

The Other Wartime Hysteria: Panic in the Halls of Reform

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I am much disposed to like the world as I find it, and to doubt my own judgment as to what would mend it.

Benjamin Franklin (1771)

Does the Iraq war, both in its domestic and foreign effects, signal a crisis at the heart of American liberalism, raising profound questions about its staying powers and capacities? Is the United States moving a breakneck pace away from its core liberal and political traditions, in preference for understandings closer to those of Nazi political philosopher Carl Schmidt? Does Laurence Tribe's decision not to go forward with a new edition of his canonical casebook on constitutional law signal that the nation has reached a moment of crisis that portends the end of our Hartzian liberal tradition?¹

In the immortal words of Woody Allen, "Excuse me, I'm due back on the planet earth."² These questions, which seem to have been asked in all earnestness, raise more questions about the questioners that they do about the state of American liberalism. A substantive response to any one of these questions would be a paper in and of itself -- and I am not particularly interested here in providing one, beyond a few, admittedly rapid-fire (and glib), replies. On Iraq, I note that every war America has had, going back to the very beginning, has raised the same questions, and, as such, this war is no more a challenge to Hartz than the entirety of American history is a challenge to Hartz (which is

¹ These were the questions raised by Mark Graber in the call for paper for this conference.

² *Annie Hall*.

another argument altogether). As for our ability to export our liberal values, these too go way back, although, as a practical matter, perhaps less far, since America's ability to project its power and values in the international arena (vis-à-vis the British and the French, for example) is a much more recent affair. The Schmidt charge is more a matter of rhetoric than substance: the executive has often asserted sweeping powers in wartime, and there is plenty of warrant for this the Constitution and (broad, though certainly contestable) Hamiltonian readings of executive power, without the implication that 'Amerika' is on the fast track to fascism. It is true that when the executive power to act beyond the strict requirements of law is asserted, people should worry (and they do). But this power (whether in the form of the prerogative, or emergency powers, or the nature of executive power), as Locke wrote about, and the Founders knew, has long been part of our political inheritance and of the broader liberal political tradition. As for Tribe, the notion that his reading of the Constitution, which, however influential it has been, is a relatively recent invention, associated with only one version of liberalism (New Deal/Great Society), is coextensive with the American liberal tradition as a whole, going back to the founding, is simply wrong.³

More interesting is the origins of these panics themselves. The roots of this panic – which has a special grip on activists in contemporary, influential, single-issue legal interest groups, and academics – are two-fold. While it is certainly possible to emphasize the anti-American and anti-patriotic strains of this panic (which is readily

³ See, e.g., Laura Kalman, *The Strange Career of Legal Liberalism*; Rogan Kersh, *Dreams of a More Perfect Union*; Ken I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law*.

traceable as a holdover of key strains of the New Left of the 1960s),⁴ I will instead emphasize here two sets of roots that are as American as fireworks on the Fourth. The first is the habitual ‘Don’t tread on me’ orneriness of Americans about the aggrandizement of government power, and sports on our rights – a sign that some of the old impulses that Hartz himself has described are as alive as ever.⁵ The second is the anger of frustrated reformers, who (in an echo of dynamics that also played out at the time of the First World War) see the war on terror (indeed, the attacks of September 11 themselves) as a maddeningly frustrating distraction from all manner of more important projects of domestic reform.⁶ The reformist tradition, like the liberal tradition, is constitutive of American political culture: it is certainly not simply a product of the conservative-anathematized 1960s. What is distinctive about its contemporary valence is that it has come to define the establishment of an entire (and highly visible) set of American institutions (colleges and universities), and players in the public policy process (stridently visible single-issue advocacy groups) which are overwhelmingly reformist in their outlooks and perceived institutional missions. When we combine the liberal impulse, with the reformist impulse in the context of an attack on the country, we can understand the wartime panic amongst the legal liberal advocacy establishment, and amongst the professors.

I will address the second first.

⁴ See, e.g., Susan Sontag, “What’s Happening in America (1966),” in Sontag, *Styles of Radical Will* (New York: Delta Books, 1969). For contemporary accounts of the liberal-left itself that see the same anti-Americanism I do, see Todd Gitlin, *The Intellectuals and the Flag* (2006); Richard Rorty, *Achieving Our Country*.

⁵ There is nothing uniquely “liberal” about this impulse, in the contemporary sense of that term (although it is supremely liberal in the classic sense of the term). This is precisely the strain of the contemporary reaction that animates the libertarians in the Cato Institute, Bob Barr, and David Keene of the American Conservative Union, along with Moveon.org.

⁶ See, e.g., *Why We Fight* (film).

Remembering the Reform Tradition

Reformers may not be the best judges of their own place in the Universe.⁷

Contemporary accounts of the axes of American political thought tend to emphasize the opposition between liberalism and communitarianism. A much-cited addition to these poles was the addition of “ascriptive Americanism,” that is (in essence) illiberal racism and other forms of bigotry.⁸ Transparently missing from this framework was the category of “reformism,” which was once at the forefront, but now seems to have disappeared, from discussions of the architecture of American political thought.⁹ To be sure, this is not to say that the substantive politics treated by scholars of reformism have disappeared from view: much of that has been picked up by scholars of race, and social movements, and others. What has fallen by the wayside, however, is an identification of the reformer as a distinctive political “type,” with a distinctive social and political vision (not to mention psychological orientation). Since so many contemporary academics fit this type, it is hardly surprising that, in contemporary academic work, it no longer exists.

⁷ Ronald G. Walters, *American Reformers, 1815-1860* (New York: Hill and Wang, 1978).

⁸ Rogers M. Smith, “Beyond Tocqueville, Myrdal, and Hartz: Multiple Traditions in American Political Thought,” *American Political Science Review*. Smith’s addition of this category provided a formal place within the framework for much of the work of scholars in the preceding generation on disempowered groups.

⁹ See, e.g., Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* (New York: Vintage Books, 1955); Christopher Lasch, *The New Radicalism in America, 1889-1963: The Intellectual as a Social Type* (New York: Vintage Books, 1965). I note that some who have discussed reformism, and who are recurred to frequently in recent discussions, situate it within the liberal tradition. See, e.g., David Greenstone, *The Lincoln Persuasion*. Hofstadter, himself, of course, was one of the emblematic “consensus” historians of the 1950s. For recent exceptions, see Carol Nackenoff, “Constitutionalizing Terms of Inclusion: Friends of the Indian and Citizenship for Native Americans, 1880s – 1930s,” in Ronald Kahn and Ken I. Kersch, *Supreme Court and American Political Development* (University Press of Kansas, 2006) (Nackenoff was a student of Greenstone’s at the University of Chicago). See also Ken I. Kersch, *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law* (Cambridge University Press, 2004).

An earlier generation of scholars – ironically enough, of the same consensus generation as Hartz – was not so blinkered. Richard Hofstadter’s, Christopher Lasch’s, and Ronald Walters’s description of the reformist type or personality will, when described, seem so familiar to contemporary academics as to disappear. This familiarity, however, should not lead us to discount its distinctiveness.

The reformer, according to these scholars (who focused primarily on nineteenth century prototypes) will understand himself as not being wholly in and of his times, but above it.¹⁰ Reformers “regarded themselves as outsiders whose critical distance from their societies enabled them to see its flaws.” They held the “basic assumption ... that they were special people, either quite detached from their time and place or else having a peculiar position within it.”¹¹ As such, as Christopher Lasch noted, despite their upper or middle class backgrounds, they will have a notable propensity to identify themselves with society’s outsiders and outcasts.¹²

Reformers will make a critical assessment of what is wrong with society (and the country), and needs correcting, that is, that there are social evils that they can identify, and, if successful, cure. And they come to identify the purpose of education itself with revealing to their students, who might not otherwise see them, the existence of these wrongs and evils, and, they hope, mobilizing them to work to take on these wrongs and evils – which are identified and understood as “social problems.” The commitment to remedying these wrongs, scholars of reformism demonstrate, can assume what is readily identifiable as a religious dimension in the lives of these reformers. Along the same

¹⁰ Walters, 12; Lasch, ix.

¹¹ Walters, 213.

¹² Lasch, xv.

lines, education for them becomes a form of evangelism.¹³ They conceive of education, that is, not simply as a process involving the transmission of values or the creation of an informed citizenry, but as an instrument of social change. They will see this as especially necessary given what they take to be the “self-evident unreasonableness” of much of the social and political system under which they live.¹⁴

Of course, they will closely identify themselves with the cause of progress. In so doing, they will see themselves as part of the vanguard of reasonableness in their own times that is “part of some grand process stretching across the centuries.”¹⁵ Put otherwise, they are inheritors of a legacy of progress.

Scholars of reformism have noted the propensity of reformers to be committed to a slate of causes, which they feel, in their own times, fit together coherently, but, viewed historically, may seem unusual (for example, a common profile in the 1840s would include simultaneous commitments to temperance, anti-Sunday mail delivery, antislavery, and public education).¹⁶ Reformers, as a distinctive type, may be closely aligned with popular, democratic political movements. But it is important to recognize that, in significant respects, they are not really of them. They “tend to expect that the masses of people, whose actions at certain moments in history coincide with some of these beliefs, will share their other convictions as a matter of logic and principle.” But this is commonly not the case. As Richard Hofstadter noted, they have a tendency to “remake the image of popular rebellion closer to their heart’s desire.”¹⁷

¹³ Walters, ix, 14; Hofstadter, 16-17. Reformist campaigns are often described as “crusades.”

¹⁴ Lasch, xiv, 286.

¹⁵ Walters, 213.

¹⁶ Walters, ix, xii.

¹⁷ Hofstadter, 19.

The Dark Side of Reform

To simply note that reformers are not “types” to contemporary scholars does not come close to doing justice to the place of these figures and their beliefs in American political thought today. For many they are either unremarkably ordinary (if, thankfully, more public-spirited than most), or, alternatively, the very definition of heroic.

Some, in earlier times, saw more clearly, and critically. Most prominent amongst both the clear and critical, perhaps, was Nathaniel Hawthorne, whose *The Blithedale Romance* is a fictionalized portrait of utopian Brook Farm community. In this novel, Hawthorne provides a devastating portrait of the reform-obsessed, public-spirited philanthropist, Hollingsworth, a man resolutely committed to the reform and rehabilitation of criminals, as a distinctively American social type.

In two passages in particular, Hawthorne (in the voice of the book’s narrator, a curious sojourner in the utopian community) dissects the reformer as type:

[H]ad the system at which he was so enraged¹⁸ combined almost any amount of human wisdom, spiritual insight, and imaginative beauty, I question whether Hollingsworth’s mind was in a fit condition to receive it. I began to discern that he had come among us actuated by no real sympathy with our feelings and our hope, but chiefly because we were estranging ourselves from the world with which his lonely and exclusive object in life had already put him at odds. Hollingsworth must have been originally endowed with a great spirit of benevolence, deep enough and warm enough to be the source or as much disinterested good as Providence often allows a human being the privilege of conferring upon his fellows. This native instinct yet lived within him. I myself had profited by it in my necessity. . . . Such causal circumstances as were here involved would quicken his divine power of sympathy, and make him seem, while their influence lasted, the tenderest man and the truest friend on earth. But, by and by, you missed the tenderness of yesterday, and grew drearily conscious that Hollingsworth had a closer friend than ever you could be; and this friend was the cold spectral monster which he had himself conjured up, and on which he was wasting all the warmth of his heart, and of which, at last – a these men of a

¹⁸ The two were discussing Fourier.

mighty purpose so invariably do, -- he had grown to be the bond-slave. It was his philanthropic theory. This was a result exceedingly sad to contemplate, considering that it had been mainly brought about by the very ardor and exuberance of his philanthropy. Sad, indeed, but by no means unusual. He had taught his benevolence to pour exclusively through one channel; so that there was nothing to spare for other great manifestations of love to man, nor scarcely for the nutriment of individual attachments, unless they could minister, in some way, to the terrible egotism he mistook for an angel of God.... He knew absolutely nothing, except in a single direction, where he had thought so energetically, and felt to such a depth that, no doubt, the entire reason and justice of the universe appeared to be concentrated thitherward.... [I]t required all the constancy of friendship to restrain his associates from pronouncing him an intolerable bore. Such prolonged fiddling upon one string, -- such multiform presentation of one idea!¹⁹

And:

He was not altogether human. There was something else in Hollingsworth besides flesh and blood, and sympathies and affections, and celestial spirit. This is always true of those men who have surrendered themselves to an overruling purpose. It does not so much impel them from without, nor even operate as a motive power within, but grows incorporate with all that they think and feel, and finally converts them into little else save that one principle. When such begins to be the predicament, it is not cowardice, but wisdom, to avoid these victims. They have no heart, no sympathy, no reason, no conscience. They will keep no friend, unless he make himself the mirror of their purpose; they will smite you and slay you, and trample your dead corpse under foot, all the more readily, if you take the first step with them, and cannot take the second, and the third, and every other step of their terribly straight path. They have an idol, to which they consecrate themselves high-priest, and deem it holy work to offer sacrifices of whatever is most precious; and never once seem to suspect -- so cunning has the devil been with them -- that this false deity, in whose iron features, immitigable to all the rest of mankind, they see only benignity and love, is but a spectrum of the very priest himself, projected upon the surrounding darkness. And the higher and purer the original object, and the more unselfishly it may have been taken up, the slighter is the probability that they can be led to recognize the process by which godlike benevolence has been debased into all-devouring egotism.²⁰

¹⁹ Nathaniel Hawthorne, *The Blithedale Romance*, 78-79.

²⁰ Hawthorne, *Blithedale Romance*, 92-93. He adds: "Of course, I am perfectly aware that the above statement is exaggerated, in the attempt to make it adequate. Professed philanthropists have gone far; but no originally good man, I presume, ever went quite so far as this. Let the reader abate whatever he deems fit. The paragraph may remain, however, both for its truth and its exaggeration, as strongly expressive the tendencies which were really operative in Hollingsworth, and as exemplifying the kind of error into which my mode of observation was calculated to lead me."

Reform and the Modern State

The modern American state is a reform state. It was built through the influence of reformers, first in the burst of abolitionism, and then through successive waves of Populism, Progressivism, and then a succession of social movements involving labor, civil rights, and feminism (amongst others). Reformism shaped the institutional architecture of the modern state. In so doing, it built an incentive structure that privileged, and gave undue weight, to both reformist influence, and reformist ideas. When we speak of the role of “advocacy,” as opposed to “interest” groups, we acknowledge this departure. And when we accord a special role for social scientific expertise in law, we privilege work that, in both its origins, and its contemporary reality, is often the work of latter day Hollingsworths, (if inevitably, usually in more palatable forms):²¹ by men and women committed less to the broader system, and a set of limits, than fired and obsessed by a single cause – advocacy-group liberalism, if you will.

Is it worth isolating reformism as a distinctive strain of American political thought? Might not we simply situate reformers with the preexisting categories of liberalism, communitarianism, and ascriptive Americanism? There is little doubt, for instance that, depending on the cause (or amalgamation of causes), reformism can be either liberal or illiberal. Doing so, however, will tend to obscure some the operations of the reformist mindset – be it liberal or illiberal – that are on broad display in prominent political contexts, including the reaction many had to the September 11 attacks (and the Iraq War).

²¹ I would note that Ralph Nader, one of the most influential contemporary reformers (and a favorite among many academics) is very close to the Hollingsworth type.

The predisposition of many sympathetic to the reformers themselves will be to see them as defending American liberalism, at a time it is newly under siege by an increasingly Schmittian wartime state – hence the panic about whether, at long last Hartz’s America is approaching its end. This is because the limits placed on individual liberty in the current context as a result of the September 11 attacks, and the war – which, by historical standards, (other than to the panicked) are strikingly *de minimus* – are the sort of wartime limits to which reformers are, in the context of the modern centralized state, are likely to be most sensitive. At the same time, the limits placed on individual liberty by the routine operation of that state, since the early twentieth century, and by contemporary reform agendas (such as (illiberal) feminism and ethno-centric, racist multiculturalism), are the sort of limits to which reformers are, in the context of the modern centralized state, utterly indifferent, if not aggressively in favor of. Perceived descents into another Red Scare, or neo-McCarthyism – distractions from, and weapons deployed against the affirmative project of building a reformist, egalitarian social democracy -- are their turf. The ordinary depredations of freedom that stem from the success of that project itself, simply put, do not count.

The Future of American Liberalism

How healthy is the liberal tradition in America today? Ironically enough, the panic being sent up by academic reformers that we are on the verge of losing all our rights and liberties is perhaps the clearest sign that it is alive and well. And here I am not making the claim that (thank God) there are some people willing to stand up for our

liberties, while others are trying to get rid of them, so as long as they wail, we as a society still have some hope. I am arguing instead that panics over the impending loss of liberties, and the collapse of our democratic experiment are constitutive of American liberalism itself, both when those panics, in my normative assessment, raise valid concerns, and when they are made by people who are clearly off their rockers. These claims about lost rights – whether made by Anti-federalists, slave-owners, pro-business conservatives, the Freedmen, the denizens of the Cato Institute, the American Civil Liberties Union, the Center for Constitutional Rights, or postings on the Law and Courts and Constitutional Law listservs -- indicate to me that the framework we argue within continues to place a very high premium on an individual and his rights. Although it is claimed that the other side in any one of these fights has failed to place a high premium on individual rights, this seems to me to be very rarely the case, at least for any extended period of time. Few (and the greatest exception here may be the early twentieth century progressives, before they rose to political power) have dismissed rights claims out of hand and more or less categorically unworthy of consideration. To be sure, the other side will often evince statist inclinations in certain areas, and be more welcoming of different rights and different rights instantiations than those who lodge the charge at them of being indifferent to individual rights. But it seems very clear to me that Iraq or no Iraq, Tribe or no Tribe, the discussion is still framed in terms of rights. I don't see that that has changed at all in recent years, and, as such, the Hartzian tradition is alive and well.

Recent work on civil liberties in wartime by Mark Graber suggests, in fact, that some panic about the possibilities of lost rights due to the war may very well be in order

on the other side of the political divide. Graber has suggested (like Randolph Bourne) that war is the health of the state. He then goes on to argue that the growth of the state in wartime has served to expand American liberty. But, of course, this assessment depends largely on the sorts of rights one chooses to count as progress.²² It may very well be the case that the less alarmed the reformists become over the state of freedom in modern America, and the ostensibly impending demise of Hartzian liberalism (such as by a Democratic victory in the aftermath of the failures of the Second Iraq War), the more alarmed we should actually be. Regardless, the America we have now is essentially the same America we had, through wars and waves of reformist campaigns that shaped the modern administrative state, since the earliest years of the twentieth century. If Hartz's reading was relevant in the 1950s, when it was first published, it is just as relevant today.

²² Graber, in Tushnet book [check/elaborate].