
Newsletter from Boston

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Number 7

Again, it has been a long time since the last newsletter.

Hiroshima

In this, the fiftieth year since the dropping of the bomb on Hiroshima, and in the wake of the fiasco of the Enola Gay exhibit at the Smithsonian Institute, it seems appropriate to review, briefly, the decision by the leaders of the United States to drop the first atomic bomb on Hiroshima.

My interest in this issue arises out of a rude awakening I had many years ago when I was enlightened as to how steeped in propaganda this issue has been and still is. I was then involved in a rather vocal discussion with a quite liberal friend of mine (Dr. Jim Jeffers) concerning the morality of the foreign conduct of the United States. I was surprised when, at one point during the discussion, he raised the issue of the dropping of the atomic bomb on Hiroshima, which he called an immoral decision.

This surprised me because, after all, those of us who grew up in this country know that you are taught from an early age that the bomb was dropped so that an invasion of Japan would not be necessary and thus, many American lives were saved. However, Jim Jeffers shocked me by ask-

ing why the United States did not first have a demonstration blast of the atomic bomb for representatives of the Japanese government before actually dropping the bomb on a city; this alone

may have been sufficient to cause the Japanese surrender.

When he said this to me, I was both angry and shocked, not at him, but at the duplicity with which my education had been conducted. It was obvious to me that this

must have been a real option to the policy makers at the time and yet, in my years of education, this had never been raised as an issue, not in school, not in my political readings, not in the popular media or the news.

And in fact, this was a real issue. Within the Manhattan Project, the possibility of dropping the bomb on a "demonstration" target, with Japanese observers present, had been broached but rejected, partly for fear that the demonstration bomb might be a dud and would lead the Japanese to fight even more ferociously (Dower, J.W., *Technology Review*, August 1995).

Actually, the American motives for dropping the bomb were even more suspect. The decision makers in the United States knew in the spring and early summer of 1945 that Russian entry into

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the war was imminent (and occurred on August 8, 1945, two days after the atomic bomb was dropped on Hiroshima), and that this event almost surely would result in the Japanese surrender; post-war assessments suggest that even without Russian entry into the war, the Japanese were close to surrender (Alperovitz, *Technology Review*, August/September 1990; Dower, J.W., *Technology Review*, August 1995). Alperovitz argues, using recently declassified documents, that the main purpose for dropping the atomic bomb was to affect the postwar balance of power with the Soviet Union.

Now, you might agree or disagree as to whether a demonstration blast would have been sufficient to end the war. What is undeniable, however, is that this issue is not normally discussed in the United States, even now, fifty years after the bomb was dropped.

My question is why, even today, is this issue never discussed? This seems astonishing to me and leads me to suspect that this issue has been concealed, not in the sense of a conspiracy, but in the Noam Chomsky sense of "self-censorship." Chomsky points out that those who rise to positions of power in our society where they can decide what issues the mass media will present to the public are already ideologically selected by the system to have views that are comfortable for the public and acceptable to those in power, and that this represents a *de facto* form of censorship.

Those of you already familiar with Noam Chomsky's political writings and speeches are familiar with this argument, as it is the basis of much of his political ideology. However, others of you may find this ludicrous that such censorship would exist in our land of a "free-press." To those of you who doubt the plausibility of this censorship, I ask how you would explain the min-

imal (or nonexistence) discussion in our society of the possibility of a demonstration atomic blast, especially now fifty years after the United States dropped the atomic bomb, and in this year where there has been much public discussion concerning the Enola Gay exhibit at the Smithsonian.

We have already begun to explore the truth of the Vietnam war, but we have not yet started an assessment of the morality of the dropping of the atomic bomb. This tells much about the limitations of political discourse in our country. Recently there has been much criticism of the Japanese concerning their selective presentation of the history of World War II; perhaps, before we criticize the Japanese, we need first put our own house in order.

The Need for Secret Party Declaration in Primaries.

Massachusetts is one of approximately 24 states that has closed primaries, i.e., they require persons to declare and/or change their party affiliation prior to voting in a primary election. As this information (concerning what party affiliation the voter chose) becomes a matter of public record, it is my thesis that this is a violation of the individual right to a secret ballot.

The rationale provided for closed party primaries is that they are an election of a representative for that party, and therefore only members of that party should be eligible to participate in that process. If an individual is unwilling to publicly declare their political affiliation, then their motives for voting in the primary are suspect.

Now, as political parties are private institutions, why should they not have the right to decide the method by which their representatives are chosen? My view is that if our political system did involve competition between many private political parties, then the right to freedom of

political association would demand their election processes necessarily be outside governmental control, except insofar as these procedures violated individual civil rights (e.g., discrimination on the basis of race). Note here that discrimination on the basis of political opinion would, at least in theory, be acceptable.

Now I propose to develop two separate but mutually supportive arguments that undermine the legality of closed primaries. First, I find that our fundamental right to franchise (i.e., to vote), demands the right to participate in the primary process. Second, I find that, since harm can be demonstrated, the right to a secret ballot must supersede the right to political association as applied to the primary election process.

A Digression. Before we can discuss the relative merits of the right to a secret ballot as balanced against the right to freedom of political association, we need to know the basis of these rights. Freedom of political association is an essential element of a democracy. The right to political association has been found by the Supreme Court to have its basis in the First Amendment (freedom of religion, speech, press and assembly) and the Fourteenth Amendment (rights ensured to all persons) to the Constitution of the United States, although these two amendments do not explicitly mention the right of association [357 U.S. 460 (1958); 468 U.S. 609, 618 (1984); 487 U.S. 1, 13 (1988); *Handbook of United States Election Laws and Practices*, Alexander J. Bott, Greenwood Press, NY, Chapter 8 (1990)].

However, the basis for a secret ballot is not to be found in the United States Constitution. While the origins of the secret ballot appear to have been Australian, New England has long had a tradition of secrecy in the election process. Today "... secrecy in voting both at the time of ballot

and thereafter, ... is accorded almost universal recognition by the [state] constitutions, statutes or case law of the various American ... jurisdictions" [Nutting, *Freedom of Silence: Constitution Protections Against Governmental Intrusion in Political Affairs*, 47 Mich. L. Re. 181, 181-200 (1948), p. 195]. Massachusetts enacted a secret ballot requirement in 1888 [*ibid.*].

Furthermore, the state requirement for voting by ballot "... is too plain to be misunderstood. It was to secure the entire independence of the electors, to enable them to vote according to their individual convictions of right and duty, without the fear of giving offense or exciting the hostility of others. And with this view, the right is secured to every voter of concealing from all others, or from such of them as he may choose, the nature of his vote, for what person or *party* [emphasis added] he may have voted" [Christiancy, J concurring in *People v. Cicott*, 16 Mich. 283 at 311, 312 (1868)].

"The evidence shows almost beyond question that, in requiring the use of the ballot, the framers of the [state] constitutions intended to preserve the New England tradition of secrecy rather than to create a means by which votes could be cast and counted more readily. The meaning attached to the word 'ballot' by general usage in itself indicates the truth of the assertion" [Nutting, *op. cit.*, page 187].

Thus, while the right to political association has been found to have its basis in the United States Constitution, the right to a secret ballot is founded in states constitutions (Massachusetts), statutes or case law. Now, as we have a collision of fundamental rights in the problem at hand (closed primaries in Massachusetts), we must ask which right has a compelling interest.

The Argument. The question to be addressed

is what is the basis for claiming that all citizens have the right to participate in the primary election process of the party of their choice while keeping that choice secret. We first explore the right to vote in the primary process.

One could argue that the right to franchise is satisfied by ensuring that all citizens have the right to vote (with a secret ballot) in the general election -- voting in the primaries would be a privilege conferred by the political parties. And it seems reasonable that the political parties ought to have the right to protect themselves against a competing party deliberately raiding that party's primary with the purpose of nominating the weakest candidate.

However, it seems to me important to recognize that we do not have a multi-party political system in this country but rather a two-party system; in fact, in some parts of our country, a single party has dominated the political system for significant stretches of time. In a two-party system, it has long been recognized that, over time, the platforms of the two parties both approach the center avoiding opinions at the periphery. The recent Republican move to the right is not contrary to this position, but instead a comment on the increasingly conservative nature of the political center in our country. The increasingly conservative nature of the Democratic Party is clear evidence of this trend. Much of the rest of the world regards Democrats and Republicans as cut from a single mold; they have trouble detecting the great 'differences' that we use to distinguish our parties. The Green Party, for example, that has arisen in many countries of Europe (with support at the 5 or 10% level), is unlikely to arise in a two-party system.

Now, given the centrist nature of our political parties, and that most elections involve an incum-

bent in one of the two parties, it will frequently be the case that the only true 'choice' in an election will occur in the primary process of the opposition party. By forcing compulsory disclosure of political affiliation, or at least political preference, citizens have been denied free and unconstrained participation in the primary process, and thus the right to franchise has been eroded. Notice that this argument is strengthened *a fortiori* in regions like the southern United States, or even here in Massachusetts, where a single party (the Democrats) dominated the political scene for many years.

While these considerations strengthen the importance of a secret ballot in the primary process, they leave unanswered the right to political association that the secret ballot threatens, especially regarding the concern of primary raids by members of the opposing party. This is a possible adverse effect that must be considered when these two rights are balanced. But before considering that issue, we turn to the second prong of the argument, namely the demonstration that harm can occur when the right to a secret ballot is waived during the primary process, at least as far as party declaration is concerned.

In 1982, John Lakian was running for the Republican nomination for Governor of the state of Massachusetts. On August 18 of that year, *The Boston Globe* ran a front page article claiming that John Lakian's self-portrait was very misleading, and among their allegations was that the supposed Republican John Lakian had in fact voted in the Democratic Primary in 1978 (this information was provided by the town clerk in Carlisle, where Lakian lived). The *Boston Globe* used this, along with other facts, to challenge Lakian's *bona fide* as a true Republican. Lakian soon thereafter dropped out of the race for governor.

It is unconscionable to me that an individual's private voting record is used to criticize him in his run for public office, and suggests that any of us that might decide in the future to pursue public office must contend with the public record left of our voting history. I, for one, will not vote in primaries until this injustice is rectified.

The Current Legal Status. While I had thought this issue was my own private little concern, it turns that there have been several court cases related to this issue, one of which is especially relevant. The state of Wisconsin has conducted open primaries since 1903. However, in 1980, the Democratic National Convention passed rules prohibiting state parties from selecting their delegates to the national convention in open or blanket primaries (blanket primaries allow you to vote for candidates of all parties but you cannot vote for more than one candidate for each office). When the Democratic National Party indicated that they would not seat the delegates elected in the Wisconsin primary, the State of Wisconsin sued [*Democratic Party of United States v Wisconsin ex rel. La Follette*, 1981, see Alexander Bott, *op. cit.*].

The ruling was most interesting. The Court found in favor of the national party, replying on the right of political association. "The state asserted that it had a compelling interest in preserving the integrity of elections, providing secrecy of the ballot, increasing voter participation in the primaries, and preventing harassment of voters. The Court, however, pointed out that these interests are related to the conduct of the primaries and not to the delegate selection process [*ibid.*]."

Thus, while the State has the right to regulate the conduct of the primary, it cannot dictate who will be delegates to the national conventions nor how the delegates will vote. This seems to me a

decision that preserves the right to a secret ballot, while still allowing to the national party its right of political association. The national parties can choose to follow the results of the primary election, but are not compelled to. As the state parties already have the power to decide whether to have a primary or caucus (and certainly a caucus is not a secret ballot), then nothing is lost by this process.

However, it remains my concern that states such as Massachusetts that have closed primaries are in violation of the state constitutions (or other appropriate ordinance), and I intend to write to the local election board here in Massachusetts requesting an explanation of why my fundamental right to a secret ballot is being denied by the state.

The IX Amendment to the Constitution.

When I was writing the previous piece on the right to a secret ballot, I was reminded of the confirmation hearings of Judge Robert H. Bork to the Supreme Court of the United States. It was during those televised hearings that I first learned about the importance of the IX Amendment of our Constitution.

It is thought by many that the Constitution of the United States is the basis upon which all of our law rests, and this is to an important extent true; however, the IX Amendment to the Constitution states that "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

This constitutional amendment is not well-known outside of the legal community. It did, however, play a significant role in the rejection of the nomination of Judge Bork to the Supreme Court. You may recall that a key issue in the Congressional hearings was the right to privacy.

Judge Bork was of the opinion that he could find no such right in the Constitution.

Among the most impressive speeches I have heard was that delivered by Senator Robert Packwood (Republican, Oregon) during the Senate deliberations on this topic [Congressional Record, October 22, 1987, S14803-S14809] (yes, the same senator who was forced to leave the Senate for sexual misconduct; brilliance in thought is not always matched with brilliance in action). He was among the opposition to the Bork nomination.

Senator Packwood systematically explained the historical origins of the IX Amendment to the Constitution including its relationship to Magna Carta, and its role in the Constitution, limiting that document to defining the limits of governmental power rather than defining the extent of individual liberties. It is this amendment that is the basis for including common law as an integral aspect of our legal code. (It is useful to note that the English have no written constitution, precisely for the reason that such a document might be used to limit the rights of the people.) Our right to a fair trial arises out of traditional English common law.

In fact, James Wilson, James Madison and Alexander Hamilton originally argued against inclusion of a Bill of Rights in the Constitution because they worried that such an enumeration of rights might be used to limit other rights of the citizens. Madison, when introducing the Bill of Rights four years later in 1789, stressed the importance of the IX Amendment as guarding against the Bill of Rights becoming a document that "... would disparage those rights that were not placed in that enumeration; and it might follow, by implication, that those rights which were not singled out, were intended to be assigned into the hands

of the General Government, and were consequently insecure."

Senator Packwood decided that if Judge Bork was looking to the Constitution to find the basis of a right to privacy, then Judge Bork did not have a fundamental understanding of the purpose of the Constitution and therefore was not qualified to sit as a judge on the highest court of the land. This senatorial debate provided for me the clearest example of why lawyers frequently are among the most qualified to be lawmakers: they, better than most, understand the origins, basis and limits inherent in law.

Side note. You may wonder, at this point, why the right to a secret ballot discussed in the previous section, does not have common law as its basis, as does, for instance, the right of privacy. It is interesting to find that the secret ballot is a relatively new innovation and does not have a long historical basis. Historically, the English system of voting was one *viva voce* (voice vote). Thus, our right to a secret ballot, while having a long history in New England, has its legal basis in states' constitutions, statutes or case law [Nutting, *op. cit.*].

Comments from Last Newsletter

It has been a long time since the last newsletter. I received many interesting responses to that newsletter, and I'll try here to respond to those comments, hoping that those of you who wrote me, remember what you wrote!

The two new issues I raised were (i) state lotteries as methods for raising income for the state, and (ii) the existence of God and free will.

State Lotteries. While everyone who wrote to or called me agreed that state lotteries were an unfair burden on poor people, and not a proper way for the state to raise revenues, several of these individuals seemed to misunderstand my

fundamental objection. I do not object to gambling, legal or otherwise. I love to gamble, and I find it fun and interesting. My objection was to the promotion of gambling by the state as a method of raising revenue that appears to be specifically targeted to the lower middle class. I do not object to riverboat gambling in Pennsylvania nor to new casinos on the East coast; I do not object to poker, blackjack or betting on the horses. Instead, I object to the cowardly decision of many states to exploit the weakness of the politically less powerful of their citizens for the purpose of fund raising rather than confronting the tough economic choices that they must make.

On Free Will and God. The comments on this topic were many and varied. First, Prof. Durand insists that my characterization of agnostics was unfair. I must acknowledge that there is truth in his objection: he mostly properly points out that agnostics do not dispute the existence of God; rather, they simply feel that this is not an issue of interest or concern to them. Thus, while an agnostic might accept that the notion of free-will is closely related to the existence of God, or at least something supernatural (depending on how God is defined), it does not follow that this need be a central issue in their thoughts. Their agnosticism remains.

A second objection to my argument that free will is inconsistent with an all-powerful and all-knowing God that was offered was that concepts beyond our comprehension may be involved. While this cannot be dismissed out of hand, it is an argument that eviscerates further exploration since it places limits on our understanding. It does, however, beg the question of why God gave us a mind with limitations that prevent exploration of this most fundamental of issues, and assumes that reason, the very basis of our humani-

ty, cannot be used as a basis of religious knowledge.

When faced with these same issues, St. Thomas Aquinas argued that reason can be used to explore theology pointing out that reason as well as revelation is a gift of God. Now Aquinas did allow for some theological "truths [that] the human reason is not able to investigate ...," but he claimed that these truths surpassed reason (i.e., they could not be proved, only conjectured) rather than being in conflict with reason. Aquinas said "that the truth of reason is not opposed to the truth of ... faith." For God gave us the ability to reason and what came from God cannot lead to falsehood. And reason tells us (based on my argument in the last newsletter) that freewill is in conflict with an all-powerful, all-knowing God who is entirely good.

A common thread of letters and discussion expectedly concerned whether or not we have a free will and what the consequences are that follow from that. However, it was a bit surprising that no one questioned what I meant by free will. For myself, I am a bit at a loss to say what exactly it means to have a free will. How do we know if we are acting on the basis of our free will or whether we are simply acting as we are programmed? I find myself unable to answer this question, and it seems then that all other questions concerning free will become secondary.

Speaking of definitions, I also note that we do not all necessarily agree about what we call "evil." What is the difference between something evil that occurs and something that is bad? Dr. Doug Johnson claims that an act that is evil is characterized by the "... deliberate committing of an act which the person knows to be wrong." This begs the question a bit since we then are left with the somewhat vague notions of right and

wrong. Is evil merely something untoward that occurs, or is it malicious? Can someone do evil even though they have the best intentions at heart?

I am not here merely emphasizing the difficulty of defining fundamental concepts. Instead, I would suggest that the difficulty in defining what we mean by free will and by evil are intrinsic to the questions of the existence of each of these concepts. Before we can decide if we have a free will, we need to know what free will is and how we would identify it. I find myself at a loss when exploring these issues.

Recipes for the Holidays

Debbie Diggs tells me that this year she would like a good recipe for egg nog. Well, I do have a very nice egg nog recipe from my mother's collection, and I also have a wonderful vegetable side dish that makes for a very pretty presentation for a holiday dinner.

Plantation Egg Nog

1 cup granulated sugar

9 eggs separated

2 cups bourbon

1/2 cup cognac

2 cups half and half

3 cups heavy cream, whipped

grated nutmeg

Add 1/2 cup sugar to egg yolks in medium size bowl. Beat with mixer until fluffy thick. Stir in bourbon, cognac and half and half. Chill several hours or until very cold. Beat egg whites in a bowl until foamy. Beat in remaining sugar, 1 tablespoon at a time until forms soft peaks. Fold beaten egg yolks, then beaten whip cream into meringue mixture. Pour into large punch bowl. Sprinkle with nutmeg. Ladle into punch cups. (20 4-oz servings)

Freeze any left-over eggnog to make ice

cream.

Roasted Fall Vegetables

Use these quantities as guidelines; the dish is successful with almost any combination. Include at least one kind of potato, one winter squash and one type of onion. This version mixes red and sweet potatoes, Hubbard squash, red onions, leeks, radishes, Shiitake mushrooms and red peppers. Use a ceramic or glass baking dish – something you would make lasagna in – and set the vegetables in it slightly overlapping.

Olive oil (for sprinkling)

4 very small red potatoes, unpeeled and left whole

2 sweet small to medium potatoes, peeled and sliced thickly

1 bunch leeks (2 medium)

Large handful fresh thyme and other fresh herbs

2 medium red onions

1 Hubbard squash, peeled, seeded and cut into 4-inch pieces

1/4 pound shiitake mushroom, stems removed

1 red pepper, cored, seeded and cut into 6 pieces

1 bunch radishes (about 8), rinsed with stems cut off

1 small eggplant (optional)

Set the oven at 400°. Smear bottom of a large baking dish with olive oil and set aside. Put all potatoes into a saucepan of cold water, bring to a boil, lower the heat, and let the water simmer gently for 5 minutes. When the sweet potatoes have softened but still hold their shape, lift them out with slotted spoon. Let red potatoes cook an additional 5 minutes. Cool all potatoes.

Remove the dark green ends from the leeks and trim off the hairy root ends, leaving enough of the root intact so the leeks don't fall apart. Clean leeks. Half leeks length wise and rinse them once more. Pat dry with paper towels.

Arrange the vegetables in clusters as follows: Set two leeks at either end of the dish. Set half the sweet potatoes beside them, overlapping them. Halve the red potatoes and arrange them in the dish in clusters. Drizzle oil over the vegeta-

bles, add thyme, fresh herbs and spices to taste; arrange to add to presentation. Peel the onions, leaving the roots intact. Cut them into sixths. Arrange the onions in the dish, then add the squash, mushrooms, red peppers, and radishes. Drizzle with more oil, add more thyme, fresh herbs and other spices as desired. Cover the dish with foil.

Transfer to the hot oven and roast 2 hours or until the vegetables are tender (they should almost fall apart), basting once or twice with the juices that accumulate in the bottom of the pan. Remove thyme and other spices from dish (as possible).

Serve so that each guest has a sample of all vegetables spooning juices from pan over vegetables and moisten lightly with caper vinaigrette; serve with thickly sliced crusty bread and roasted garlic.

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