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SEPTEMBER 11 REFLECTIONS FROM GROUND ZERO: PARENT, INTERNATIONAL LAW TEACHER AND RULE OF LAW PERSPECTIVES

*David Aronofsky**

September 11, 2001 has forever impacted me from multiple perspectives.

First and foremost, I write as a father whose older daughter began her NYU education only a few short weeks before September 11. We never contemplated the far distance between Manhattan and Missoula, Montana until that morning when we heard the news and realized she was only a few blocks from the World Trade Center. My wife and I lived many anxious moments wondering whether she was safe, unable to contact her. A few hours after the attack, she got an e-mail to me indicating that she had seen the Towers fall and was scared, but otherwise okay. About 30 minutes later, she reached me by cell phone in my office and I was able to conference her mother into the call. Just talking to each other at that moment was the most comforting moment we'll likely ever have as a family.

I also teach Public International Law at The University of Montana Law School with a wonderful co-teacher colleague who is a career federal government public international law attorney living in Missoula. Our backgrounds complement each other well since we both have over 20 years experience as working international lawyers, with much of that time spent in Washington, D.C. After sharing our personal concerns over whether we knew any Pentagon or New York attack victims, we had to decide whether to cancel our September 11 class that afternoon. The Law School left this to each faculty member, and most opted to cancel. My co-teaching colleague and I chose instead to hold class because we thought our students might need a place to come discuss what happened. We also wanted to be available to our Law School community as resources. Every student enrolled in the course showed up and we all talked through, at times quite emotionally, what we thought about the day's events from a public international law standpoint. As a teacher, that has been by far my most difficult, and most uplifting, experience.

We modified our syllabus that day by moving up our laws of war and terrorism sections. The teachers and students alike wanted to use the course to better understand what September 11 might mean. From that point forward we added related topics and activities to all our classes, especially

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those related to the legal status of combatants from the Taliban and al Qaeda. Our international human rights law sessions acquired special meaning as we tried to apply human rights principles to September 11 attackers. Although we teach parts of our course from news headlines, neither of us grasped how natural, and how important, it was to do so last semester until after September 11. We joined our students in realizing that September 11 was taking the U.S. and the rest of the world into uncharted international law waters, on a voyage seeming even now as if it is just beginning.

I personally view the September 11 attacks as acts of war against the United States, and the U.S. military response in Afghanistan well within the boundaries of a legally acceptable response by international standards. Certain U.S. non-military responses, however, are another matter.

As a lawyer and legal educator who has long worked for bringing the rule of law to emerging democratic countries on several continents, I cannot separate September 11 events from my rule of law beliefs. My law reform work has generally been a terrific professional experience, because (O.J. Simpson trials notwithstanding) the rest of the world often recognizes and appreciates U.S. rule of law leadership. Anyone who doubts this need merely review constitutions and statutes in former dictatorships to see the huge U.S. imprint. Civil rights and civil liberties previously unknown in many places are today taken for granted. For this reason alone, September 11 raises critical questions about whether the U.S. will continue as the world's leading civil rights and civil liberties defender; or instead, as the world's leading hypocrite.

Those committed to civil rights and civil liberties should be appalled at U.S. law enforcement roundups and detentions of people of Middle East ethnicity who are lawfully residing in the United States. Our President, Members of Congress and U.S. Attorney General all took oaths of office to uphold the U.S. Constitution, not violate it. I for one find any such detentions, unless based on probable cause of criminal wrongdoing, outrageous and of dubious constitutional validity. Although the courts will ultimately prove my legal theory right or wrong, I have no qualms about criticizing our government for these activities because they potentially reverse our own civil rights movement by light years.

Those concerned about civil rights and civil liberties should likewise be appalled at U.S. treatment of persons detained in or en route to Guantanamo. Although the U.S. military has effectively won the war and our country has the power to do whatever it wishes to the captured, every American should view with alarm the U.S. Government uncertainty over these detainees' legal rights. As I write this, it appears that President Bush has just decided to apply some Geneva Convention principles to the detainees although they will evidently not be considered prisoners of war. If they are not, who is our military fighting? Leaving these detainees in legal limbo while making up the rules as we go along does not pass muster

in any society committed to rule of law values. Surely we must realize that terrorists like those who attacked the U.S. on September 11 have been doing this for years to their own victims, and the examples we have set to date give them the excuse to continue. Even hardened military veterans now see why this subjects our own captured U.S. military personnel to similar treatment, and are concerned.

Arbitrary justice is not the American way, and has not been so for decades. Moreover, we cannot expect new democracies with fledgling independent judiciaries to respect basic human rights derived from the U.S. Constitution and international treaties if the U.S. itself fails to do so. Once these countries retreat from rule of law, we can soon expect widespread legal abuses. These in turn will likely lead to contempt and disregard for the law generally – with corresponding linkages between such sentiments and even more terrorist acts a likely result.

Equally troubling in U.S. non-military responses to September 11 for those who believe in civil rights and civil liberties is the apparent U.S. Justice Department reliance on World War II era U.S. Supreme Court jurisprudence to justify our government's actions. Secret trials and summary executions of Nazi saboteurs may have been good law in 1940's wartime, but those events predated many important Supreme Court Bill of Rights decisions. Can anyone committed to rule of law principles credibly argue for returning to pre-Miranda "anything goes" days of uncontrolled law enforcement discretion? Does anyone today consider the 1943 Korematsu decision¹ valid precedent for depriving persons of Middle East ethnicity of their rights and liberties, because it has never been directly overruled? I have heard U.S. officials justify setting aside fundamental legal rights on the premise that "the Constitution is not a suicide pact." I submit that setting aside U.S. Constitution safeguards instead helps create such a pact, by promoting justice based solely on military might rather than universal law principles. History has yet to see any country dependent solely or primarily on military might survive over time.

My final point addresses the deafening silence, at least initially, of the U.S. legal community following the fierce verbal assaults by U.S. officials on applying our criminal justice system and laws to September 11 attackers. I listened with dismay as many public officials openly ridiculed the roles of law, lawyers and judges in bringing these attackers to justice. Recognizing how heated passions in an immediate September 11 aftermath could trigger such reactions, I nonetheless questioned then and question now the soundness of this position. Vigilante justice at the end of a rope or gunpoint has played all too prominent a role in U.S. history, and I want never to return there. Instead, September 11 must be a wakeup call for all who believe in constitutional rights and rule of law. In times of crisis we have three choices. We can intentionally disregard civil rights and civil

¹ Toyosaburo Korematsu v. United States, 323 U.S. 214 (1944).

liberties, citing the crisis as an excuse; muddle along without worrying about these issues and conveniently forget legal abuses which occurred during the crisis after it ends; or rise to the occasion and make sure the United States lives by law-based, rights-based principles in everything we do regardless of the difficulties. To me the choice is obvious, as the September 11 legacy will be left to my daughter's generation throughout the world.