

THE LIMITS OF COURAGE AND PRINCIPLE

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INTRODUCTION

Michael Ignatieff, the director of the Carr Center for Human Rights at Harvard's Kennedy School of Government, is not a lawyer. His work, however, treats issues of core concern to lawyers: nation-building, human rights, the ethics of warfare, and now, in his latest book, the proper relationship between liberty and security.¹ *The Lesser Evil* is, in part, a book a legal scholar might have written: a normative framework for lawmaking in the face of the terror threat. It is also something more unusual: an exercise in an older type of jurisprudence. Ignatieff discusses law in the light of moral psychology and a general view about the nature of value, but in a way that respects the concrete, practical character of legal decisions and does not make law hostage to philosophy. The book should thus be read on two levels: as a contribution to current legal debates about balancing liberty and security and as an object lesson in the value and limitations of Ignatieff's heterodox approach to law.

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1. See MICHAEL IGNATIEFF, *EMPIRE LITE: NATION-BUILDING IN BOSNIA, KOSOVO, AFGHANISTAN* (2003) [hereinafter *EMPIRE LITE*]; MICHAEL IGNATIEFF WITH K. ANTHONY APPIAH ET AL., *HUMAN RIGHTS AS POLITICS AND IDOLATRY* (Amy Gutmann ed., 2001) [hereinafter *IGNATIEFF ET AL., HUMAN RIGHTS*]; MICHAEL IGNATIEFF, *VIRTUAL WAR: KOSOVO AND BEYOND* (2000); MICHAEL IGNATIEFF, *THE WARRIOR'S HONOR: ETHNIC WAR AND THE MODERN CONSCIENCE* (1998) [hereinafter *IGNATIEFF, WARRIOR'S HONOR*].

A word about Ignatieff's approach is due before discussing the main argument of *The Lesser Evil*. Ignatieff first came to prominence as a philosophically minded journalist who took the Balkan wars of the 1990s as an occasion to reflect on modern warfare² and then cemented his reputation as a student of the legal, political, and ethical dimensions of the human rights revolution.³ One could know all this, though, without knowing the two chief sources of his method: the jurisprudence of the Scottish Enlightenment and the thought of the late Isaiah Berlin.⁴ One cannot understand Ignatieff's distinctive approach without appreciating each of these influences.

The jurists of the Scottish Enlightenment, particularly Adam Smith, understood political, social, and economic life as a play of what they called "the passions."⁵ By that term they did not mean what we often denote by "passion" today: a powerful impulse or need, expressing something essential about personality or identity, which overrides the constraints of convention and reason. Our modern use is classical, and specifically Platonic, in its opposition between reason and passion; it is also Romantic in its tendency to honor passion as more authentic than, and in this respect potentially superior to, reason.⁶ The Scots, by contrast, used "passions" to refer to a constellation of deep-seated and widespread motivations that, taken together, formed the basic vocabulary of a fluid, dynamic account of human nature.⁷ The passions were broadly divisible into *social* passions, including desire for the esteem of others and sympathy, the wish for one's sentiments to be in harmony with those of others; *antisocial* passions, particularly the appetite for dominating or lording it over others, which the theorists of passions regarded as a basic and pervasive motive; and *asocial* passions, chiefly intellectual and aesthetic, including a delight in order and regularity and, straining against this, a thrill at chaos and disruption.⁸

2. See IGNATIEFF, WARRIOR'S HONOR, *supra* note 1.

3. See IGNATIEFF ET AL., HUMAN RIGHTS, *supra* note 1.

4. Very early in his career, Ignatieff published *Wealth and Virtue*, an edited collection of scholarly essays on the Scottish Enlightenment. WEALTH AND VIRTUE: THE SHAPING OF POLITICAL ECONOMY IN THE SCOTTISH ENLIGHTENMENT (Istvan Hont & Michael Ignatieff eds., 1983). Years later, shortly after Isaiah Berlin's death at the end of 1997, Ignatieff published a book on which he had long been at work: an intellectual biography of Berlin, whom he had come to know over years of conversation and study. MICHAEL IGNATIEFF, ISAIAH BERLIN: A LIFE (1998).

5. See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (R.H. Campbell, A.S. Skinner & W.B. Todd eds., Oxford Univ. Press 1976) (1776); ADAM SMITH, LECTURES ON JURISPRUDENCE (R.L. Meek et al. eds., Oxford Univ. Press 1978) (1823); ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (Knud Haakonssen ed., Cambridge Univ. Press 2002) (1759). See generally THE CAMBRIDGE COMPANION TO THE SCOTTISH ENLIGHTENMENT (Alexander Broadie ed., 2003).

6. On these distinctions, see CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY (1989).

7. I discuss the taxonomy of the passions in somewhat greater theory in Jedediah Purdy, *A World of Passions: How to Think About Globalization Now*, IND. J. GLOBAL L. STUD., Summer 2004, at 1, 21–34.

8. *Id.* at 24.

This view of human nature left little room for the Platonic and Kantian idea of moral reasoning as the clear specification of rational principles that should govern the unruly appetites and passions. The Scots regarded passions as too essential, pervasive, and polyvalent to be overridden by a stylized reason. They instead envisioned moral life as itself the product of the passions, a domain of life to be interpreted through the play of its constituent motives. For the Scots, moral reasoning therefore consisted not in *prescription*, that is, laying out sets of principles and rules to guide action, but rather in *diagnosis*, understanding how a given social order set in motion one play of the passions or another.⁹ Moral life was as natural as hunger, sex, or language; but it could take very different forms, some characterized by violence and domination, others by reciprocity and mutual forbearance.¹⁰ Philosophers sought to understand how new situations, such as the rise of capitalism and the spread of slavery in Europe's colonies, reshaped the moral lives of those who inhabited them.¹¹

This has been Ignatieff's approach to his topics; it distinguishes him from most scholars in and outside the legal academy. In his writing on the ethics of warfare, he has not begun from the principles of just war theory or international law. Instead, he has started with the facts of a world in which wars are increasingly fought not by nation-states with well-organized armies, but by whole peoples, as in the Rwandan genocide, or bands of irregulars that make little distinction between civilian and combatant.¹² The title of Ignatieff's first book on this theme, *The Warrior's Honor*, indicates his attention to how *combatants* understand the ethical constraints of the new kinds of wars they fight.¹³ Similarly, his work on human rights has addressed not so much the proper definition of universal and inviolable rights as the question how people come to care for, and feel obligated by, the suffering of faraway persons and culturally remote peoples.¹⁴

Isaiah Berlin's contribution to Ignatieff's approach is sometimes called "value pluralism," a more ungainly term than Berlin himself would likely have used.¹⁵ The heart of the idea is that there is not, and cannot be, a single, coherent, comprehensive solution to moral, legal, or political questions, because human life is marked by loyalty to competing, incompatible, but legitimate values.¹⁶ The world is too rich with value, or too cacophonous, to allow us one final answer to the great question, "What should we do?" For

9. *See id.*

10. *See id.*

11. *See id.*

12. *See* IGNATIEFF, *WARRIOR'S HONOR*, *supra* note 1.

13. *Id.*

14. *See* IGNATIEFF ET AL., *HUMAN RIGHTS*, *supra* note 1; *see also* MICHAEL IGNATIEFF, *THE NEEDS OF STRANGERS* (1984).

15. The term is used, for instance, in John Gray's treatment of Berlin's thought. *See* JOHN GRAY, *TWO FACES OF LIBERALISM* 34 (2000).

16. *See* ISAIAH BERLIN, *The Pursuit of the Ideal*, in *THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS* 1 (Henry Hardy & Roger Hausheer eds., 1997).

instance, we choose between, or trade off against each other, liberty and security; loyalty to our particular cultures and traditions and cosmopolitan duty to the entire human race; the freedom to be left alone and the freedom affirmatively to shape our own lives (what Berlin famously called “negative” and “positive” liberty).¹⁷ The balances we reach cannot be uniquely right, to the exclusion of all other answers, because all such choices are tragic in the strict sense that they involve the sacrifice of some legitimate values on behalf of others.

The consequence of Berlin’s value pluralism was what one might call liberal skepticism, the recognition that in a world of valid and inconsistent values, trying to enforce one true answer for everyone can bring moral and political disaster. Berlin believed that at least a part, and probably a large part, of the totalitarian experience of twentieth-century politics stemmed from the moral arrogance of rulers who sought to enforce a single vision of human life and violently cleared away whatever did not comport with it: Russian kulaks, Chinese dissidents, and the other victims of history. Fascism, too, Berlin understood as a rejection of value pluralism, a desperate and fantastical rebellion against morally ambiguous modernity and an attempt to erect in its place the temples of one’s own church and tribe, which would forever erase the premises of liberal skepticism.

Value pluralism is the implicit premise of Ignatieff’s discussion of liberty and security. He seems firmly to believe that there is no one formula that will guide us through the jurisprudential and legislative decisions of an age of terror. Instead, the best we can do is to try to understand precisely and carefully the values that are at stake in our decisions and the ways in which they are interrelated, and on the basis of this understanding formulate some rules of prudence to help our judgment.

The objection to approaches such as Ignatieff’s is familiar: that description is all well and good, but in the end we must reach decisions, and when we do we will need principles to guide us. From this perspective, Ignatieff’s psychological and sociological inquiry is at best a halfway house, at worst a kind of speculative, high-toned journalism that evades the hard business of saying what we should do, and why.

The Lesser Evil is, among other things, the author’s best attempt to answer this objection. More than Ignatieff’s earlier work, it approaches specific problems of governance and criminal justice in counterterrorism campaigns. Whether or not it is entirely satisfactory, the book itself is the best test of Ignatieff’s heterodox approach. The book sheds light on its topic and also on its own method.

I. DEFINING THE LESSER EVIL

The Lesser Evil is a multilayered book. It ranges far while managing to maintain a coherent center. In this Review, I proceed as Ignatieff does, first

17. See ISAAH BERLIN, *Two Concepts of Liberty*, in *THE PROPER STUDY OF MANKIND*, *supra* note 16, at 191.

laying out his prescriptions for the proper balance of liberty and security, then considering how far his method succeeds in guiding and supporting those conclusions.

Ignatieff proposes that “all coercive measures” adopted in pursuit of a war on terror should be subjected to five tests, each of which captures an important democratic value.¹⁸ The first test, “the dignity test,” asks whether the proposed measures violate individual dignity. This standard “should always preclude cruel and unusual punishment, torture, penal servitude, and extrajudicial execution, as well as rendition of suspects to rights-abusing countries” (p. 24). He calls the second “the conservative test,” a rhetorically convenient (and somewhat evasive) name for what one might also call a civil-libertarian test. As Ignatieff puts the question, “[d]o [the coercive measures at issue] damage our institutional inheritance? Such a standard would bar indefinite suspension of habeas corpus and require all detention, whether by civil or military authorities, to be subject to judicial review” (p. 24). Ignatieff’s third test is an “effectiveness test,” which asks whether the proposed measures will make citizens more or less secure *in the long run*—for instance by increasing or decreasing international support for terrorists—and not just in the exigencies of a present crisis, actual or perceived (p. 24). Fourth, he urges a “last resort test,” a requirement that less coercive measures be tried and found wanting before adoption of more coercive alternatives (p. 24). He calls the last test “adversarial justification,” which turns on whether a measure has been vetted by the institutions of constitutional governance and a free press.¹⁹

Ignatieff does not go into much detail about what he regards as the implications of these “tests,” or how the competing considerations they express ought to be weighed against one another. This is a serious difficulty for anyone who would like to take guidance from Ignatieff; his standards raise questions which they do little to resolve. The last resort test, for instance, is implausible if, as Ignatieff’s phrasing suggests, it would require a sequential ramping-up in the severity of counterterror measures until the point of efficacy was reached. A security policy intended to prevent major attacks on U.S. citizens could not, consistent with the government’s responsibility to protect the public, deliberately begin with measures suspected to be too weak, then strengthen them after successful attacks vindicated that suspicion. It may be that Ignatieff intends to endorse something like the “least restrictive alternative” requirement familiar from U.S. constitutional law. If that is what he means, he should say so and distinguish between a

18. Pp. 23–24. As will become evident, Ignatieff uses *democracy* in three senses. Two express distinct aspects, or versions, of what might more accurately be called constitutional principles: a majoritarian, security-oriented “pragmatic democracy” and a minorities-protecting, rights-based, procedure-preserving “moral democracy.” Ignatieff also uses *democracy* in a somewhat more familiar sense, to refer to the institutional procedures, both governmental (such as representative legislatures) and private (such as a free press), that channel the activity of collective self-governance. Pp. 3–6.

19. P. 24. Ignatieff’s account of which features of democratic decisionmaking are properly termed “adversarial,” and what vetting function they serve, is almost completely undeveloped. See *infra* Part V, where I address this difficulty in his position.

preference for nonintrusive measures at any given moment, on the one hand, and a requirement of ratcheting up intrusiveness only in response to failure, on the other.

Moreover, the effectiveness test is uninformative in practice: no-one would dispute the principle of promoting long-run security; but there will always be disagreement over the empirical conditions that determine whether a specific policy—such as, signally, the invasion of Iraq—will leave citizens more or less secure. In presenting the standard as he does, Ignatieff is unhelpful: while he purports to provide principles for decisionmaking in times of uncertainty, this principle has content only to the extent that the uncertainty is resolved by unfolding events.

The weakness of both the last resort test and the effectiveness test compromises the whole structure of Ignatieff's argument. The content of the dignity test and the conservative test is somewhat clearer than that of the effectiveness and last resort tests: the dignity and conservative tests presumably reflect basic human-rights norms and years of constitutional jurisprudence. That said, however, the apparatus is useful only if one can weigh the competing considerations—liberty on the one hand, security on the other—against each other in a way that is at least somewhat determinate. In Ignatieff's structure, dignity and institutional conservatism stand for judgments about liberty, while effectiveness and the last-resort requirement stand for judgments about security. If the second two are unworkable or indeterminate, then there is too little to weigh.

For this reason, an enormous amount of work will inevitably fall to Ignatieff's final standard, the adversarial justification test. Democratic processes will produce judgments about the nature and extent of terrorist threats and about which counterterror measures will conduce to security. The same processes will also vet the consequences for civil liberties and norms of dignity of counterterror measures. What Ignatieff takes the adversarial justification of democracy to be, and how he understands its nature and limits, must therefore be at the heart of the question of whether his account is either informative or workable. Ignatieff has a great deal to say on these themes. Indeed, they take up much of *The Lesser Evil*, and are at once the strongest and the weakest aspects of the book.

Ignatieff identifies two competing conceptions of self-government as shaping American attitudes to the question of balancing liberty and security and claims as his position a middle ground that finds room for the core values of both conceptions. Although Ignatieff calls these conceptions of "democracy," it would be more accurate to think of them as conceptions of constitutional governance, ideas of the authoritative principles of self-rule. The first, which he calls "pragmatic democracy," is majoritarian and is oriented to preserving the interests of the polity as the majority defines them, above all the survival of the nation itself (pp. 2–4). The slogan of pragmatic democracy is Justice Jackson's famous remark that the Constitution is not a suicide pact. On this view, civil liberties should extend just so far as they do not jeopardize the essential interests of the community and no farther. The purpose of rights against government coercion is *to protect the majority*

(from the government), and when such coercion seems unnecessary to protect the majority, those rights have no more force. On this view, Ignatieff's effectiveness test would be the only criterion for assessing coercive measures—with the possible side-constraint of the last-resort test to avoid unnecessary incursions on the liberty of the majority.

If this seems too crude a caricature of majoritarian democracy, or too glib in imagining a bright line between the safety of the majority and the liberty of a minority, it may be instructive to remember that in the current debates over liberty and terror, the characteristic tradeoff is between the liberty of a relatively small and vulnerable population, such as noncitizens or American Muslims, and the perceived security of the entire country.²⁰ When the burdens of security are concentrated in a discrete and relatively powerless population and the perceived benefits attach to all, the stage is set for the classic danger of majoritarian democracy: “the tyranny of the majority.”²¹

Ignatieff identifies the second competing conception of democracy as a “moral” view, in which democracy is not just “majority rule disciplined by checks and balances,” but is “also there to express the idea that individuals matter intrinsically” (p. 5). Once again, while the term “democracy” is intelligible for his purposes, Ignatieff is getting at something nearer to a constitutional vision. Under ordinary conditions, these two conceptions are complementary: individual rights and collective self-governance are two sides of the same political coin. Liberal rights enforce a transparent government, maintain the free speech that allows for criticism and inspection of political arguments and decisions, and prevent the state from exercising arbitrary prerogatives, such as indefinite detention, that would tend to undermine the freedom of the majority. Under the threat of terror, however, the two can break apart in the way just described: the majority is tempted, perhaps even obliged, to sacrifice the intrinsically important rights of minorities in pursuit of security.

In the face of this prospect, Ignatieff proposes a third view of the moral commitments of democracy, which he calls a “lesser evil position” (p. 8). This, too, is a constitutional vision, one specifically intended to illuminate hard choices in times of crisis. It is helpful to understand this position on three levels: casuistic, moral-psychological, and political. On the first, casuistic level, Ignatieff contends that when the security of the majority and the rights of minorities come into conflict, neither the leviathan of majoritarianism nor the bright-line protections of individual rights will deserve to govern in all cases. Rather, judgment will be necessary to place the competing values in their proper relationship. When values that have been mutually reinforcing come into conflict, it becomes necessary to set them out explicitly and devise a compass for navigating among their competing imperatives. It is in answer

20. See Ronald Dworkin, *Terror and the Attack on Civil Liberties*, N.Y. REV. BOOKS, Nov. 6, 2003, at 37.

21. The phrase is classically associated with Alexis de Tocqueville, although it expresses a concern about majoritarian government that was widely held in the early nineteenth century. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (J.P. Mayer ed. & George Lawrence trans., Anchor Books 1969) (13th ed. 1850).

to this need that Ignatieff proposes his “tests” for coercive antiterror measures, with their attention to effectiveness, dignity, institutional conservatism, the last-resort criterion, and adversarial justification.

On the moral-psychological level, the purpose of the lesser-evil position is to focus the minds of decisionmakers on the fact that even lesser evil is *evil*, and not rendered good by a tradeoff against something worse. As Ignatieff points out, the reason to insist on this point is that “human beings are so adept at inventing good intentions, coming up with plausible excuses for atrocious consequences” (p. 13). Those who endorse one side of a tradeoff between liberty and security will be perennially tempted to lapse into self-certainty and self-righteousness, as if their conclusions were self-evident and justified without remainder. The effect on moral psychology of adopting the lesser-evil approach is to check this temptation by calling even justified evil by its right name.

On the political level, Ignatieff’s lesser-evil approach expresses a conception of democracy distinct from the pragmatic and moral conceptions, one much nearer the term’s ordinary sense of popular self-government. Ignatieff is interested not so much in the institutional operation of self-government as in the kind of justification it requires citizens to give one another. He understands democracy as a practice of reason-giving that inhibits moral solipsism. Refining his earlier assessment of the propensity to self-righteousness, Ignatieff maintains, “human beings can justify anything as a lesser evil if they have to justify it only to themselves” (p. 14). Democracy subjects justifications to at least a modicum of “open adversarial review” among the branches of government, the political parties, and citizens (p. 24). So long as some people speak out, from conviction, interest, or both, to insist that a lesser evil is still evil, the proponents of that evil will have more difficulty pretending that it is no evil at all.

To endorse this idea, one need not accept the ambitious claims of some that “deliberative democracy” produces a specific and (from some points of view) particularly palatable set of policy prescriptions.²² All that one must accept is the relatively modest idea that democratic processes constitute a fragmented, imperfect, but actual tribunal of public justification, in which it is—at least—impossible to pretend that there are no contrary views, or that one’s own would be obvious to all people of good faith. Ignatieff insists that “[a] lesser evil morality is designed for skeptics” (p. 9). He might also say that democracy is a trainer of skeptics, inasmuch as it foregrounds the plurality of values and arguments in play in a political community.

Ignatieff rests much on the view that democracy exercises a moderating influence on political judgment. This is the keystone of the lesser-evil position on one of Ignatieff’s major concerns: the relationship between terror attacks and the rule of law. The problem Ignatieff sets out to illuminate is that in response to the threat of terror attacks—or to actual attacks—officials will make exceptions to the standards generally regarded as defining rule of law, whether violations of due process by emergency detentions and interro-

22. See AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996).

gation or infringement on the division of powers, as by the president's decreeing provisional policies unilaterally. How would Ignatieff's stylized democratic types approach this hazard? In his account, the pragmatic democrat would regard such exceptions as entirely consistent with rule of law, since the underlying purpose of law is to maintain order and security, and procedural protections are instruments to those ends, readily discarded when they impede the same ends; for the moral democrat, procedural protections instantiate the foundational commitment to individual dignity, and so are inviolable even in circumstances of extreme exigency (pp. 32–33). For the first, the hallmark of law is effectiveness in the present moment; for the second, it is precommitment to a set of rules and principles that hold even in exceptional times.

Ignatieff accepts that precommitment is essential to the rule of law. He argues, however, that law should be understood as precommitted not to a specific set of protections though the heavens might fall, but rather to *procedures of justification* for authorizing exceptions to existing rules. These procedures are the familiar features of “adversarial review” that Ignatieff endorses elsewhere: open debate, the checks of bicameralism and the presidential veto, the scrutiny of a free press, and judicial review, to rehearse the most familiar. For Ignatieff's position to represent a viable—and interesting—third way between the straw men of pure pragmatism and pure (“moral”) principle, democratic processes must be the most reliable way of keeping responses to terrorism within the bounds of Ignatieff's other standards: dignity, institutional conservatism, effectiveness, and the test of the last resort.

II. THE STRENGTHS OF DEMOCRACY AND THE STRATEGY OF TERROR

Unfortunately, as Ignatieff realizes, there are reasons to doubt that democratic procedures reliably check excessive responses to terrorism. Not least among these reasons for doubt is that democracies tend recurrently to overestimate threats to their survival, and so to react to perceived threats in disproportionate ways. Ignatieff acknowledges this difficulty and engages it directly, reflecting on the reasons democratic procedures may prove most unreliable for balancing liberty and security at just the junctures where they are most needed.

The paradox lies in the interaction of democracy with the political strategy of terrorism. As Ignatieff notes, life in democracies is characterized by a great deal of personal freedom: to move from place to place, to keep communication private, and to share all sorts of spaces, from exurban malls to Park Avenue to airliners, with strangers. Implicit in this freedom is trust: that no one is about to disrupt the whole complex flow with a single, violent act of bad faith. Terrorists breach that trust; they also take advantage of it: openness and mobility frame the open door that the terrorist walks through with his weapons.

Ignatieff argues that terrorist attacks pose not just a danger to life and property, but also a threat to the political order of democratic societies. Such

attacks tempt democrats to believe that one source of our strength—freedom and openness—is in fact a source of weakness and vulnerability. In the grip of this belief, democrats will be tempted to take defensive measures, such as restrictions on civil liberty, that betray their own principles of rule of law and the dignity of the person. They will also be tempted by offensive countermeasures which may in fact increase the danger they face, such as hasty military action abroad.²³

Exaggerated reactions to terror by democratic societies play into the strategy of terrorists in two ways. Defensive measures pose one kind of danger. When a democratic society abandons its principles willy-nilly in the face of terrorism, it gives credence to the political argument of the terrorists: that the democratic legal order is only a mask of convenience, behind which lurk naked force and violent self-interest.

Offensive actions present another danger. Disproportionate, ineffective, or inapposite responses, such as the Iraq invasion may yet prove to have been, can become recruiting events for terrorists. Such reprisals inadvertently present the democratic society as a hegemon and oppressor, and thus enable terrorists to offer themselves as the representatives and defenders of the population that bears the brunt of the reprisal.

Ignatieff's argument, then, involves two contentions. One is that terrorism—unlike, say, organized crime—is a *political* strategy: terrorists seek to win ideological recruits, legitimate their own use of force, and delegitimize the political orders they oppose. When the democratic targets of terror ignore this fact and simply respond to terrorism with overwhelming force, they can play into the political strategy of terror. The second contention is that democracies do not know their own strength. They are inclined to imagine themselves as weaker than they are, and so to react to the threat of terrorism in desperate ways that betray their principles and, paradoxically, make them more rather than less vulnerable to the political strategy of terrorism.

Ignatieff tries to address this problem with a brief, empirical reassurance to democratic citizens. Surveying the uses of terrorism as a political tool in Russia before the Soviet revolution, in Germany before the Nazi ascent to power, and in later decades in Sri Lanka, Italy, Germany, Ireland, and Latin America (pp. 54–81), he concludes that “while no democracy has ever been brought down by terror, all democracies have been damaged by it, chiefly by their own overreactions” (p. 80). In his view, the Russian Empire and Germany fell because of military and economic crises and constitutional infirmities. Latin American responses to left-wing terrorism in the 1970s and 1980s produced or deepened authoritarianism, but brought no victory to terrorists. The European targets of terrorism neutralized their enemies effi-

23. I have long regarded the invasion of Iraq, for instance, as such a measure. See Jedediah Purdy, *Liberal Empire: Assessing the Arguments*, ETHICS & INT'L AFF., Fall 2003, at 35. Ignatieff has taken the opposite view. See *supra* note 37. This is but one example of the difficulty to be encountered in getting any work out of Ignatieff's “effectiveness test.” For my part, I am prepared gladly to concede—and hope—that a turn in events will prove my view wrong; but I am not increasingly optimistic.

ciently—and were at their weakest when, like the British in Northern Ireland, they struck at civilian populations and violated basic legal norms, thus converting ambivalent civilians into supporters of terrorist movements. The nub of this empirical argument is that terrorists are never in themselves powerful enough to threaten the existence of a democratic state; they succeed only when they are able to frighten democrats enough that the terrorists can control the terms of engagement and induce the exaggerated responses they desire.

Ignatieff's historical accounts are extremely brief, and his choices are eccentric. While it is true that assassinations and street violence contributed to the run-up to both the Nazi seizure of power and the Bolshevik revolution of October, 1917, I am not aware that either has been proffered as an example of the political potency of terrorism. More critically, Ignatieff makes things too convenient for himself on this historical score. He contends that terrorists *defeat* democracies only when constitutional vulnerabilities or exogenous crises make the democracies vulnerable; otherwise, they win their partial victories by inducing democracies to abandon their principles; thus democracies, which if otherwise sound are not in existential danger from terrorism, should not abandon their principles. But Ignatieff's historical claim is not as reassuring as he would like it to be. It is all but axiomatic that terrorists undertake their methods because they are too few or too weak to march on the capitals of their enemies. If they can topple a state only by compounding other weaknesses already afflicting it, well, that would seem to be already conceded in their strategy.

Ignatieff contends that terrorists win only when we democrats help them to win, as with authoritarian overreactions, or when history spins out of control, as in Russia and Germany. The former point—which applies to the flowering of Latin American authoritarianism in response to terror—supports his larger argument against compromising liberal principles. The latter point does not: it is precisely the purpose of harsh antiterror measures to prevent history from spinning out of control, or to brake the consequences of its doing so. I believe what Ignatieff wants to say, but cannot quite bring himself to say, is not that terrorists can never win, but that they might sometimes win; yet, all things considered, we are nonetheless more likely to preserve both our existence and our principles if we are extremely reluctant to compromise those principles. In other words, a principled response to terrorism is not a sure thing; it is a lesser evil. Rather than make this point outright, Ignatieff seeks reassurance from empirical claims that do not quite provide it.

III. TERRORIST NIHILISM AND DEMOCRATIC NIHILISM

The core of Ignatieff's argument, then, is not that terror poses no threat to the existence of democratic societies and so that we should be entirely confident in upholding civil liberties in the face of terrorist threats. The argument is rather that the danger of losing our democratic identity in our response to terror is a greater evil than the danger of being overpowered by

terrorists (in conjunction, as noted above, with exogenous or internal crisis). To appreciate this argument, one must understand the mechanisms by which Ignatieff believes we democrats (or liberals)²⁴ can be induced to give up our democratic identity.

Ignatieff puts it this way:

What happens when political violence ceases to be motivated by political ideals and comes to be motivated by . . . emotional forces . . . : *ressentiment* and envy, greed and blood lust, violence for its own sake? What happens when counterterrorism, likewise, ceases to be motivated by principle and comes to be driven by the same complex of emotional drives? (p. 114)

Let us take this point step by step, for a great deal is contained in it. First, Ignatieff proposes that the motivations of political life can change from interest guided by principle to an incommensurable set of psychological forces: resentment and a delight in violence for its own sake, or in the intoxicating experience of potency that it provides. Second, he identifies the motives of at least some terrorists—Ignatieff believes most of al-Qaeda belongs here—with this latter orientation, which he terms “nihilism,” or violence undertaken for reasons outside of principle. Third, he takes the innovative step of suggesting that the threat of nihilism is reciprocal (even if not exactly symmetrical). We liberals, in the course of battling nihilism, could become nihilistic ourselves. Put differently, we could leave principle so far behind, and grow so engaged by the dubious psychic gratifications of a “war on terror,” that we would become alien to ourselves, unrecognizable from the vantage point of our present, principled self-understanding. We would be transformed into our enemies.

Ignatieff proposes to sketch the way in which this psychological decline into nihilism can take place. His vocabulary for this description is broadly psychoanalytic: he describes the displacement of powerful drives—for status, power, or sex—onto violence, which becomes a fetishistic embodiment of those aims. Status and power are relatively straightforward. Violence can come to be identified with, and to seem the only or the purest means to, “personal aggrandizement, immortality, fame, or power” (p. 117). Who does not recognize the fantasy of the upright man with a gun, or the true believer with a bomb? From Dirty Harry to the suicide bombers of Gaza, the occasions change, but the assertion of power and the demand for respect are the same. The consummation of this tendency is in the death cult, in which suicide bombing assumes the place of the highest human end (p. 117).

Ignatieff also speculates that “[c]hanneling sexual desire away from life is an important process in the creation of the death cult” (p. 126). He proposes two specific ways in which this may happen. Violence can be conceived as itself a kind of erotic consummation, as among the female sui-

24. It is perhaps better at this point to use “liberal” rather than “democratic.” Ignatieff himself switches at this point in the discussion, although what is under discussion is what he calls the “moral” conception of democracy, centered on a liberal respect for procedure and the rights of the individual.

cide bombers of the Tamil Tiger terrorist movement, for whom “[d]ying was reconceived as an orgasmic reunion with the [Tiger] leader in death” (p. 126). Sexual energy can also support violence through revulsion, by contributing to a loathing for the victims, a “phobic sense of pollution” that derives from the neurotic terror of sexuality, but expresses itself in disgust at a whole class of victims, whether members of a decadent West or an ethnic other (p. 127). One need not adopt the psychoanalytic vocabulary that Ignatieff prefers in order to take seriously his account of the seduction of violence. As he points out, it “isn’t necessary to delve into the question of why human beings love violence and seek to use weapons as instruments of power and even of sexual gratification” to accept that experience shows us doing so over and over again (p. 121).

The seduction may hold for the opponents of terrorists as well as for the terrorists themselves. As Ignatieff rather delicately puts it, “[t]he type of personality attracted into a counterterror campaign may not have any intrinsic or reflective commitment to democratic values of restraint” (p. 121). It is perhaps not necessary to be so quite delicate after the revelations of American torture at Abu Ghraib prison in Iraq: those who are invited to use the weapons of violence against enemies may come to love the use of those weapons too much.²⁵ Nor can one restrict this concern to the violent behavior of line soldiers. At the highest levels of government, the pleasures of power and of moral self-certainty can be just as powerful as in the prison yard.²⁶ The risk of nihilism lurks both among terrorists and in the liberal societies they attack.

In the background of Ignatieff’s argument is his Scottish Enlightenment method: the view of moral analysis as best conducted diagnostically, in terms of the order of the passions that constitutes a personality. On Ignatieff’s account, nihilism is best understood not as a doctrine, but as a passional composition in which delight in violence and domination, fantasies of omnipotence and immortality, and other antisocial passions define the personality. Ignatieff adds to this Isaiah Berlin’s fascination with the darkest forms of modern politics, and, no doubt, his own travels in lands rent by nationalist violence. These cast a shadow on the diagnostic method of the passions but do not displace its emphasis on the structure of personality.

Ignatieff proposes a view of political society, and specifically of the purposes of liberal constitutionalism, that reflects these concerns. He identifies “the control of violence and coercion in the name of human dignity and freedom” as lying at the heart of “the spirit of [liberal] constitutional society,” and identifies “this constitutional identity” as “all that we have to resist the temptations of nihilism” (p. 143). He continues, “liberal democracy has been crafted over centuries precisely in order to combat the temptations of nihilism, to prevent violence from becoming an end in itself” (p. 144). This is a remarkable claim. It proposes that nihilistic violence is a default

25. See Chris Hedges, *On War*, N.Y. REV. BOOKS, Dec. 16, 2004, at 8.

26. See Arthur Schlesinger, Jr., *Eyeless in Iraq*, N.Y. REV. BOOKS, Oct. 23, 2003, at 24.

position, or at least a perennial tendency in human affairs, which principled forms of political community must perennially labor to avert. In holding this view of human nature, Ignatieff takes a deeply pessimistic attitude.

This was not the attitude of the U.S. constitutional Framers, who mostly saw the purpose of liberal society as nearer securing natural liberties and promoting prosperity.²⁷ Even James Madison's *Federalist* No. 10,²⁸ the most influential document of pessimism to come from the Framers, presents faction as a constant problem born first of competing interests, only second of enthusiasm and zealotry; but Madison, whose attention to the antisocial passions reflected his schooling in Scottish Enlightenment thought,²⁹ gave no indication that he regarded "violence [as] an end in itself" as the default situation or primary threat which constitutional government had to keep at bay. As for other liberal thinkers, John Locke regarded the state of nature as vexed by "inconveniences" from conflicts over property rights, not a war of all against all; his account of constitutional government is all to do with securing natural rights and property claims, not staving off nihilism.³⁰ Even Thomas Hobbes, a dubious liberal but certainly a theorist of the rule of law and a pessimist if ever the mainstream of Anglo-American thought has produced one, did not believe that violence for its own sake held much charm for people. His "war of all against all," which made life "nasty, brutish, and short," was driven by a combination of epistemic uncertainty and the impulse to self-preservation: people struck out against others because they could not know who might otherwise strike them first, not because the blow delighted them.³¹ The founding of a sovereign government solved the epistemic problem by creating a univocal source of enforceable rules that made behavior predictable and so decoupled self-preservation from the need for preemptive attacks on others.³²

Ignatieff's idea of the motivations that underlie political life does have much in common with that of Edmund Burke, another student of the passions, who believed that devotion to the moral identity of the political community checked the impulses of violence and zealotry which would otherwise take command.³³ Curiously,³⁴ in this respect he also has much in

27. On the political orientation of the Framers, see GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1992).

28. *THE FEDERALIST* No. 10 (James Madison).

29. On the influence of Scottish thought on the American founding generation, see generally *THE CAMBRIDGE COMPANION TO THE SCOTTISH ENLIGHTENMENT*, *supra* note 5.

30. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1960) (1698).

31. See THOMAS HOBBS, *LEVIATHAN* (Richard Tuck ed., Cambridge Univ. Press 1996) (1651).

32. See *id.*

33. See EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 247–48 (Conor Cruise O'Brien ed., Penguin Books 1969) (1790).

34. I say "curiously" because Smith is so often associated with a Panglossian view of market society, when in fact he was a profound student of the darker, domination-seeking aspect of human

common with Adam Smith, who portrayed not political life, but social and economic existence, as defined by its proportion of two competing organizing principles: domination and submission on the one hand, and reciprocity and consent on the other.³⁵ Ignatieff's stress on the urgency of maintaining constitutional identity in the face of terror—particularly nihilistic terror—does not simply reflect prudence or a general preference for principle.³⁶ It rather expresses quite a specific and shadowed view of human motivation, and of the forces that can keep its worst potentials in check. Ignatieff's is a significantly darker view than that of the majority of the U.S. constitutional tradition.

That Ignatieff sees a darker world than most liberal theorists is not a criticism of his account of liberal constitutionalism, but a characterization that helps in classifying his thought. Moreover, the fact that Ignatieff's position is somewhat apart from the main line of liberal constitutionalism hitherto does not disqualify it from being the right characterization today. Ignatieff's exegetical level is not legal, but metalegal. He sets out to characterize the primary threats to social order, liberty, and human dignity that the law confronts, and the nature and limits of its resources for confronting and managing these threats. In a time when nihilistic enemies present a major threat to those social and legal ends, and their threat raises the temptation of reciprocal nihilism, it may be that Ignatieff's pessimistic constitutionalism is more salient than it would otherwise be.

IV. LESSER EVILS IN AN AGE OF ARMAGEDDON

What changed on September 11, 2001? Ignatieff offers a two-part answer to this contentious question. First, the destruction of the World Trade Center created a vastly important precedent. As the assassination of Czar Alexander II by Russian nihilists (as terrorist assassins were then called) created a model for a century of ideological murder, so the spectacular blow against the United States, which redirected U.S. foreign policy and very possibly the course of history, gave an example that is sure to inspire imitators and successors (pp. 152–53).

Second, even though the September 11th attackers did not use any of the now-famous triad of chemical, biological, and nuclear weapons, their attack put the world on notice of the possibility of spectacular, high-casualty incidents. Such events have become plausible thanks to a set of causes already in motion before the twin towers fell. One is the rise in the number of terrorists who are essentially nondeterrable because they are tied neither to any

nature. I discuss this aspect of Smith's thought in *A World of Passions*. See Purdy, *supra* note 7 at 25.

35. See SMITH, *THE THEORY OF MORAL SENTIMENTS*, *supra* note 5.

36. Ignatieff's preference for principle may represent an evolution in his thinking. In *The Warrior's Honor*, he argued that abstract principles have little purchase on people at war, whose role-specific sense of honor *as warriors* was much more motivationally effective than any general rules. See IGNATIEFF, *WARRIOR'S HONOR*, *supra* note 1. I am indebted to Jamie Boyle for this observation.

state or place nor to any population against which they would seek to avoid reprisals. (Ignatieff contends that Palestinian terrorists, for instance, are unlikely to use chemical weapons against Israelis because of the prospect of retaliation against other Palestinians—not obviously true, but not a negligible point.) Another is the decline in the relative cost of producing and storing “weapons of mass destruction,” which means that such weapons are no longer necessarily the monopoly of states, but are for the first time accessible to disaffected groups or even individuals. A third cause is the near-collapse of government in many parts of the former Soviet Union and sub-Saharan Africa. The Soviet collapse potentially puts nuclear material and other hazardous substances on the market, while the African crises mean that in large swathes of territory, such as parts of Somalia and Sudan, the nominally governing state is not strong enough to exclude or suppress terrorist groups that might acquire or develop such weapons. Taken together, these facts make high-casualty terror attacks relatively likely.

On Ignatieff’s account, the real horror of such attacks is that they could achieve what he contends terrorism has never been able to manage in the past: the defeat of a democracy.

A succession of mass casualty attacks, using weapons of mass destruction, would leave behind zones of devastation sealed off for years and a pall of mourning, anger, and fear hanging over our public and private lives. Such attacks would destroy the existential security on which democracy depends. . . . We might find ourselves living within a national security state on permanent alert, with sealed borders, constant identity checks, and permanent detention camps for suspicious aliens and recalcitrant citizens. (pp. 153–54)

It is indeed a dystopian image. It is, moreover, clearly possible, if not now then within the next ten to twenty years, depending on the rate of diffusion of the most destructive technologies.

This changes the nature of the threat that terrorism poses to liberty. Even if one accepts my modification of Ignatieff’s claim that history shows terrorists categorically unable to topple liberal states, for more than a century the *chief* threat terrorists could exercise was to tempt, goad, or alarm liberal states into giving up their freedom in a spasm of overreaction. Today, on Ignatieff’s account, terror for the first time poses a symmetrical Scylla and Charybdis of threats to liberty. On the one hand, it remains all too possible that fear itself could drive us to throw essential protections overboard in favor of a national security state with an imperial executive and unaccountable counterterrorism agencies. On the other hand, if our counterterror efforts fail, terrorist attacks might prove devastating enough to all but impose such a security state. Before, we had only to avoid the reef of our own overzealous reprisals. Now, there is a needle to thread. Liberal societies cannot afford to give up their liberty, but neither can they afford to hold open the door that might admit devastating attacks.

This challenge raises the stakes enormously for efforts to *prevent* terrorist attacks without compromising basic liberties. Ignatieff makes fairly

specific recommendations for these efforts. He urges that the infrastructure of international commerce be reformed to ensure full monitoring of everything that crosses borders: shipping containers, goods, and people. In a sense, all international activity will have to adopt some of the security features of airline travel, even at substantially increased cost, to prevent the now-proverbial suitcase bomb from entering the United States at a maritime port or across the Rio Grande. Just as important, antiproliferation efforts, directed at keeping nuclear, biological, and chemical weapons out of private hands, will have to be fully funded and far more consistently pursued than has recently been true. Antiproliferation regulation should also clamp down on laboratories and scientists working (legally) on technologies essential to weapons of mass destruction: researchers must become accustomed to monitoring and to restrictions on their publicizing information. Such measures, if adopted, would amount to a security tax on the time and money of industries and individuals that have benefited from the same open systems that now facilitate threats. Ignatieff contends that the cost of these restrictions would be outstripped by the benefit: preventing devastating attacks without recklessly sacrificing liberties.

Two other of Ignatieff's proposals are more dramatic. Following many commentators, he urges the United States to put itself squarely on the side of promoting democracy in the Middle East, where "[f]or sixty years, Western states have been on the wrong side in a suppressed civil war between Arab peoples and their governments" (p. 156). Ignatieff is probably right that "apocalyptic nihilism feeds on political despair," and thus in the long run democracy is an important disincentive to terrorism (p. 156). That does not tell us much, however, about the wisdom of any particular action that disrupts the authoritarian status quo in the Arab Middle East. To take one example, Ignatieff was a cautious supporter of the United States invasion of Iraq, a project that at the time of this writing increasingly seems a spectacular failure of the democracy-promotion aim. At a minimum, this adventure in moral-political judgment highlights the difficulty of making good on a nominal commitment to promoting democracy.³⁷ This is surely an area in which Ignatieff's effectiveness test will have hard going in distinguishing between policies that will make us more safe in the long run and those likely to endanger us. It is also an area in which the psychological hazards of self-righteousness and delight in the exercise of power, which Ignatieff aptly parses elsewhere, can be expected to enjoy considerable influence.³⁸

Ignatieff also supports what he calls "preemptive war," although he appears to accept the argument of the Bush administration that, in striking terrorists, preemption properly shades over into what would once have been called prevention.³⁹ The doctrine of preemptive war has traditionally

37. For Ignatieff's reflections on this issue, see Michael Ignatieff, *The Burden*, N.Y. TIMES, Jan. 5, 2003 § 6 (Magazine), at 22.

38. See, e.g., JONATHAN GLOVER, HUMANITY: A MORAL HISTORY OF THE TWENTIETH CENTURY (1999); CHRIS HEDGES, WAR IS A FORCE THAT GIVES US MEANING (2002); Purdy, *supra* note 7.

39. For the distinction, see MICHAEL WALZER, ARGUING ABOUT WAR 143–51 (2004).

pictured an attack on the assembling forces of an enemy.⁴⁰ The single modern instance of preemption in conventional war was Israel's (1967) devastation of the Egyptian air force in anticipation of an imminent Arab attack. By contrast, Ignatieff characterizes preemptive strikes against terrorists as including attacks on states that harbor terrorists—including, one would imagine, Afghanistan even before September 11, 2001 (p. 163).

Ignatieff insists that preemptive attacks should be defensible, and actually defended, in light of public reason. The alleged threat should be candidly aired, with attention to the opinions of other governments and publics and to the norms of international law, as well as to domestic views (p. 164). Nonetheless, Ignatieff is clear that he believes unilateral action is appropriate when international approval is not forthcoming: therefore, the appeal to other countries and multilateral institutions appears to be less a limit on the freedom to conduct such war than an incentive to formulate clear reasons for preemptive war—the same role Ignatieff assigns to domestic democratic processes (p. 165).

As with Ignatieff's endorsement of democracy-promotion in Arab countries, the example of Iraq raises some troubling questions for his argument that democratic politics promotes public reason about proposed preemptive wars. The 2003 invasion of Iraq was undertaken as a preemptive war, in response to the allegedly imminent threat of Iraqi-backed terror attacks. No evidence has emerged that such a threat ever existed. Some evidence has emerged that the Bush administration distorted the contemporary evidence in making the case for war.⁴¹ Nonetheless, George W. Bush was reelected, and a substantial share of Americans falsely believed well after the invasion that the deposed Iraqi regime had been proven to have had illegal weapons.⁴² Those Americans tend strongly to support the Bush administration. This sequence of events should at least give pause to any confident expectation that democratic decisionmaking will uphold public reason. Indeed, because the case for preemptive war always rests on an appeal to popular fear (of an enemy attack), advocates of preemptive war will always have the chance to take advantage of just what Ignatieff identifies as a perennial weakness of democratic politics: the exaggerated feeling of vulnerability to terror.

The power of democratic reason-giving forms the heart of Ignatieff's argument, a rationalist answer to problems he has diagnosed in light of pervasive human irrationality. He proposes that the only guide in balancing liberty and security is a serious and diligent commitment to the principles of liberal freedoms and democratic argument. In reading *The Lesser Evil* and reflecting on the events of the last few years, it is difficult not to wonder whether this is too thin a reed for our trust.

40. *See id.*

41. For a discussion of the uses of intelligence in the run-up to the Iraq war, see GEORGE PACKER, *THE ASSASSINS' GATE: AMERICA IN IRAQ* 39–100 (2005).

42. For instance, a poll conducted in spring of 2003 found that forty-one percent of respondents believed the United States had found illegal weapons in Iraq. *See* Program on Int'l Policy Attitudes, *What's New* (June 4, 2003), http://PIPA.org/whatsnew/html/new_6_04_03.html.

V. THE LIMITS OF COURAGE AND PRINCIPLE

Do Ignatieff's study of the passions and implicit commitment to the idea of value pluralism contribute anything to his normative reasoning? Ignatieff's five "tests" for coercive action are neither exceptional nor exceptionable. Their form—criteria for reasoning with no lexical ordering or weighting—provides no specific answer to any particular question. Their content is something close to the middle ground occupied by many pragmatic liberals, who accept both that antiterrorism policies must be effective and that procedural checks are important for avoiding always-tempting abuses. Does the philosophical background help, or is it adornment for principles that could as well stand on their own? Or, does the philosophy get in the way of pragmatically productive thinking?

In one sense, at least, the philosophical traditions are indispensable for Ignatieff. The diagnostic bent of both passions theory and value pluralism inclines him to ask not so much what our values *should* be as what it *means* for our values to be what they are. The purpose of Ignatieff's schematic summary of "pragmatic" and "moral" conceptions of democracy is to remind readers that most of us are inarticulately committed to both sets of values and must work to keep them in balance—particularly in new circumstances, when old arrangements between the two will not necessarily serve or will come into jeopardy. The intent of his discussion of nihilism is to present a picture of the perennial human dangers that form the backdrop to liberal democracy and contribute to its urgency.

In times of ordinary law and politics, when institutions work routinely and the balance among competing public values stands more or less by convention, Ignatieff's mode of reflection may be superfluous, if illuminating to those who find such thought congenial. It comes into its own, however, when events force a reorientation of institutions and re-sorting of principles. In those circumstances, it is critical that we understand the principles that undergird our rules and institutions, and, in turn, the moral aspirations and recurrent threats that give those principles their importance. Otherwise, we will be setting out without a compass. *The Lesser Evil* is an orienteering exercise for a time that needs more of them.

This, however, is where Ignatieff's strength becomes a weakness by encouraging a serious omission. In describing the conflict among legitimate liberal and democratic values, he takes as his object the experience of the exemplary democratic citizen. Indeed, it is not just any citizen he seems to envision, but a peculiarly cerebral and high-minded one. His discussion, with its emphasis on the struggle between nihilism and principle, evokes the philosophical wars of Enlightenment and mid-century Existentialist agon, struggles between stern codes of morality and the unbridled destructiveness of those who have concluded that God is dead, and all is permitted.⁴³

43. See ALBERT CAMUS, *THE REBEL: AN ESSAY ON MAN IN REVOLT* (Anthony Bower trans., Albert A. Knopf 1956) (1951); PIERRE MANENT, *THE CITY OF MAN* (Marc A. LePain trans., Princeton Univ. Press 1998) (1994); JAMES D. WILKINSON, *THE INTELLECTUAL RESISTANCE IN EUROPE* (1981).

Ignatieff writes in the book's peroration, "[t]he challenge of an ethical life in liberal democracy is to live up, as individuals, to the engagements expressed in our constitutions and to seek to ensure that these engagements are kept in respect of the least advantaged of our fellow citizens" (p. 169). Preparing to close one chapter, he claims, "it has always been true that the force which sustains the liberty of the many has been the intransigent courage of the few" (p. 53). The battleground of principle and nihilism is, apparently, the soul of the mindful citizen—and not just any citizen, but "the few" whose "courage" prevents the degradation of their "fellow citizens." The person he has in mind is a philosopher by temperament (and perhaps education) and an engaged citizen out of a sense of duty, and is positively obsessed with principle and its complexity. The struggles among values and passions that Ignatieff describes occurs only in two domains: diffusely, in the whole polity as viewed with the eye of God, and specifically in intellectuals like Michael Ignatieff.

This is where Ignatieff might have been much more helpful on his themes had he thought and written more like a lawyer and less as a student of values and passions. Lawyers—even academic lawyers—do not identify conflicts of value, particularly those that carry major practical consequences, without immediately asking a set of institutional questions. When a practical problem arises in which these values are implicated—for instance, which requirements of due process apply to terror suspects?—the following questions come fast: Which part of which branch of government takes the first crack at it? Congress? The presidency? The military? Which part gets the final say? If the courts do, should they dictate a specific set of procedures, as in the long-ago *Miranda* ruling,⁴⁴ or invite other branches to formulate a new version of due process for eventual court review, as in the recent *Hamdi*⁴⁵ and *Rasul*⁴⁶ decisions? And how will citizens be able to contest the decision? By putting pressure on Congress, by voting out the president, or only by supporting a constitutional amendment? Without answers to these questions, the diagnosis of values and passions remains in a real sense unreal, merely notional. This is so because there is no way of knowing the process by which the values and passions of any citizen or the whole population will—or will not—be translated into actions taken on behalf of the polity.

To say this is not simply to criticize Ignatieff from outside his project. On the contrary, these questions are integral to understanding the implications of his diagnosis, even on its own terms. The most distinctive aspect of Ignatieff's argument, the diagnosis of the passions, founds his account of the political goal of terror: inducing democracies to betray their own principles in spasms of fear and exaggerated measures of self-defense. But the foremost check that democracies have cultivated against this hazard is not a

44. *Miranda v. Arizona*, 384 U.S. 436 (1966).

45. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

46. *Rasul v. Bush*, 542 U.S. 466 (2004).

stalwart civic soul; it is institutional arrangements that limit the power of panic to unsettle existing principles and procedures. The most valuable contributions to Ignatieff's themes engage *both* the passions and institutional arrangements, with judgments about the first informing conclusions about the second. Vincent Blasi's classic discussion of the First Amendment as a check against political hysteria is one example.⁴⁷ Bruce Ackerman's recent proposal for a structure of time-limited emergency powers with a mandatory sunset provision, to ensure that decisions taken in times of exigency do not become permanent, is another.⁴⁸ Both ask the question of *Federalist* No. 10: Given what we know about the instability of human nature, how can we design a government that appropriately checks and channels the passions most likely to distort political decisions? Because Ignatieff fails to take this step, it is not clear that *The Lesser Evil* deserves the designation its subtitle claims, as a work in "political ethics." Because it cannot guide decisions taken in politics, the book is nearer a work in political psychology.

It is also unclear whether, even as psychology, Ignatieff's account gets the experience of liberal constitutionalism quite right. He embraces the idea that constitutional liberty rests in good part on ordinary citizens' identification with the rights and freedoms, the form of justice, that their political order provides.⁴⁹ His account of that identification, though, with its stress on the agon between principle and nihilism, may capture the experience of only a philosophically minded sliver of the citizenry. It may be that the identification that most Americans experience with constitutional liberty is a rather more subtle matter of habits of judgment and evaluation—a sort of civic second nature. Americans express such a second nature when they reflexively invoke their "constitutional rights" to defend basic freedoms and entitlements, whether or not these appear in the text of the Constitution. Ignatieff has nothing really to say about this ordinary form of political commitment, nor about the actual institutional activity that keeps government approximately in line with these half-intuitive values.

Michael Ignatieff has written a book in defense of liberty, in praise of democracy, and directed at clarifying and fortifying "the intransigent courage of the few" (p. 53). There is nothing wrong with this. Indeed, it is too rare that the task is conducted with Ignatieff's learning and subtlety. The fact remains, though, that the liberty of the many depends foremost on their own mainly unphilosophical devotion to free government, and to institutions of sound design that keep power from straying too far from liberty. The book that describes the fate of those bulwarks in an age of terror has not yet been written.

47. See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

48. See Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004).

49. See BURKE, *supra* note 33, at 121.

