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From *Plyler v. Doe* to Trayvon Martin: Toward Closing the Open Society

Lyle Denniston*

Abstract

Lyle Denniston, the longest serving and most experienced journalist covering the United States Supreme Court, takes his theme of an inclusive and open society from the constitutional and cultural vision of the late Justice Lewis F. Powell, Jr. and then offers a detailed argument that America is forfeiting—or at least compromising—that vision in favor of a safer, more secure and more cramped society, at home and abroad. The Article, taken from a memorial lecture in Justice Powell’s honor at Washington and Lee University in April 2012, draws upon a variety of very different societal and legal developments that are found to have in common the movement of people and ideas to the margins or even out of sight. The analysis ranges from the treatment of individuals captured by the American military during the perceived “war on terrorism,” to the new xenophobic reaction to undocumented immigrants, to the expanded militarization of the American intelligence apparatus, to the narrowing of the supposedly open digital culture, to the new cultural ghettoization of the white-dominated American suburb, to the still rampant exclusion and discrimination against people of color and people of different sexual identities. Against the possible perception that Denniston has extolled only liberal or progressive values, he argues that people of all ideologies have much to lose if American society becomes further afraid of diversity, change, and openness.

It is a distinct privilege and a high honor to be invited to deliver a lecture on your campus, in honor of Justice Powell—an

* The Lewis F. Powell, Jr. Distinguished Lecture, presented April 5, 2012 at the Washington and Lee University School of Law. Presently, Lyle Denniston is the Supreme Court reporter for scotusblog.com, an online clearinghouse of information about the Court.

esteemed graduate of your university and your law school, a Virginia gentleman capable of deep kindness and great tolerance, and a most distinguished (if initially reluctant) member of the Supreme Court of the United States, where he served for fifteen years.¹ It is rewarding to know that the university houses Justice Powell's papers,² which well document a judicial career in which he was a dominant figure, making majorities in an often-fragmented Court, and standing courageously alone when he felt the need to do so.

I am much indebted to your colleague and classmate, Parker Kasmer, who has made it easy for me to be here, and I am grateful to the students for their civic act in inaugurating the Powell Lecture Series a decade ago.³ I know I am in good company when I take this place.

My topic tonight is a sober one, but I would like to begin on a more pleasant note: a story about Justice Powell that, in fact, I heard from a student when I visited this campus some years ago.

A student who sat next to me at dinner said his father was a friend of Justice Powell's, and during a visit to Powell's chambers, was strongly urged to send his son to Washington and Lee. The Justice was very enthusiastic about the college during that conversation. After the discussion moved on to other topics and then ended, the father left Powell's chambers. As he was walking

1. See Linda Greenhouse, *Lewis Powell, Crucial Centrist Justice, Dies at 90*, N.Y. TIMES, Aug. 26, 1998, <http://www.nytimes.com/1998/08/26/us/lewis-powell-crucial-centrist-justice-dies-at-90.html?pagewanted=all&src=pm> (last visited Nov. 14, 2012) (describing Justice Powell's life) (on file with the Washington and Lee Law Review).

2. See *id.* ("Throughout his life, he kept strong ties to Washington and Lee, to which he gave his personal and Supreme Court papers, now housed in the Lewis F. Powell Jr. Archives on the campus in Lexington."); *About the Powell Archives*, WASHINGTON AND LEE UNIVERSITY SCHOOL OF LAW, <http://law.wlu.edu/powellarchives/page.asp?pageid=245> (last visited Nov. 14, 2012) ("The Lewis F. Powell, Jr. Archives comprises the Papers of Lewis F. Powell, Jr., other manuscript collections held by the law library, the rare book collection, and the archives of the School of Law.") (on file with the Washington and Lee Law Review).

3. See *About the Powell Lecture Series*, WASHINGTON AND LEE UNIVERSITY SCHOOL OF LAW, <http://law.wlu.edu/powelllecture/page.asp?pageid=856> (last visited Nov. 14, 2012) ("In 2002, the students of Washington and Lee University School of Law founded The Lewis F. Powell, Jr. Distinguished Lecture Series in honor of former Supreme Court Justice Lewis F. Powell, Jr.") (on file with the Washington and Lee Law Review).

down the corridor, Powell came swiftly after him, caught up with him, and again urged the father to make sure that the boy went to W&L. This time, though, he offered an argument that he must have felt would be most convincing: he ticked off the names of women's colleges and the exact number of miles each was from Lexington. The lad did not tell me whether that was the clincher.

May I turn, then, to my subject and start with an opinion written by Justice Powell almost exactly thirty years ago. It was a separate opinion in the case of *Plyler v. Doe*.⁴ The case had a secondary title, and it is far more descriptive: *Texas v. Certain Named and Unnamed Undocumented Alien Children*.⁵

Justice Powell's opinion⁶ speaks of an open society⁷ that, to my mind, no longer exists in this country for undocumented immigrants. You will know my sensitivity on this subject when I tell you that, as I write stories today about it, I refuse to describe such human beings as "aliens."

Still, the actual or threatened closing of an open society goes well beyond the fate of those who live in America without legal permission to be here. The trend is, for me, apparent in a variety of current policies and legal developments, perhaps very different from each other in fundamental ways but, in combination, moving people or ideas beyond the pale or, indeed, out of sight. We find it much easier to define something of which we are ignorant, or something that stirs fear in us, as necessarily to be excluded from our circle of acceptance.

Part of it has to do with the creation of pariah classes, pushed into the category of The Other.⁸ Another part of it has to

4. *Plyler v. Doe*, 457 U.S. 202 (1982).

5. *See id.* (noting the secondary title).

6. *See id.* at 236–41 (Powell, J., concurring).

7. *See, e.g., id.* at 237 ("The classification in question severely disadvantages children who are the victims of a combination of circumstances. Access from Mexico to this country across our 2,000-mile border, is readily available and virtually uncontrollable. Illegal aliens are attracted by our employment opportunities, and perhaps by other benefits as well."); *id.* at 238 ("The classification at issue deprives a group of children of the opportunity for education afforded all other children simply because they have been assigned a legal status due to a violation of law by their parents.").

8. *See generally* ADRIAAN PEPPERZAK, TO THE OTHER: AN INTRODUCTION TO THE PHILOSOPHY OF EMMANUEL LEVINAS (1993), available at http://docs.lib.purdue.edu/purduepress_ebooks/20/ (discussing the philosophical concept of The Other, a concept first developed by French philosopher Emmanuel Levinas).

do with the refusal to confront—openly and candidly—very deep wrongs. And part of it has to do with intentionally clogging or closing the channels of public discourse.

The phenomenon extends to the creation of a military garrison with wired enclosures at Guantanamo Bay in Cuba, in order to detain—perhaps for the remainder of their lives for some of them—a class of people we want nowhere near our shores and are unwilling to bring before our courts so that their fate might be decided justly.⁹

And it reaches to a fearsome prison outside of Kabul, Afghanistan, where we have chosen to place another group of people detained as terrorist suspects, precisely to put them beyond the reach of our nation's courts of law.¹⁰

Further, it reaches the impenetrable wall of secrecy that surrounds a national policy that is, slowly but perceptibly, turning the entire American intelligence apparatus into a lethal military machine that does not even exempt United States citizens from its retribution.¹¹

9. See Lyle Denniston, *Court Bypasses All New Detainee Cases*, SCOTUSBLOG (June 11, 2012, 11:39 AM), <http://www.scotusblog.com/2012/06/court-bypasses-all-new-detainee-cases/> (last visited Nov. 14, 2012) (stating that the Supreme Court “turned down seven separate appeals by Guantanamo Bay prisoners,” indicating “that it is not now inclined to further second-guess the government’s detention policy”) (on file with the Washington and Lee Law Review); Lyle Denniston, *D.C. Circuit: Last Stop for Detainees?*, SCOTUSBLOG (Mar. 9, 2012, 3:48 PM), <http://www.scotusblog.com/2012/03/d-c-circuit-last-stop-for-detainees/> (last visited Nov. 14, 2012) (stating that although “the detainees very often win in District Court . . . not one has ever gotten released from confinement by court order” because “the government has never lost any of its appeals in the D.C. Circuit Court”) (on file with the Washington and Lee Law Review).

10. See Lyle Denniston, *U.S.: No Habeas Rights at Bagram*, SCOTUSBLOG (Sept. 15, 2009, 4:45 PM), <http://www.scotusblog.com/2009/09/u-s-no-habeas-rights-at-bagram> (last visited Nov. 14, 2012) (describing the argument made by the United States that Bagram detainees were not entitled to habeas rights and noting District Judge John D. Bates’s “suggestion that the U.S. military may be using the Bagram prison site as a way to put detainees beyond the reach of American civilian courts”) (on file with the Washington and Lee Law Review).

11. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 9 (D.D.C. 2010) (failing to reach “the merits of the alleged authorization of the targeted killing of a U.S. citizen overseas” because “questions of justiciability require[d] dismissal of [the] case at the outset”); Lyle Denniston, *New Challenge to Drone Killings*, SCOTUSBLOG (July 18, 2012, 3:43 PM), <http://www.scotusblog.com/2012/07/new-challenge-to-drone-killings/> (last visited Nov. 14, 2012) (describing a lawsuit initiated by two civil rights groups “seeking to hold top government officials to blame legally for killing three U.S. citizens in attacks from the air in Yemen”) (on

Some of those developments may be known to you.

But there is more, much more, in areas of our culture where free exploration had seemed the norm. There is the determined effort—stalled for the time being by a true internet uprising—to put severe new restraints on the openness of digital culture.¹² The Supreme Court has recently declared that there is no guarantee that a public domain in literature and music has any constitutional claim to remain open when the juggernaut of Hollywood-driven copyright bears down upon it.¹³

And there is the steady march of intolerance against people because of the color of their skin or the nature of their sexual identity. We have come to the place, it seems, where a black teenager can be slain in the street by a neighborhood sentinel,¹⁴ and we are left to debate not the inexplicable reason for such an act, but whether it was legally justified by a barrel-chested law that tells one to “stand his or her ground.”¹⁵ And we have come to the place, it is obvious, where three distinguished judges of a state supreme court can be denied reelection solely because they interpreted an equality guarantee in their state’s constitution to allow for same-sex marriage.¹⁶

file with the Washington and Lee Law Review).

12. See Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011) (expanding law enforcement’s ability to combat online copyright infringement); Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property (Protect I.P.) Act of 2011, S. 968, 112th Cong. (same); see also Jonathan Weisman, *In Fight Over Piracy Bills, New Economy Rises Against Old*, N.Y. TIMES, Jan. 18, 2012, <http://www.nytimes.com/2012/01/19/technology/web-protests-piracy-bill-and-2-key-senators-change-course.html?hp=&pagewanted=all> (last visited Nov. 14, 2012) (describing the internet’s strong opposition to the proposed Stop Online Piracy Act and Protect I.P. Act and the subsequent withdrawal of congressional support for the bills) (on file with the Washington and Lee Law Review).

13. See *Golan v. Holder*, 132 S. Ct. 873, 878 (2012) (determining that a statute allowing works to be removed from the public domain “does not transgress constitutional limitations on Congress’ authority”).

14. See Greg Botelho, *What Happened the Night Trayvon Martin Died*, CNN (last updated May 23, 2012, 10:48 AM), <http://www.cnn.com/2012/05/18/justice/florida-teen-shooting-details/index.html> (last visited Nov. 14, 2012) (outlining the events surrounding Trayvon Martin’s death) (on file with the Washington and Lee Law Review).

15. See FLA. STAT. § 776.013(3) (2012) (“A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force . . .”).

16. See *Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009) (holding that the

In the face of such unsettling times, let me start over again with Lewis Powell and those “Undocumented Alien Children”¹⁷ in Texas.

The Texas legislature had passed a law barring local school districts from using any state funds to finance the education of children who were not legal residents of this country and denying such children even entry into the public schools.¹⁸ By a vote of five to four, in *Plyler v. Doe*, the Supreme Court found that statute to be a violation of the equal protection guarantee of the Fourteenth Amendment.¹⁹

Justice Powell wrote separately,²⁰ even while joining the majority opinion written by Justice Brennan.²¹ Recalling that the Court had previously made clear that children are not to be condemned for the misdeeds of their parents,²² Justice Powell wrote:

The classification at issue deprives a group of children of the opportunity for education afforded all other children simply because they have been assigned a legal status due to a violation of law by their parents. These children thus have been singled out for a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass of

Iowa marriage statute limiting marriage to a union between a man and a woman “violates the equal protection clause of the Iowa Constitution”); *see also* Grant Schulte, *Iowans Dismiss Three Justices*, DES MOINES REG. (Nov. 3, 2010, 4:26 AM), <http://www.desmoinesregister.com/article/20101103/NEWS09/11030390/Iowans-dismiss-three-justices?gcheck=1> (last visited Nov. 14, 2012) (discussing the election results) (on file with the Washington and Lee Law Review).

17. *See Plyler v. Doe*, 457 U.S. 202 (1982) (containing a secondary title that refers to the appellees as “Certain Named and Unnamed Undocumented Alien Children”).

18. *See* TEX. EDUC. CODE ANN. § 21.031 (West 1981) (withholding state funding for the education of children not legally admitted into the country and allowing school districts to refuse to enroll such children), *invalidated by Plyler v. Doe*, 457 U.S. 202 (1982).

19. *See Plyler*, 457 U.S. at 230. (striking down the Texas statute because it violated the Equal Protection Clause of the Fourteenth Amendment).

20. *See id.* at 237–41 (Powell, J., concurring).

21. *See id.* at 205–30 (majority opinion).

22. *See id.* at 238 (Powell, J., concurring) (“[V]isiting . . . condemnation on the head of an infant’ for the misdeeds of the parents is illogical, unjust, and ‘contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.’” (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972))).

future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment.²³

Those words are phrased as law, but they are infused with a sense of the decency that was so much a part of the work of Lewis Powell. There is in those phrases not the remotest hint of intolerance. He laments the failure of the federal government to police the border, but he refuses to make the children pay for that governmental lapse.²⁴

Viewed from today's perspective, Lewis Powell's vision of an inclusive society, one generous in its acceptance of people who look and are different from the majority, seems somewhat dated, somewhat unreal, perhaps somewhat naive.

Move forward from *Plyler v. Doe*, leap across thirty years, and one encounters a seemingly different world. One encounters, for example, a state law like Alabama's House Bill 56.²⁵ One of the provisions of that new state law turns public school officials into immigration enforcers, requiring all public schools in the state to determine if each child entering any grade was born outside the United States or is a child of an illegal alien parent.²⁶ Because of *Plyler v. Doe*, they cannot be barred from school,²⁷ but the information gathered about them can provide the basis for

23. *Id.* at 238–39.

24. *See id.* at 240–41 (“So long as the ease of entry remains inviting, and the power to deport is exercised infrequently by the Federal Government, the additional expense of admitting these children to public schools might fairly be shared by the Federal and State governments.”).

25. *See* ALA. CODE §§ 31-13-1 to -30 (2012) (attempting to fight illegal immigration in Alabama by maximizing enforcement of federal laws and cooperation with federal authorities), *partially invalidated by* United States v. Alabama, Nos. 11-14532, 11-14674, 2012 WL 3553503 (11th Cir. Aug. 20, 2012) (finding that federal law preempted some provisions of House Bill 56).

26. *See id.* § 31-13-27(a)(1) (“Every public . . . school in this state, at the time of enrollment . . . shall determine whether the student enrolling . . . was born outside the jurisdiction of the United States or is the child of an alien not lawfully present in the United States . . .”), *invalidated by* Hispanic Interest Coal. of Ala. v. Governor of Ala., Nos. 11-14535, 11-14675, 2012 WL 3553613 (11th Cir. Aug. 20, 2012) (finding the provision in violation of the Equal Protection Clause).

27. *See Plyler v. Doe*, 457 U.S. 202, 230 (1982) (determining that Texas cannot “deny a discrete group of innocent children the free public education that it offers to other children residing within its borders” without showing that the denial would further a substantial state interest and finding that Texas did not make the necessary showing).

their, or at least their parents', deportation in what would surely be a crisis for many families.

Then cross over into Louisiana. Officials of that state recently asked the Supreme Court of the United States to forbid the federal government from counting any undocumented immigrants living anywhere in the United States, and to order the government to recalculate the 2010 Census without them.²⁸ It was an undisguised effort to declare such people outside of the American political community because the Census data is used to calculate the distribution of seats in the United States House of Representatives.²⁹ It is a fact that, since the first census in 1790, all such undocumented people have been counted.³⁰

The Court did turn down that request, without comment, in March 2012,³¹ but that did not take away the message that Louisiana's legal maneuver sent, and, indeed, it does not prevent Louisiana from beginning its challenge anew in a lower court.

In addition, in April 2012, the Supreme Court held a hearing on Senate Bill 1070,³² the Arizona law seeking to control the lives

28. See Plaintiffs' Motion for Leave to File a Complaint, Complaint, and Brief in Support of Motion, *Louisiana v. Bryson*, 132 S. Ct. 1781 (2012) (No. 22O140 ORG), *denied by* 132 S. Ct. 1781 (2012), available at <http://www.ag.state.la.us/Shared/ViewDoc.aspx?Type=3&Doc=312> (seeking to exclude illegal immigrants from the population data used to apportion seats in the House of Representatives) (on file with the Washington and Lee Law Review).

29. See Lyle Denniston, *New Dispute Over Immigrants*, SCOTUSBLOG (Nov. 15, 2011, 12:10 AM), <http://www.scotusblog.com/2011/11/new-dispute-over-immigrants/> (last visited Nov. 14, 2012) (describing the motivation behind the complaint that Louisiana sought to file) (on file with the Washington and Lee Law Review).

30. See Campbell J. Gibson & Emily Lennon, *Historical Census Statistics on the Foreign-born Population of the United States: 1850–1990* (U.S. Bureau of the Census Population Div., Working Paper No. 29, 1999), available at <http://www.census.gov/population/www/documentation/twps0029/twps0029.html> (stating that although “[t]he first decennial census of the U.S. population was taken in 1790 . . . in order to obtain the population counts needed for Congressional apportionment . . . [a] question on place of birth, which is the source of data on the foreign-born population, was not added until the 1850 census” (citation omitted)) (on file with the Washington and Lee Law Review).

31. See Orders in Pending Cases, *Louisiana v. Bryson*, 132 S. Ct. 1781 (2012) (No. 22O140 ORG), <http://www.supremecourt.gov/orders/courtorders/031912zor.pdf> (“Motion for leave to file a bill of complaint is denied.”).

32. See Support Our Law Enforcement and Safe Neighborhoods Act, 2010 Ariz. Sess. Laws 113 (seeking to deter illegal immigration in Arizona), *partially invalidated by* *Arizona v. United States*, 132 S. Ct. 2492 (2012) (considering

of undocumented immigrants living in that state—controls that are potentially so onerous that they could only be expected to drive many of those people out of the state altogether, and that is precisely its goal.³³

In a nation where, by the year 2050, according to the Census Bureau, 54% of the total population will be made up of minorities,³⁴ these gestures among the states appear to be remarkable efforts to stand against history. And driven as they often are by claims of rampant crime by such immigrants,³⁵ they add to a pervasive complex of fear.

It is that very fear that took the life of seventeen-year-old Trayvon Benjamin Martin on a pleasant street—Retreat View Circle in Sanford, Florida—on February 26.³⁶ The story we know so far is that a neighborhood watch volunteer in a gated community, George Zimmerman, felt the need to pursue that young black man wearing a hooded sweatshirt.³⁷ Zimmerman was diligent about it; he apparently kept up the pursuit even though a

whether “federal law preempts and renders invalid four separate provisions of the [Support Our Law Enforcement and Safe Neighborhoods Act]”; Julia Preston, *Justices to Rule on Role of the States in Immigration*, N.Y. TIMES, Apr. 22, 2012, <http://www.nytimes.com/2012/04/23/us/states-await-supreme-court-hearing-on-arizona-immigration-law.html?pagewanted=all> (last visited Nov. 14, 2012) (describing the issues on which the Supreme Court hearing would focus) (on file with the Washington and Lee Law Review).

33. See 2010 Ariz. Sess. Laws 113, § 1 (“The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.”).

34. See *Minorities Expected to Be Majority in 2050*, CNN (Aug. 13, 2008), http://articles.cnn.com/2008-08-13/us/census.minorities_1_hispanic-population-census-bureau-white-population?_s=PM:US (last visited Nov. 14, 2012) (noting the changing make-up of the American population) (on file with the Washington and Lee Law Review).

35. See Alex Nowrasteh, *The Arizona Law Fights Phantom Problems*, U.S. NEWS (Apr. 23, 2012), <http://www.usnews.com/debate-club/is-arizonas-sb-1070-immigration-law-constitutional/the-arizona-law-fights-phantom-problems> (last visited Nov. 14, 2012) (noting that Arizona used the “so-called ‘illegal immigrant crime wave’” to justify its law) (on file with the Washington and Lee Law Review).

36. See Lane DeGregory, *Trayvon Martin’s Killing Shatters Safety Within Retreat at Twin Lakes in Sanford*, TAMPA BAY TIMES, Mar. 25, 2012, <http://www.tampabay.com/news/humaninterest/article1221799.ece> (last visited Nov. 14, 2012) (describing the community in which George Zimmerman pursued and shot Martin) (on file with the Washington and Lee Law Review).

37. See Botelho, *supra* note 14 (describing what happened on the night Martin was killed).

police dispatcher told him when he called in, “OK. We don’t need you to do that.”³⁸

There apparently was a scuffle between the two, and, in a moment, the youth lay in the grass, bleeding to death from a gunshot wound.³⁹

Whatever we may assume about racial tension and its possible role in this tragic incident, we do know that it occurred in a community that wanted to be insulated from the threats that lay beyond its gate and its fences.⁴⁰ That subdivision’s very name, the Retreat at Twin Lakes, tells of a desire to be left alone.

But if we are to believe the findings in a new book by Rich Benjamin, such gated communities are creating a new cultural reality in America,⁴¹ and it is one in which the incident in Sanford may have been predictable.

Benjamin is a black author whose book is titled *Searching for Whitopia: An Improbable Journey to the Heart of White America*.⁴² He spent two years traveling to see what life would be like in predominantly white, gated communities across the country.⁴³

The book, I suspect, will take its place in the annals of America’s cultural studies alongside such classics as Robert and Helen Lynd’s *Middletown*,⁴⁴ their social science reflections on Muncie, Indiana; Thornton Wilder’s play *Our Town*,⁴⁵ about the fictional village of Grover’s Corners, New Hampshire, and Sinclair Lewis’s satirical novel, *Babbitt*,⁴⁶ about a businessman busily climbing the social ladder in the fictional town of Zenith, somewhere in the Midwest.

38. *Id.* (internal quotation marks omitted).

39. *See id.* (stating that police “found Martin ‘face down in the grass’”).

40. *See* DeGregory, *supra* note 36 (describing the community as a place where “[e]verything was walled in, to keep out the unknown”).

41. *See generally* RICH BENJAMIN, *SEARCHING FOR WHITOPIA: AN IMPROBABLE JOURNEY TO THE HEART OF WHITE AMERICA* (2009) (discussing the growth of predominantly white communities, which Benjamin calls “whitopias,” throughout the United States).

42. *Id.*

43. *See id.* at 8 (stating that he “lived in three such communities”).

44. ROBERT S. LYND & HELEN MERRELL LYND, *MIDDLETOWN: A STUDY IN CONTEMPORARY AMERICAN CULTURE* (1929).

45. THORNTON WILDER, *OUR TOWN* (Harper & Row 1957) (1938).

46. SINCLAIR LEWIS, *BABBITT* (Library of America 1992) (1922).

Rich Benjamin's judgment about a typical gated community is harsh.⁴⁷ As he described his findings in *The New York Times* in March 2012, he said such a community is "self-contained, conservative and overzealous in its demands for 'safety.'"⁴⁸ "Gated communities," he said, "churn a vicious cycle by attracting like-minded residents who seek shelter from outsiders and whose physical seclusion then worsens paranoid groupthink against outsiders."⁴⁹ They have, he said, "a bunker mentality."⁵⁰

If Benjamin is right, the presence of a hooded black teenager on a residential street at nighttime would be the personification of The Other,⁵¹ a disturber of domestic tranquility. And in the context of my remarks here, what happened to Trayvon Martin may be yet another example of the closing down of an open society.

The phenomenon does not stop there.

Reflect, for a moment, on the "bunker mentality"⁵² that has developed as America confronted global terrorism in the wake of the attacks of September 11, 2001. Former Vice President Cheney's "one percent doctrine" exhibited that attitude: if there is a one percent chance that an act of terrorism will occur, it *will* occur, and preparation must be made to head it off at all cost.⁵³

We have 166 individuals still housed in the military prison at Guantanamo Bay, Cuba, and many of them have been cleared for release, but they have nowhere to go.⁵⁴ The Congress of the

47. See generally BENJAMIN, *supra* note 41 (criticizing "whitopias," which are becoming increasingly common in the United States).

48. Rich Benjamin, *The Gated Community Mentality*, N.Y. TIMES, Mar. 29, 2012, <http://www.nytimes.com/2012/03/30/opinion/the-gated-community-mentality.html?r=2> (last visited Nov. 14, 2012) (on file with the Washington and Lee Law Review).

49. *Id.*

50. *Id.*

51. See generally PEPPERZAK, *supra* note 8.

52. See Benjamin, *supra* note 48 (discussing the "bunker mentality").

53. See RON SUSKIND, *THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11*, at 62 (2006) (analyzing former Vice President Cheney's view that "[i]f there's a one percent chance that Pakistani scientists are helping al Qaeda build or develop a nuclear weapon, we have to treat it as certainty in terms of our response").

54. See Huma Khan, *Protests Mark Guantanamo Bay Detainee Center's 10th Anniversary*, ABC NEWS (Jan. 11, 2012, 2:11 PM), <http://abcnews.go.com/blogs/politics/2012/01/protests-mark-guantanamo-bay-detainee-centers->

United States has decreed that they cannot be brought to this country.⁵⁵ In effect, the lawmakers have declared that the entirety of America is a gated community that these people dare not enter. Congress also has mandated that, if a Guantanamo prisoner should be sent to any other country, his or her life thereafter must be controlled by conditions that no self-respecting sovereign nation would agree to accept within its own borders.⁵⁶ Hence, many simply stay at Guantanamo.

Four years ago, the Supreme Court declared that those at Guantanamo had a constitutional right to go to an American court to challenge their continued confinement, and a chance to obtain actual release.⁵⁷ But the federal appeals court in Washington, D.C., in a string of decisions,⁵⁸ has hollowed out that

10th-anniversary/ (last visited Nov. 14, 2012) (“Today, 171 detainees remain in the detention center, some of them deemed too dangerous to release and others with nowhere to go.”) (on file with the Washington and Lee Law Review). Since then, four prisoners have been released or transferred, and one detainee has died. See Rod Nickel, *Guantanamo’s Last Western Detainee Returned to Canada*, REUTERS (Sept. 29, 2012, 3:37 PM), <http://www.reuters.com/article/2012/09/29/us-guantanamo-khadr-idUSBRE88S0AN20120929> (last visited Nov. 14, 2012) (stating that 166 detainees now remain at Guantanamo) (on file with the Washington and Lee Law Review).

55. See Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1032, 124 Stat. 4137, 4351 (prohibiting the use of appropriated funds for the transfer or release of Guantanamo detainees into the United States); Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2680, 2742 (codified at 28 U.S.C. § 2241(e)(1) (2006) (“[N]o court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba . . .”) amended by Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635–36, *invalidated by* Boumediene v. Bush, 553 U.S. 723, 732 (2008).

56. See National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1022, 125 Stat. 1298 (requiring al Qaeda detainees captured in the course of hostilities to be kept in military custody).

57. See *Boumediene v. Bush*, 553 U.S. 723, 732 (2008) (finding that Guantanamo detainees have the constitutional privilege of habeas corpus).

58. See, e.g., *Latif v. Obama*, 677 F.3d 1175, 1176 (D.C. Cir. 2011) (vacating the grant of a Guantanamo detainee’s petition for writ of habeas corpus and remanding the case for further consideration); *Almerfed v. Obama*, 654 F.3d 1, 2 (D.C. Cir. 2011) (reversing the grant of a Guantanamo detainee’s petition for writ of habeas corpus), *cert. denied*, 132 S. Ct. 2739 (2012); *Uthman v. Obama*, 637 F.3d 400, 402 (D.C. Cir. 2011) (reversing the grant of a Guantanamo detainee’s petition for writ of habeas corpus and ordering the petition to be denied on remand), *cert. denied*, 132 S. Ct. 2739 (2012); *Al-Bihani v. Obama*, 590 F.3d 866, 869 (D.C. Cir. 2010) (affirming the denial of a Guantanamo detainee’s petition for writ of habeas

legal remedy to the point where a judge on that court has said publicly that he does not believe any of his colleagues would uphold any federal judge's order to release anyone from Guantanamo if there is even the slightest chance that they are, in fact, inclined toward terrorism⁵⁹—when terrorism is defined so loosely that no one can know precisely what it means.

And it is not even clear that habeas corpus, an increasingly limited legal option open to those held at Guantanamo Bay, is available for hundreds of other prisoners held by the United States military at a prison in Afghanistan.⁶⁰ Those prisoners' fates may be determined entirely by the Afghan government now that control of that prison has been handed over to local authorities.⁶¹

Certainly, the government faces fierce and awesomely complicated challenges on what to do about terrorism, but surely we do not need to send the Constitution into wartime exile as part of that response.

We seem also to have put the Constitution's core concept of checks and balances on hold as we seek to know how the government is actually waging a "war on terrorism."

A doctrine of "state secrets" that began in 1950 as a limited means of excluding specific items of evidence bearing on national security from being explored in court cases⁶² has now mushroomed into a doctrine that shuts down judicial inquiry altogether, merely upon a classified declaration by a government

corpus), *cert. denied*, 131 S. Ct. 1814 (2011).

59. See *Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring) ("I doubt any of my colleagues will vote to grant a petition if he or she believes that it is somewhat likely that the petitioner is an al Qaeda adherent or an active supporter.").

60. See *Al Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010) (holding "that the jurisdiction of the courts to afford the right to habeas relief and the protection of the Suspension Clause does not extend to aliens held in Executive detention in the Bagram detention facility in the Afghan theater of war").

61. See Rod Nordland, *Issues Linger as Afghans Take Control of a Prison*, N.Y. TIMES, Sept. 10, 2012, <http://www.nytimes.com/2012/09/11/world/asia/parwan-prison-at-bagram-transferred-to-afghans-at-least-formally.html> (last visited Nov. 14, 2012) (describing the transfer of Bagram prison to Afghan authorities) (on file with the Washington and Lee Law Review).

62. See *United States v. Reynolds*, 345 U.S. 1, 7–8 (1953) (discussing the judicially-created state secrets privilege).

security official.⁶³ And those who have had a peek at the reasons claimed for such invocations of national security, while not revealing what they had learned, have said that the claims of national security are frequently exaggerated and often are based on no more than unfiltered raw intelligence of an extremely dubious kind.⁶⁴

There is a world of difference, of course, between an open society and a national security state, but one must ask whether there is no middle ground. Is there no way by which the Judiciary can inquire into the use of torture as a means of intelligence gathering? Is there no means by which the Judiciary can examine the policy of targeted killing even of United States citizens abroad who are deemed to be terrorist threats? And is there nowhere within the structure of government where the secret world of a thoroughly militarized Central Intelligence Agency can be meaningfully examined?

Put another way, an abiding question for Americans living in this frightened age is whether accountability has become an unaffordable luxury, whether a faith in democratic principle is naively out of date.

Are there other threats to the open society that we thought we had? Of course there are, and they have nothing to do with national security.

America has never had an opportunity for openness to match what came with the arrival of the Digital Age. We know so much more about each other, including, perhaps, some things we would just as soon not know. But leaving that aside, has any one of you in this audience never marveled about what could be reached with a click or two of a mouse? What a universe of ideas and

63. See *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1093 (9th Cir. 2010) (en banc) (“[W]e hold that the government’s valid assertion of the state secrets privilege warrants dismissal of the litigation . . .”), *cert. denied*, 131 S. Ct. 2442 (2011).

64. See *Latif v. Obama*, 677 F.3d 1175, 1208 (D.C. Cir. 2011) (Tatel, J., dissenting) (“[T]he Report at issue here was produced in the fog of war by a clandestine method that we know almost nothing about. It is not familiar, transparent, generally understood as reliable, or accessible; nor is it mundane, quotidian data entry akin to state court dockets or tax receipts.”); see also Thomas I. Emerson, *National Security and Civil Liberties*, 9 YALE J. WORLD PUB. ORD. 78, 80 (1982) (stating that “[s]ubsequent events almost always demonstrate that the asserted dangers to national security have been grossly exaggerated”).

experiences is out there, and so very much of it is available free—free of cost, free of predigestion, free of censorship, free of bias, free of lunacy. The selection of what to examine and to absorb or reject is solely by unmediated private choice.

And I am not talking about the number of apps that you have on your phone that enable you to live your daily life so much more conveniently. I would imagine you have seen that television commercial in which one person has a great idea about something, only to be told by another person that it has already happened so many seconds ago. It almost seems that we have created apps that allow time to run backwards!

But the digital world is not as open as you might think, and there are very real signs that it may lose more of its openness. From early on in this age, we have learned that electronic exploration and the concept of copyright were on a collision course or at least were in considerable tension. You may remember the *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*⁶⁵ episode, in which the Supreme Court informed us that the free trade in creative expression was not really very free after all.⁶⁶ We have heard a lot since then about piracy.

That was nothing, though, in comparison to the restraints on digital communication that proposed new federal legislation would bring about. The so-called Stop Online Piracy Act,⁶⁷ and variations of it, appeared to be absolutely draconian to major players in the digital community.⁶⁸ And just when it seemed that the major entertainment and recording companies had Congress in their control on this issue, the Internet rose up in angry protest in January and drove that legislation off of the

65. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

66. *See id.* at 919 (“We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”).

67. Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011).

68. *See* Julianne Pepitone, *Tech Giants Say SOPA Piracy Bill Is ‘Draconian,’* CNN MONEY (Nov. 16, 2011, 6:10 PM), <http://money.cnn.com/2011/11/16/technology/sopa/index.htm> (last visited Nov. 14, 2012) (stating that the Stop Online Piracy Act “sparked a giant backlash from big tech companies, including Google and Facebook,” who viewed it as “far too strict and rife with unintended consequences”) (on file with the Washington and Lee Law Review).

calendars in both the House and Senate.⁶⁹ So much for a passive citizenry. But, we are told, the antipiracy movement is far from dead; it is just lying in wait for another opportunity.⁷⁰

One very unsettling facet about that entire incident is that among the loudest cheerleaders for the legislation was none other than the nation's most fervent defender of First Amendment freedoms, renowned New York attorney Floyd Abrams.⁷¹

One can be reasonably certain, I would suggest, that if the Stop Online Piracy Act or some version of it does emerge from Congress, its validity will be upheld by the Supreme Court—as long as the Court's current prevailing view of copyright holds.

While the Constitution speaks of copyright as protected only for “limited times,”⁷² the Court in the *Eldred v. Ashcroft*⁷³ decision in 2003 upheld the concept that limited does not really mean very limited.⁷⁴ That decision validated the Hollywood-initiated Sonny Bono Copyright Term Extension Act⁷⁵ that

69. See Jonathan Weisman, *After an Online Firestorm, Congress Shelves Antipiracy Bills*, N.Y. TIMES, Jan. 20, 2012, <http://www.nytimes.com/2012/01/21/technology/senate-postpones-piracy-vote.html> (last visited Nov. 14, 2012) (explaining Congress's support of the bills before the protests and describing the withdrawal of congressional support in response to the protests) (on file with the Washington and Lee Law Review).

70. See Melissa Bell, *Laws Alone Won't Put a Lid on Piracy*, WASH. POST, Jan. 27, 2012, http://www.washingtonpost.com/lifestyle/style/online-piracy-hasnt-gone-away/2012/01/25/gIQAMEsnVQ_story.html (last visited Nov. 14, 2012) (discussing the ongoing problem of piracy after SOPA and the continuing need for a solution) (on file with the Washington and Lee Law Review).

71. See Letter from Floyd Abrams, Partner, Cahill Gordon & Reindel LLP, to Chairman Lamar Smith & Ranking Member John Conyers of the House Comm. on the Judiciary 13 (Nov. 7, 2011), http://www.mpa.org/Re_sources/1227ef12-e209-4edf-b8b8-bb4af768430c.pdf (“This proposed legislation is not inconsistent with the First Amendment; it would protect creators of speech, as Congress has done since this Nation was founded, by combating its theft.”).

72. See U.S. CONST. art. I, § 8, cl. 8 (giving Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for *limited Times* to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .” (emphasis added)).

73. *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

74. See *id.* at 204 (allowing Congress to extend the duration of existing copyrights).

75. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended in scattered sections of 17 U.S.C.).

extended existing copyright protection on many creative works for very long additional periods.⁷⁶

And *Eldred*, it seems, did not reach the outermost expansion of copyright. Just this past January, in the decision in *Golan v. Holder*,⁷⁷ the Supreme Court essentially destroyed—at least in constitutional terms—the concept of a “public domain.”⁷⁸

For at least the past thirty years, scholars have been developing the notion that, when a once-copyrighted work reaches the end of that monopoly protection, it enters into a “public domain” that has its own claim to constitutional protection, under the First Amendment.⁷⁹ Works that had never been put under copyright in the United States were already in the “public domain” and, so it was argued, could not be withdrawn into a copyrighted status.⁸⁰

The *Golan* decision explicitly rejected that idea as a constitutionally grounded principle.⁸¹ Those who have been using for their own purposes a literary or musical work that has been in the public domain do not thereby acquire First Amendment protection against having such a work newly copyrighted, the Court said.⁸²

No one, the Court declared, obtains any personal right under the Constitution to copy or perform a work just because it has

76. See *id.* (extending copyright terms in the United States by twenty years).

77. *Golan v. Holder*, 132 S. Ct. 873 (2012).

78. See *id.* at 878 (“Neither the Copyright and Patent Clause nor the First Amendment, we hold, makes the public domain, in any and all cases, a territory that works may never exit.”).

79. See, e.g., Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 360–64 (1999) (explaining the public domain); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 970–77 (1990) (same).

80. See, e.g., Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215, 259 (2002) (“[T]he defining characteristic of the public domain in intellectual property is that any individual is free to use the material as he or she sees fit; and once matter enters the public domain, the government cannot alienate that ‘property’ by removing it from the public domain.”) (citations omitted).

81. See *Golan*, 132 S. Ct. at 889–91 (explaining why a statute granting copyright protection to works already in the public domain did not violate the First Amendment).

82. See *id.* (finding that “nothing in the historical record, congressional practice, or [the Court’s] own jurisprudence warrants exceptional First Amendment solicitude for copyrighted works that were once in the public domain”).

come out from under earlier copyright protection or has never been copyrighted in the United States, so no one can object if copyright is later conferred.⁸³ Any legal rights that exist belong only to the author or composer, it added.⁸⁴

And to add to the indignity of this insult to the public domain, the Court's opinion disposed of the claim of constitutional significance for a public domain in a footnote—Footnote 26.⁸⁵

The greatest casualty of the *Golan* and *Eldred* decisions, of course, is the global digital library that has been developing in recent years, and has been profoundly dependent upon the existence of a viable public domain.

The risk to an open society of creative expression is now beyond dispute, even granting that some measure of copyright protection does contribute to the creative urge in artists, writers, and composers. How long, we may ask, must it exist before it stifles further creative expression that is derived from an original work?

I would like to turn then to a final—and probably more controversial—threat to an open society. I refer, of course, to the effort, pursued in so many sectors of our public policy and our civic discourse, to exclude gays and lesbians from an equal role in society and its institutions—especially in those central institutions in mainstream culture, marriage⁸⁶ and the military.⁸⁷

83. *See id.* at 892 (“Anyone has free access to the public domain, but no one, after the copyright term has expired, acquires ownership rights in the once-protected works.”).

84. *See id.* (“Rights typically vest at the *outset* of copyright protection, in an author or rightholder.” (citation omitted)).

85. *Id.* at 888 n.26 (disagreeing with the dissent's suggestion “that at least where copyright legislation extends protection to works previously in the public domain, Congress must counterbalance that restriction with new incentives to create”).

86. *See* Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7) (“[T]he word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”).

87. *See* National Defense Authorization Act for Fiscal Year 1994 (Don't Ask Don't Tell), Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1670–73 (1993) (codified at 10 U.S.C. § 674) (codifying in federal statute the existing practice of prohibiting gays and lesbians from serving in the military), *repealed by* Don't Ask Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

And this, of course, gives me an opportunity to return to Lewis Powell and his approach to life and the law.

The gay rights issue, overall, is among the most agonizing public questions confronting America, and Lewis Powell's own struggle with it was itself agonizing, as is so painfully examined in John Jeffries's great biography of the Justice.⁸⁸ Jeffries's ultimate conclusion is that, "[o]n this issue, Powell never found the middle ground."⁸⁹

Jeffries's chapter on *Bowers v. Hardwick*,⁹⁰ the 1986 decision refusing to recognize constitutional equality for sexual intimacy for homosexuals, spells out in detail Justice Powell's role in that case, switching sides but ultimately voting with the majority.⁹¹ In a real sense, Powell even then recognized the long-range constitutional implications of the controversy—the effect that could be expected on marriage and the military.⁹² And he fretted deeply about that.⁹³

Although he would say, four years later, that he had made a mistake in *Bowers*, and that the dissenters there "had the better of the arguments,"⁹⁴ it is far from clear that his mind and heart were ever settled on the ultimate question of gay equality. He died five years before *Bowers* was explicitly overruled in *Lawrence v. Texas*,⁹⁵ which, of course, set the constitutional stage for challenges to the exclusion of gays both from the military and from the civil institution of marriage.

America is probably more open politically to homosexual equality than it was in Lewis Powell's day, and that ultimately

88. See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 511–30 (1994) (describing Justice Powell's struggle with the gay rights issue).

89. *Id.* at 530.

90. See *id.* at 511–30; see also *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (finding a Georgia law criminalizing consensual homosexual sodomy constitutional), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

91. See JEFFRIES, *supra* note 88, at 513–30 (discussing Justice Powell's role in the *Bowers* decision, including his indecisiveness and changes of mind).

92. See *id.* at 518 (describing Powell's anticipation of the effect that *Bowers* would have on marriage and the military).

93. See *id.* (acknowledging Powell's concerns over the implications of *Bowers*).

94. *Id.* at 530.

95. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("*Bowers v. Hardwick* should be and now is overruled."); Greenhouse, *supra* note 1 (announcing Justice Powell's death in 1998).

may make a constitutional difference. The resolution of the issue, though, could certainly use—as part of the discussion—the sense of decency and humility that was so much a part of Justice Powell’s life.

When one delivers a memorial lecture like this one, in honor of a person no longer with us, there may be a strong temptation to enlist that celebrated person as an ally on one side or the other of contemporary controversy. One might ask a variation of that popular question of today: What would Lewis Powell say? And one might pretend to know the answer.

I have no idea how he would have reacted to each or any of the specific examples I have put forth here, or on the general question of what I see as the accelerating trend toward closing an open society. I have to believe he would have counseled caution and prudence, the exercise of measured judgment, and the patience to hear what the other side might have to say.

Lewis Powell was a conservative, as a man and as a Justice, but I do not mean by that to place him in a static category along a fixed ideological spectrum. His conservatism seemed to me always to bespeak his belief that even society’s most intractable problems could be resolved if calm judgment were brought to bear in a spirit of mutual respect and accommodation.

Many of the views that I have stated here today are, I recognize, at least tinged with values that most would recognize—in today’s political parlance—as liberal in nature. I would feel that I had failed if they were received here only in that way.

The openness of American society is not a liberal or a conservative cause; it is the essence of a society unafraid of change or of diversity, the character of a society that appreciates that time does not stand still and that civic reform is never fully done.

And it is a society that looks forward to each new journey along an open road, remembering the advice that John Milton gave to Parliament nearly four centuries ago: “[H]e who thinks we are to pitch our tent here, and have attain[e]d the utmost prospect of reformation, . . . that man by this very opinion declares that he is yet far[] short of [t]ruth.”⁹⁶

Thank you.

96. JOHN MILTON, AREOPAGITICA 42–43 (John W. Hales ed., Clarendon Press, 1904).