)).

19. His logic was that non-elites lacked the independent will requisite to be a responsible voter. Non-elites would fall under the influence of the rich if allowed to vote. The franchise was limited to the rich to protect the non-elites from falling under the influence of the rich.

20. My list does not include the treatment of indentured servants, Latinos, women, homosexuals, Jews, Catholics, or the Irish, all groups that experienced substantial repression. German-Americans faced substantial oppression during World War I. Others see abortion, the U.S. use of atomic weapons against Japan, the Vietnamese War and the sanctions on Iraq as acts of tyranny. Clearly, much broader lists are possible. As the reader will see, all-inclusiveness is not necessary for my purposes here, for the authors ignore all of these acts.

21. (Then) Judge William Taft wrote his wife about the 1894 Pullman strike: "It will be necessary for the military to kill some of the mob before the trouble can be stayed. They have only killed six ... as yet. This is hardly enough to make an impression" ([Tuchman 1962: 409](#)).

22. (www.newsmax.com/commetarchive.shtml?a=1999/6/2/071408; accessed 12/6/00)

23. In a column entitled "Shame on Us" he wrote: "It is no favor to a person to refuse to hold him or her accountable. By refusing to hold the Clintons accountable, we enabled further misdeeds" (<http://www.townhall.com/thcc/content/roberts/robe082098.html>; accessed 9/9/01).

24. "Ethics" is an ironic term when applied to J. Edgar Hoover, for he "lost" them early in his career and was a petty thief stealing from the taxpayers ([Gentry 1991: 740-46](#); [Summers 1993: 186-88, 222-24](#)).

25. "A Political Kidnapping" 12/9/98 *Investor's Business Daily*
(<http://Independent.org/tii/news/981209Roberts.html>; accessed 9/9/01).

26. (<http://www.newsmax.com/commentarchive.shtml?a=1999/6/3/070115>; accessed 9/9/01);
(www.newsmax.com/commetarchive.shtml?a=2000/4/24/100319; accessed 12/6/00).

27. Huston was the former head of the ironically named, "Young Americans for Freedom." The further irony is that when Hoover's objections scuttled the Huston plan, the White House responded by having Krogh and Liddy (an ex-FBI agent) create "the Plumbers." [end page 266] The Plumbers did the illegal break-in of Ellsberg's psychiatrist's office. Liddy then joined "CREEP" and planned the Watergate break-ins and buggings ([Gentry 1993](#)).

28. As California's Attorney General, Warren was a strong advocate of the internment, while J. Edgar Hoover opposed it ([Kluger 1976: 661-62](#); [Takaki 1993: 378-82](#)). The contrast should have made the internment one of the authors' leading examples of tyranny, but their refusal to admit to the existence of prejudice and its role in producing tyranny disqualified its use.

29. "The GOP and the White Vote" (www.vdare.com/pcr_gop_whitevote.htm; accessed 1/15/01).

30. (www.newsmax.com/commetarchive.shtml?a=2000/5/10/170132; accessed 12/6/00).

31. The Civil War was fought over the South's fear that the Republicans would restrict the spread of slavery to new states and not enforce the Fugitive Slave Act, reducing the slave states's political power. The South did not secede because of tariffs. There was, of course, an indigenous population in the South before the arrival of Europeans. Slaves did not just happen to be black; European laws and customs after the 1600s ended the practice of enslaving whites. Slavery was not fading out in the 1860s; it was highly profitable and growing. Racism most assuredly was the norm in the United States, and not just the South, and not just prior to the Civil War. Indeed, the heyday of "scientific racism" and racist histories continued well into the 20th century ([Kluger 1976: 305-08](#); [Rodgers 1987: 164](#); [Gould 1981](#); [Foner 1998](#)).

32. As with Roberts's spurious claim that Southern slavery was fading out before the Civil War, Roberts and Stratton ([1995: 30](#)) claim that segregation was fading out in the South before the NAACP began bringing legal challenges. The problem was that blacks were "impatient" (*Id.*, 31). Their response to the old question: "If not now, when?" is: "whenever."

33. (<http://www.insidenaples.com/today/editorial/a50641q.htm>; accessed 9/9/01).

34. (www.newsmax.com/commetarchive.shtml?a=1999/6/16/072949; accessed 12/6/00).

35. Mr. Roberts has intense feelings about gays. In his column "Cultural Destruction in the Military" (11/17/98) he blames feminists and gays:

Hillary's appointees have succeeded in their assault on the last bastion of heterosexual males. *** The destruction of our military's culture is intentional [end page 267]

(<http://www.newsmax.com/commentmax/print.shtml?a=1998/11/19/080332>; accessed 9/9/01).

Confusingly, in his column "Our Homeless Future" (2/12/99) he wrote:

Not even U.S. Marines could meet the demands of Sparta's training. If confronted with Spartan standards, the personnel in our feminized Army and navy would drop like flies
(<http://www.newsmax.com/commentmax/print.shtml?a=1999/2/12/083513>; accessed 9/9/01).

However, Sparta's version of "male-bonding" should be problematic for one who wants to preserve the military as "a last bastion of heterosexual males."

36. (www.newsmax.com/commetarchive.shtml?a=2000/4/24/100319; accessed 12/6/00).

37. (www.newsmax.com/commetarchive.shtml?a=2000/11/15/221856; accessed 12/6/00).

38. (www.newsmax.com/commetarchive.shtml?a=1998/12/23/093310; accessed 12/7/00).

39. (www.newsmax.com/commetarchive.shtml?a=2000/6/12/193700; accessed 12/6/00).

40. (www.newsmax.com/commetarchive.shtml?a=1999/6/16/072949; accessed 12/6/00).

41. (www.newsmax.com/commetarchive.shtml?a=1999/1/20/090540; accessed 12/7/00).

42. (<http://Members.aol.com/CallGuy190/roberts.html>; accessed 9/9/01).

43. (www.vdare.com/whams.htm; accessed 12/6/00) Mr. Roberts is very upset about feminists. Women are perpetrators, not victims. For example, in "Marines Under Feminist Attack" (11/14/97), he wrote:

Ever since the Tailgate [sic] scandal, which was orchestrated by feminists and destroyed naval aviation, the military brass have been running, in fear of their careers, from the feminists that Clinton unleashed on the military.
(<http://townhall.com/thcc/content/roberts/robe111797.html>; accessed 9/9/01)

The reader may have shared my misapprehension that drunken naval aviators orchestrated the sexual assaults on women. In language that brought to my mind the Jack D. Ripper character in *Dr. Strangelove* (who obsessed about "precious bodily fluids"), Mr. Roberts [**end page 268**] tells us that the male is more likely to philander. Nature gave him the stronger urge, because he has the fertilizer. If he is indifferent to spreading it, life could die out. The stronger urge is the male's burden (www.newsmax.com/commetarchive.shtml?a=1999/7/28/073331; accessed 12/6/00).

(Many women agree that some males spread a lot of fertilizer.) In this same column he says that women have become "unpaid prostitutes" and reaffirms the old double standard based on his belief that promiscuity impairs women's, but not men's, ability to attain emotional intimacy.

44. (www.vdare.com/whams.htm; accessed 12/6/00).

45. (www.newsmax.com/commetarchive.shtml?a=2000/4/26/090855; accessed 12/6/00).

46. (www.newsmax.com/commetarchive.shtml?a=2000/4/26/090855; accessed 12/6/00).

47. My 15 minutes of fame came from discovery of Keating's memorandum: "Highest priority. Get Black ... kill him dead...." and his *Bivens* suit (a case that allows suits against government employees in their *individual* capacities for breach of constitutional rights) against me for \$400 million. The suit was dismissed with prejudice after our "Rule 11" letter to his lawyers. (Rule 11 allows sanctions against attorneys for pressing a case they know has no legal merit.)

48. Other characteristics include excluding all information inconvenient to the authors' claims, not identifying seemingly neutral sources as being on the defendants' payrolls, innuendo, and unsupported assertions. For example, they discuss the criminal case against Messrs. Altman and Clifford without ever mentioning that the case was about them fronting for BCCI (informally known as the "Bank of Crooks and Criminals, International") -- the most notorious banking fraud in world history, or that criminologists who have studied the case think that they did in fact serve in that role ([Griffin & Block 2000](#)). The prosecutor, Robert Morgenthau lost the case, which leads to this classic innuendo: "how many other defendants did Robert Morgenthau successfully frame" (*Id.*, 59-60)? No citations are offered to support rhetorical bombs such as the claim that prosecutors "routine[ly] suborn[] perjury" (*Id.*, 136) and "if prosecutors need to fill a quota of white-collar criminals, they must find businessmen to frame" (*Id.*, 60). First, they do not establish that there are such quotas. Second, if there were quotas, they could be met without framing anyone. In my experience, the number of worthy white-collar crime cases against elites (not including petty embezzlements, etc.) always greatly exceeded white-collar crime prosecutorial and investigative resources. Every time I made a high priority criminal referral against a fraudulent S&L CEO, I knew that I was implicitly letting a lower priority white-collar criminal off the hook. **[end page 269]**

49. (www.newsmax.com/commentarchive.shtml?a--2000/4/12/081714; accessed 2/3/01).

50. (Cramer, abcnews.go.com/sections/business/street/cramer_1218/index.html; accessed 2/3/01).

51. As Mr. Roberts has urged: "Only propagandists insist on lying in the face of facts"

(www.newsmax.com/commetarchive.shtml?a=1999/1/20/090540; accessed 12/7/00).

52. Klein was reluctant to bring a broad antitrust case and tried to settle the case (on terms Microsoft could have easily lived with) prior to bringing suit ([Auletta 2001](#); [Heilemann 2001](#)).

53. [Auletta \(2001\)](#); [Heilemann \(2001\)](#).

54. [Auletta \(2001\)](#); [Heilemann \(2001\)](#).

55. [Stewart \(1992\)](#); [Bruck \(1989\)](#); [Mayer \(1990\)](#).

56. [Akerlof & Romer \(1993\)](#).

57. The authors claim that such arrangements were "common" (*Id.*, 51). They were rare.

58. ([Black 1998: 219-24, 234](#); [Akerlof & Romer 1993](#); [NCFIRRE 1993: 8](#)). But for the passage of the 1986 Tax Reform Act which ended most of these abusive tax shelters, and Bank Board Chairman Gray's "re-regulation" of the S&L industry beginning in late 1983, these real estate bubbles would have grown much larger, perhaps to levels similar to Japan. The Japanese economy, a full decade later, has still not recovered from its bubbles.

59. Conversely, their claim that the 1989 Act that finally ended the S&L debacle "ruined" many "successful thrifts" by showing "bad economic sense" in requiring *phony* "goodwill" to be removed from S&L balance sheets is wrong and preposterous in terms of economics. Everyone admits that the goodwill was an accounting fiction that was devoid of economic substance ([NCFIRRE 1993: 38-39](#)). For an S&L that was *truly* "successful" (i.e., profitable on a real economic basis, as opposed to a phony accounting basis), the removal of the fictional goodwill would have been irrelevant.

60. For a conservative perspective, see [Fukuyama \(1995\)](#); for a communitarian view, see [Fisse and Braithwaite \(1994\)](#), for [Gore's \(1993\)](#) perspective, see the report of the National Performance Review. [end page 270]

61. The book demonstrates the weakness of conventional public choice theory. The authors state explicitly the function which they claim prosecutors seek to maximize: "their conviction rate is their performance indicator" (*Id.*, 89). That is a plausible (if reductionist) claim, but it is wholly inconsistent with the authors' thesis in the book. If a prosecutor wants to maximize a conviction rate, she should 1) go after clearly guilty people; 2) avoid novel theories; 3) avoid complex cases; and 4) avoid defendants who have huge resources to spend on defense. The book claims that prosecutors do the opposite of each of these four factors, and ignores the inconsistency.

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