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James Bacchus

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## Commentary

### Turning to Tacitus

*James Bacchus\**

Tacitus?

Who was Tacitus?

It was a cold December day in 1967. It was my first final exam in my very first semester as a student at Vanderbilt University. And it was all I could do to keep from shivering in the wintry confines of Neely Auditorium as I stared at the first question I had been asked to answer in the university's effort to confirm my mastery of the mysteries of "Western Civilization" in History 101.

The question seemed to stare back at me from the single page of questions that I held in my shaking hand on that distant day—daring me for an answer. Even now, all these many years later, the question still stares back at me, and it still demands an answer, as I recall what my middle-aged memory remembers reading on that page:

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\* James Bacchus is a former Chairman of the Appellate Body of the World Trade Organization and a former Member of the Congress of the United States. He is a 1971 graduate of Vanderbilt University, and a Visiting Professor of Law at Vanderbilt University Law School.

*What did Tacitus say about the Germanic tribes, and how did what he said about the Germanic tribes reveal how he viewed the Roman Empire?*

I may not remember the question word for word. But this, give or take a word or two, was the question I was asked to answer. And I confess that the sheer recollection of this single question still makes me shiver and shake. For the cruel truth of my plight on that cold day was this. I knew who the Germans were. I knew who the Romans were. I knew that, in antiquity, the Germans had tribes and the Romans had an empire.

But I had never heard of Tacitus.

Therefore, I would, I feared, fail my final exam in "Western Civ." I would fail a required course, I would forfeit my scholarship, and I would be flushed, as a result, from the elite gene pool of academe into the teeming cesspool of real life.

In my panic, I did what generations of undergraduates have undoubtedly done in such desperate circumstances. I faked it. I feigned the knowledge I did not possess. I wrote everything I knew about the Germanic tribes. I wrote everything I knew about the Roman Empire. I wrote feverishly. I wrote frantically. I wrote exhaustively on page after page in my "blue book."

And, every few pages or so, in what I hoped was a neutral and innocuous, but, nevertheless, a seemingly knowing and knowledgeable, way, I slowed from the fervor of my panicked pace, and I wrote—as clearly and as confidently as I could—the word "Tacitus."

Then, the exam over, I fled. I fled out of Neely, across the campus, and all the way to my dorm room—in search of Tacitus. And there I found him. There he was, right where, in my ignorance, I had imagined he might be, right where I had suspected he might be, hiding in the imposing pages of the hefty textbook that we all simply called "Hexter."

"Hexter" was a bulky, buff-colored tome entitled *The Traditions of the Western World*.<sup>1</sup> We freshmen at Vanderbilt all called our "Western Civ" textbook "Hexter" because the "General Editor" of the book was someone somewhere named "J. H. Hexter" whose name was emblazoned boldly on the cover of the book. My copy of "Hexter" contained 917 pages of excerpts in small print from the rich intellectual tradition of Western civilization (complete with my compulsive underlining and my cryptic marginal notes). The voluminous array of readings in "Hexter" ranged across the centuries,

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1. THE TRADITIONS OF THE WESTERN WORLD (J. H. Hexter et al. eds., 1967) [hereinafter Hexter].

from Plato and Aristotle, to Shakespeare and Voltaire, to Tocqueville and Lincoln, to Plutarch and Cicero, and, yes, alas, to Tacitus.

Breathless from my flight across the campus, I pulled my volume of "Hexter" down from the bookshelf in my dorm room. There, on page 129, was an excerpt from *Germania*, an essay on "The Origins, Land, and Peoples of the Germans" written late in the first century A. D. In the caption that preceded the excerpt that began on that page, general editor Hexter and his contributing editorial colleagues asked their undergraduate readers: "What Can Citizens of a Highly Civilized State Learn from the Study of a Primitive People"?<sup>2</sup> The author of *Germania* was a Roman historian named Tacitus.

Still breathing heavily, my heart still beating rapidly, I noticed that, on the previous page, was a selection from an essay by another ancient Roman, Cicero, which addressed a number of issues "Concerning the Laws." I knew much about Cicero's concerns about the laws. I had read those pages from Cicero in "Hexter" several times. My underlining of the most pertinent passages in those pages was my proof of it. But I had not turned to the next page.

I had not turned to Tacitus.

I soon learned why. I soon discovered that, a few days before, after the last lecture of the semester, and after the last class of my discussion section of "Western Civ," one final reading assignment had been posted for all to see on the bulletin board in Neely Auditorium. That final assignment was to turn to Tacitus. Like countless generations of other hapless freshmen, I had somehow missed the last assignment.

As it turned out, somehow I also missed making a failing grade that semester in "Western Civ." As we used to say, I "pulled a B." Maybe all my artful, arduous faking and feigning paid off. Maybe I had been so clever in filling my "blue book" that the grader of my exam did not realize that I had never heard of Tacitus. Or maybe others in my class missed the last assignment, too, and the final exam was graded on a curve. Maybe. I suppose I will never know.

I do know, though, that, for all my fears, I returned for another semester of "Western Civ." I "pulled an A" that next semester; I became a history major; I earned my degree from Vanderbilt; and, a few years later, I was still pondering the many mysteries of Western civilization while studying for a graduate degree in history at Yale University.

One of my professors there was J. H. Hexter.

I soon realized that the late J. H. "Jack" Hexter was not nearly as thick as his textbook. In fact, he was one of the brightest men I have ever met. His field was Tudor-Stuart English history, and I met him while taking his famed seminar on the emergence of modern

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2. Tacitus, *Germania*, in Hexter, *supra* note 1, at 129.

Britain under the Tudor and Stuart monarchs during the sixteenth and seventeenth centuries. But Jack Hexter's real field was freedom.

Professor Hexter was a tireless and a fearless advocate for academic, intellectual, and many other kinds of freedom. In his weekly seminar, he taught us about Pym and Hampden, about Milton and Colonel Harrison. He taught us, too, that those and other great heroes of the struggle for freedom in Tudor-Stuart England were the heirs to many others who had preceded them, dating all the way back to the degradations of a dim antiquity.

Until then, I had perhaps been in danger of becoming what professional historians sometimes describe as a "presentist." With a passion—then—for politics, I had been so concerned with the present that I had a hard time seeing the human reality of the past. My studies until then had been largely of the recent past of my own native region in my own native country. The past was very much alive in the stormy present of the U.S. South of my youth.

Professor Hexter was not unconcerned with the present. Indeed, many years later, while he was still with us, and still teaching, and while I was a Member of the Congress of the United States, I was able to help him enact into federal law his idea for the "Troops to Teachers" program—a federal program to encourage former soldiers to become teachers. Jack Hexter simply understood that we cannot do all we should for freedom today if we do not know what others tried to do for freedom yesterday.

With his emphasis on the ancient origins of freedom, and with his stress also on the long and ongoing struggle for freedom, Professor Hexter inspired me to turn finally to the assignment I had missed as a freshmen in "Western Civ" at Vanderbilt. His book of readings was still waiting on my bookshelf. I took it down once more, and I turned to Tacitus.

I read the few pages of excerpts from *Germania* that Hexter had included in the book. Then I found and read the rest of *Germania*. Then I read *Agricola*. And the *Annals*. And the *Histories*. And the *Dialogue on Orators*. I not only read the assignment. I went considerably beyond it. I read all of Tacitus.

In saying that I read *all* of Tacitus, I am saying that I read *all that remains* of Tacitus. For only a fraction of what he wrote remains, and that fraction remains fortuitously, almost by historical accident. One historian has put it this way:

Of Tacitus we would know almost nothing if it were not for the ninth-century copyists; and the only manuscript to contain the first six books of his "Annals," the *Mediceus prior* in the Laurentian Library in Florence, was probably copied at Fulda in the ninth century and sent to Corvey, where it was found towards the end of the fifteenth century. All our manuscripts of his "minor" works, the *Dialogue on Orators*, the *Germania* and *Agricola*, are based on a ninth- or tenth-century text,

now lost, which a monk of Hersfeld offered for sale to the humanist Il Poggio in 1425.<sup>3</sup>

Fortuitous indeed. Further, in saying that I *read* all of Tacitus, I am not saying that I read all that remains of Tacitus *in the original Latin* of his few fortuitously remaining manuscripts. Other than the few Latin phrases that are the familiar commonplaces of most U.S. lawyers and jurists, I profess to know no Latin. I am still learning English. So I read all that remains of Tacitus in various translations into English. I can, thus, only report secondhand that many who have known Latin have, through the centuries, praised the balance and the brevity of his grand and eloquent Latin style.

In reading Tacitus, I began to understand for the first time the enduring wisdom of my Vanderbilt professors in asking me the question I was asked—but could not answer—on my final exam in “Western Civ” all those years ago. In undertaking the assignment that I had missed as a freshman, I began, too, to understand what might be the real answer, the right answer, to that unanswered question. The answer could be found by turning to Tacitus.

Tacitus had much to teach me—he has much to teach all of us—about the struggle for human freedom—both yesterday and today. The many who have taken the time to turn to Tacitus since he was so fortuitously rediscovered during the Renaissance have found, again and again, that he has much to teach all of us about the fragility of freedom, and about the frailty of humanity, which must somehow preserve it.

Lost and forgotten for many centuries, what remains of Tacitus was found by the humanists just in time to have a major impact on the humanistic view of human freedom in the Age of Reason. In Tudor-Stuart times, Jack Hexter’s freedom-loving Englishmen, for example, were known to give lectures, ostensibly on Tacitus, that were, in truth, veiled criticisms and daring diatribes aimed at the oppressions of both church and state. Archbishop Laud was not amused.<sup>4</sup> Later, over in France, Madame Roland read Tacitus while she was imprisoned in the Conciergerie and awaiting her execution by the Jacobins during the French Revolution.<sup>5</sup> Edward Gibbon, that other historian of Rome, said that Tacitus was one of his “old and

3. PHILIPPE WOLF, *THE AWAKENING OF EUROPE* 75 (Anne Carter trans., 1968).

4. ANTHONY GRAFTON, *THE FOOTNOTE: A CURIOUS HISTORY* 144-45 (2003) (quoting RONALD MELLOR, *TACITUS: THE CLASSICAL HERITAGE* 118-21 (1995)).

5. Michael Grant IV, *Translator's Introduction*, in *TACITUS, THE ANNALS OF IMPERIAL ROME* 7, 24 (Michael Grant IV trans., Penguin Books 1996) (109 A.D.) [hereinafter *THE ANNALS*].

familiar companions.”<sup>6</sup> Thomas Jefferson, a fair writer himself, said, “Tacitus I consider the finest writer in the world without exception.”<sup>7</sup>

Who was Tacitus to have such an impact on these and so many others so many centuries after his death? The truth is, we really do not know. We know very little about him. We know that his last two names were Cornelius Tacitus, but we do not know the first of his three Roman names. Perhaps it was Gaius. Or perhaps it was Publius. We know that he was born in 55 or 56 A.D., but we do not know when he died. Perhaps it was in 117 A.D. Or perhaps it was in 120 A.D. In many respects, Tacitus himself remains one of the mysteries of Western civilization.

We do know that Tacitus was a noted Roman orator, and that he was also a senator, consul, and governor of some renown in the late first century of our era. We think also that he may have taken to writing history as a way of handling what we might nowadays call a “mid-life crisis.” Tacitus survived, in mid-life, the terror caused by the tyranny of the Emperor Domitian, and his very survival may have helped inspire him afterwards to write the history of how it happened that so few of the lofty ideals of the Roman Republic survived the bloody realities of the early days of the Roman Empire.

He may also have been inspired to write by *how* he survived. For Tacitus had not only survived the tyranny of Domitian. He had, in his own mind, been complicit in that tyranny. In the last lines of his first known work, a brief biography of his father-in-law, *The Agricola*, Tacitus acknowledges that, while he sat in the Roman senate, he failed to speak out against the tyranny of Domitian, and, further, and worse, that he joined in the condemnation of Domitian’s senatorial victims. He confesses that “we senators . . . watched in shame . . . and stained ourselves with . . . innocent blood.”<sup>8</sup>

This may be the source of the timeless edge in what we read when we turn to Tacitus. He was a Roman aristocrat who longed for a lost world. He lamented the loss of the Roman Republic all the while he strived to serve the Roman Empire. He lived in a time when the Romans had lost much of the personal and political freedom that some of them, a few of them, had once had, and he was persuaded that, in his fear, and in the passivity that had been prompted by his fear, he had helped give that freedom away.

Thus, perhaps, the heavy-heartedness of his histories. Thus, perhaps, his seeming pessimism in telling his sad tale of all the

6. EDWARD GIBBON, *MEMOIRS OF MY LIFE* 146 (Funk & Wagnalls 1969) (1796).

7. MICHAEL GRANT, *READINGS IN THE CLASSICAL HISTORIANS* 461 (1992).

8. TACITUS, *THE AGRICOLA AND THE GERMANIA* 97 (Harold Mattingly & S.A. Handford trans., Penguin Books 1970) (98 A.D.) [hereinafter *AGRICOLA AND GERMANIA*].

shortcomings of human nature as manifested in the eventful first century of the Roman Empire. Thus, perhaps, his droll digressions, his snide and sometimes sneering asides, his apparent afterthoughts that still sparkle with world-weary wisdom centuries later. Thus, perhaps, the guilt in his pen that gives the edge to his prose, and, thus, perhaps, its resounding contemporary ring.

Why do the observations of Tacitus still have a contemporary ring after nearly two thousand years? It is because of their basic timelessness. Tacitus seemed to be writing about Rome. He was really writing about human nature. Because human nature does not change, because it remains fixed over time, because it remains the same through the centuries, the terse observations of Tacitus about human nature are timeless. They still seem to us, long centuries later, to have the ring of contemporary truth.

Many of these observations are, thus, still often cited. They are still often quoted in the contemporary fray. Heard this one? "Nothing succeeds like success."<sup>9</sup> How about this one? "Patriotism comes second to private profits."<sup>10</sup> Or have you happened to hear this one lately? "They make a desert, and they call it peace."<sup>11</sup>

Others among his acerbic asides likewise have a contemporary ring that still resonates today. The first century of the Roman Empire was, he said, a time of a "rising tide of flattery"<sup>12</sup> when "slavish obedience was the way to succeed, both politically and financially."<sup>13</sup> Moreover, "[t]he more distinguished men were, the greater their urgency and insincerity."<sup>14</sup>

Ring a bell?

During that time of "slavish passivity,"<sup>15</sup> those who presumed to lead Rome relied on "borrowed eloquence"<sup>16</sup> to multiply "hostages to fortune."<sup>17</sup> They tried to "use antique terms to veil new sorts of villainy."<sup>18</sup> Some "had every asset except goodness."<sup>19</sup>

Sound familiar?

9. TACITUS, *THE HISTORIES* 190 (Kenneth Wellesley III trans., Penguin Books 1995) (circa 100 – 110 A. D.) [hereinafter *THE HISTORIES*]. *The Histories* is an account of the Roman civil wars of 68–69 A.D.

10. *THE ANNALS*, *supra* note 5, at 207 (1996) (circa 110–120 A.D.). What remains of *The Annals* is an account of the early Roman Empire from the last years of Augustus to the tumultuous years of Nero.

11. Tacitus, *Agricola*, in *AGRICOLA AND GERMANIA*, *supra* note 8, at 81, where this frequently-quoted excerpt from the supposed speech of an opponent of Rome named Calgacus is translated as "[t]hey create a *desolation* and call it peace."

12. *THE ANNALS*, *supra* note 5, at 31.

13. *Id.* at 32.

14. *Id.* at 35.

15. *Id.* at 388.

16. *Id.* at 285.

17. *Id.* at 114.

18. *Id.* at 166.

19. *Id.* at 306.



In that dark time, there were "world-wide convulsions."<sup>20</sup> Those who had "an instinctive love of power" had made that instinct a "dominant and uncontrollable force."<sup>21</sup> "But in the pursuit of an empire there was no mean between the summit and the abyss."<sup>22</sup>

Does this remind you at all of recent events?

Tacitus found little solace in the reactions of the "slavish" majority to the tribulations of Rome. When confronted with harsh tribulations, he said, civilization subsides. "Men's minds, once unbalanced, are ready to believe anything."<sup>23</sup> In such disturbed times, "crowds habitually find scapegoats, however unjustifiable . . ."<sup>24</sup> Further, "in disturbed times uncivilized communities trust and prefer leaders who take risks."<sup>25</sup>

In such times, said Tacitus, "opportunists can always turn national disasters to advantage."<sup>26</sup> His histories were about how this had happened in Rome. In Rome, "[e]xisting resources were squandered as though the material for many more years of wastefulness were now accessible."<sup>27</sup> There were "imaginary treasures" in the expectation of great wealth from such great profligacy.<sup>28</sup> In the midst of this "national impoverishment,"<sup>29</sup> there was also an impoverishment of the national spirit. Patriotism, for many, did, indeed, truly come "second to private profits."<sup>30</sup> Worst of all, "[t]error had paralyzed human sympathy. The rising surge of brutality drove compassion away."<sup>31</sup>

Paralysis by terror? Did Tacitus, perchance, watch CNN?

Tacitus was an orator. His histories were recitations. In the custom of his time, they were written to be read aloud.<sup>32</sup> They were "designed to be declaimed"<sup>33</sup> in performances before audiences of aristocrats who assembled to hear them on ancient leisured evenings. In his *Dialogue on Orators*, Tacitus attributed the decline of eloquence in oratory to the suppression of freedom under the empire.

20. THE HISTORIES, *supra* note 9, at 175.

21. *Id.* at 103.

22. *Id.* at 125.

23. THE ANNALS, *supra* note 5, at 48.

24. *Id.* at 55.

25. *Id.* at 65.

26. *Id.* at 196.

27. *Id.* at 382.

28. *Id.* at 383.

29. *Id.*

30. *Id.* at 207.

31. *Id.* at 209.

32. This custom began in the time of the Greek historian Herodotus, in the fifth century B.C., and was continued by Tacitus and others in the Roman era. Michael Grant IV, *Translator's Introduction*, THE ANNALS, *supra* note 5, at 11.

33. Harold Mattingly, *Introduction*, in AGRICOLA AND GERMANIA, *supra* note 8, at 9, 12.

His histories were intended in part as evidence that there could still be freedom-loving eloquence in such recitations.

Tacitus was also a moralist. His histories were not only recitations. They were exhortations. His oratory was meant not only to tell a story. It was meant as moral instruction. It was intended to inspire moral action in response to the eloquence of his exhortations. Like life itself, the histories of Tacitus were morality plays in which the principal plot was the never-ending struggle in human life between vice and virtue. In the Rome of his time, Tacitus was exhorting the Romans to choose, not vice, but virtue.

When Tacitus wrote his histories, the tyrannical reign of Domitian was over. There had been an easing of despotism under Nerva, Trajan, and Hadrian. Under the shrewder caesars who succeeded Domitian, there was, once more, the pretense of the traditional republican virtues in the midst of autocratic rule. And yet the results of the terror remained. There were "virtues that were fictitious and vices that promised to return."<sup>34</sup>

Again and again, the Romans had chosen vice over virtue. The result was a Roman world that preached virtue but practiced vice. It was a world where vice ruled, and where it ruled in part because those who ruled were able to make vice seem to be virtue. They were able to do so in large part because those they ruled—the Roman patricians for whom Tacitus recited his eloquent histories—were willing to pretend that vice was virtue. They were willing to pretend that appearance was reality.

Tacitus understood how vice can be made to seem to be virtue. He knew the difference between appearance and reality. He saw through the veil of appeasing appearance that concealed the hypocritical reality of the exercise of raw political power in the Roman Empire. Most of all, he perceived how the citizens of Rome—he no less than others—had been complacent and even complicit in the making of their own subjugation.

In distinguishing vice from virtue, Tacitus was, as the late Oxford historian Sir Ronald Syme once put it, "ever alert for the contrast of name and substance."<sup>35</sup> Tacitus acknowledged that there was, in Syme's British phrasing and spelling, "the nominal sovereignty of law."<sup>36</sup> All the same, he knew that, whatever the appearance, in reality, "sovranty"—sovereignty—in the Roman Empire had been ceded to one man, and thereby to those who, through the force of their arms, through the force of their martial and financial might, kept

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34. THE HISTORIES, *supra* note 9, at 64.

35. SIR RONALD SYME, THE ROMAN REVOLUTION 324 (Oxford Univ. Press 1960) (1939).

36. *Id.* at 516.

that one man in power. In the view of Tacitus, as Syme expressed it, in the Rome of his time, "Names did not matter much."<sup>37</sup>

The Romans of the early empire yearned for security in a world threatened by terror. To escape the threat of terror, they had chosen appearance over reality. They had chosen the illusion of security over the potential of what little they had once possessed of freedom. They had succumbed to the vice of fear because they were no longer willing to pay the high price for the virtue of freedom. And, of all that aggrieved Tacitus—the moralist—this aggrieved him by far the most.

Tacitus seems to have been a pessimist. But here, too, there was a difference between appearance and reality. What distinguished Tacitus from the other aggrieved Roman aristocrats of his time, from those others who longed for republican days, from those others who lamented the loss of freedom-loving republican ways, was that Tacitus alone had the courage to voice his grievances by writing his histories. His histories are evidence that, pessimist though he may have been, Tacitus nevertheless was still enough of an optimist to believe in the possibility that things might one day be different.

In the very first paragraph of the earliest manuscript that remains of his histories, Tacitus asserted his abiding belief that "[a]n outstanding personality can still triumph over that blind antipathy to virtue which is a defect of all states, small and great alike."<sup>38</sup> This decidedly optimistic statement was made in the context of his fond memoir of his late father-in-law, Agricola. But Tacitus might have said this about himself, and he might have said this about others, in all states, and in all times. Despite the terror he had somehow survived, despite the vice he still beheld all around him, *despite all*, Tacitus still dared to believe that just one person could make a difference for the triumph of virtue.

In the assignment I missed in "Western Civ" at Vanderbilt in 1967, Professor Hexter said of Tacitus, "His writings reveal the fondness of the Roman aristocrat for the Republic, and a distaste for the increasingly autocratic government of the emperors."<sup>39</sup> The Jack Hexter who taught me later would probably, with further reflection, agree with me that this is something of an understatement. More than a "distaste" for autocratic government, the writings of Tacitus reveal a profound distrust for the oppressive one-man rule of autocratic government. More, his writings reveal also a profound belief that, despite the evidence of history, which supports a paining pessimism, there is, nevertheless, reason remaining for optimism

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37. *Id.*

38. AGRICOLA AND GERMANIA, *supra* note 8, at 51.

39. Hexter, *supra* note 1, at 129.

about the future, as evidenced by the efforts of those “outstanding personalities” who, *despite all*, still strive for the triumph of virtue.

One of the foremost English translators of Tacitus, the historian Michael Grant, has put it this way:

Human fate often looks black to Tacitus. So does human nature. Yet he is far from sceptical about the potentialities of the human spirit. Even in times of civil war and tyrannical government, he is able to point to human actions of extraordinary virtue, bravery, and pertinacity. Indeed he is a humanist, and one whose contribution to our western tradition of humanism has been immense and singularly inspiring.<sup>40</sup>

Tacitus watched forlornly as freedom was sacrificed to the false hope of security in an authoritarian state. He was no democrat. He was a Roman aristocrat. For him, freedom was aristocratic freedom, with all that the antiquated elitism of that phrase implies. Further, Tacitus definitely had his doubts about whether the possession of personal freedom, even by Roman aristocrats, was compatible with the practical necessities of governing a “global” state. Thus, while he hoped for benevolence, he was largely reconciled to what he reluctantly concluded was the need in his time for some kind of imperial monarchy.

And yet there is, all the same, something about Tacitus that seems to suggest nevertheless that, for a suffering humanity, it might one day, some day, somehow, be otherwise. For all of his elitism, for all of his aristocratic disdain for the destructive emotionalism of the Roman mob, there is, in the histories of Tacitus, a redeeming undertone of what Grant has described as “the Stoic interpretation of the Roman Empire as the vehicle of human brotherhood.”<sup>41</sup> This undertone in Tacitus implies and embraces a *universal* humanity as a corollary and as a consequence of a *universal* human nature. And it is this contemporary undertone of universalism that still resonates for us so loudly today.

Sir Ronald Syme spent many years researching and writing the two-volume biography that is widely considered the definitive work on Tacitus.<sup>42</sup> Syme said afterwards, “It is good fortune and a privilege if one can consort for so many years with an historian who knew the worst, discovered few reasons for ease or hope or confidence, and nevertheless believed in human dignity and freedom of speech.”<sup>43</sup> Tacitus knew the worst; yet he believed in the possibility of the best. Even as others sought a false security, even as others submitted to the seeming inevitability of autocratic rule in the face of the threat of terror, Tacitus still held fast to his underlying belief in the possibility

40. Michael Grant, *Introduction*, in *THE ANNALS*, *supra* note 10, at 23.

41. *Id.* at 15.

42. See generally SIR RONALD SYME, *TACITUS* (1958).

43. Sir Ronald Syme, quoted online at <http://www.ancienttimes.net/cgi-ancienttimes/ikonboard/topic.cgi?forum=47&topic=11>.

that virtue would ultimately triumph through the fulfillment of human freedom.

All these years later, Professor Hexter's heavy tome on *The Traditions of The Western World* still sits on my bookshelf. "Middle-aged and well-meaning," as Tacitus might say,<sup>44</sup> I take down the book from the shelf, and I take up the assignment I left unfinished long ago. I turn, anew, to Tacitus, and I ask myself the question that, for all of my feigning, I left unanswered on my final exam in "Western Civ" in 1967: What was Tacitus trying to say to his fellow Romans in what he wrote about the Germans nearly two thousand years ago?

In the several pages of excerpts from *Germania* that begin on page 129 of my aging copy of "Hexter," Tacitus paints a highly favorable portrait of the German tribes that pressed the borders and challenged the rule of the Roman Empire. The Germans were a primitive people. They were, in the eyes of the Romans, mere barbarians. But Tacitus portrayed them, in the fastness of their forests, and in all their primitive and barbarian ways, as freedom-loving, and as free.<sup>45</sup>

In *Germania*, Tacitus described a people who shared in the exercise of their freedom at all times, and who shared also in the defense of their freedom at all costs. He observed that the power of the German kings was not "absolute or arbitrary."<sup>46</sup> Further, on major affairs, the German kings consulted with "the whole community."<sup>47</sup> "As for the leaders," Tacitus reported, "it is their example rather than their authority that wins them special admiration . . ."<sup>48</sup>

In these and other remarks in *Germania*, Tacitus was denouncing the Romans of the empire as much as he was describing the Germans of the forests. Implicitly, but unmistakably, in describing the Germans, Tacitus contrasted their virtues with the vices of his own countrymen. In his eyes, the Germans, with all their virtues, resembled the Romans of the old republic during the glorious days before the dissolutions and the degeneracies of the empire, and, in his eyes, the Romans of his own time, with all their vices, had much to learn from the barbarians in the forests.

Tacitus especially envied the "complete liberty" of the Germans, which he saw as the source of many of their virtues.<sup>49</sup> In his admiring

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44. THE ANNALS, *supra* note 5, at 224.

45. Generally, the Tacitean portrait of the Germanic tribes still holds up after two millennia. See HERWIG WOLFRAM, THE ROMAN EMPIRE AND GERMANIC PEOPLES 3-4, 12, 15-16 (Thomas Dunlap trans., 1997).

46. Hexter, *supra* note 1, at 131.

47. *Id.*

48. *Id.*

49. AGRICOLA AND GERMANIA, *supra* note 8, at 119.

account of the Germanic tribes, Tacitus seemed to envy in them, in particular, the sheer freedom of their primitive and barbaric ways. He seemed to see in them a bit of the "noble savage." There is just a hint of Rousseau, just a whiff of romanticism, in the freedom-loving life he saw the Germans as leading in their "state of nature" in the primeval forests on the other side of the Danube and the Rhine rivers. This may very well have influenced how he portrayed them in *Germania*.

But now is not then. Whatever the "state of nature" may have been long ago in those pristine German forests, we have, all these centuries later, long since passed beyond the primeval. And, now, on this side of the forest, on this side of the river, on this side of a wishful romanticism, there is the sobering realism of civilization, and there is as well the sobering challenge of trying our best to find a way to live together within civilization. Now, if we are fortunate, there is also the reassuring reality of the rule of law.

Did Tacitus understand the need for the reality of the rule of law? He must have. After all, Tacitus was, as an orator, also a lawyer. And there is reason to believe he was quite a good lawyer. His friend and contemporary, Pliny the Younger, heard Tacitus argue in the rhetorical arena of the Roman courts, and called him the greatest legal orator of his time.<sup>50</sup> Tacitus was certainly no stranger to the law.

Nor am I. And I have long since concluded that the rule of law is the surest safeguard of freedom in a civilized society. Indeed, I see the rule of law as an indispensable prerequisite to freedom and civilization. This said, what, then, do I, as a lawyer, and as a sometime jurist, make of the professed verdict of that optimistic pessimist, that romantic realist, that renowned lawyer, Tacitus, who said that, "The more corrupt the republic, the more numerous its laws"?<sup>51</sup> What did Tacitus really mean to say by saying this?

This cryptic and oft-quoted assertion that there is a connection between corruption and law is not found in *Germania*, one of his early works, but in the *Annals*, his last known work. There, Tacitus told the sad tale of the decline of Roman freedom under the early principate, from Augustus onwards. Under the principate that soon became the Roman Empire, the *form* of the law was often observed, but the *spirit* of the law was often lost. The law said one thing; the law meant another. And, increasingly, this was so. The volume of the laws proliferated while the virtues of republicanism declined into the vices of despotism. Under the Roman Empire, the laws became more numerous as the laws became more meaningless.

50. PLINY THE YOUNGER, LETTERS 93 (Loeb Classical Library 1924) (1915).

51. This is a common translation. Another translation of this passage is, "Corruption reached its climax, and legislation abounded." THE ANNALS, *supra* note 5, at 133.

What Tacitus said must be read in this context. Tacitus did not mean to imply that we should live without laws. He did not mean to say that with fewer laws, we would have more freedom. He did not mean to suggest that we should go back across the rivers and return to the forests. He meant only to say that the law must mean what it says. He meant only to remind us that we must have the reality as well as the appearance of laws, because he believed that, to be free, we must have laws, however numerous, that have real meaning.

In the *Annals*, Tacitus maintained that "the origins of law" were in the advent of civilization.<sup>52</sup> He praised "the rule of law" under the famous "Twelve Tables" of law that were enacted at the foundation of the Roman Republic.<sup>53</sup> The Twelve Tables, he said, were "the last equitable legislation. For subsequent laws, other than those directed against specific current offences, were forcible creations of class-warfare, designed to grant unconstitutional powers or banish leading citizens, or fulfil some other deplorable purpose."<sup>54</sup>

Today, unlike Tacitus, we have the benefit of a longer and broader view. We have the benefit of an extended experience of the world in which the "rule of law" has, fortunately, and, frequently, been something more than appearance, and something other than pretense. I would agree with Tacitus that the effort to establish the rule of law began with the beginnings of civilization. But I would also contend that neither freedom nor civilization can be sustained without it. Without the rule of law, there will be no freedom, and thus there will be no ultimate triumph of virtue.

Law is not words alone. Law is the will behind the words. Law is what we are willing to do to make the words of the law mean what they say. Law is also what we are willing to let others do that would leave the words of the law without real meaning. We can salute the flag. We can shed a tear as it passes in the parade. We can call ourselves "patriots." But all our pledges of patriotism will not make us patriots if we permit others to corrupt the law by emptying it of all meaning. Far more important than any "Patriot Act" are all the patriotic acts we must take to make the law mean what it says by making certain that we preserve the freedom that makes the rule of law possible.

Tacitus knew this. He had learned this the hard way. Tacitus understood that the rule of law is not the mere pretense—the mere appearance—the mere semblance—of law. But, do we? Tacitus understood that law can be corrupted when there is too much power in too few hands. But, again, do we? Tacitus understood that law will

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52. *Id.* at 132.

53. *Id.*

54. *Id.*

fail, and that vice will triumph over virtue, if we trade our freedom to those who hold power over us in exchange for their promise of our security. But, once more, do we?

What do we learn when, finally, we turn to Tacitus? Here, in our middle age, it is true that “the few of us that survive are no longer what we once were.”<sup>55</sup> Even so, we may be tempted, like some who opposed the oppressive rule in Rome, to see ourselves as “the last of the free.”<sup>56</sup> If so, what, then, are we willing to do to preserve our freedom? What are we willing to sacrifice to save Rome?

Will we simply salute and shed a tear? Will it be said of us, as Tacitus said of the Romans during the time of the first treason trials: “Everyone refused. Their excuses were different, but they were all afraid.”<sup>57</sup> And will it be said of us, as Tacitus said of the Gauls who were defeated by the Romans: “[T]heir valour perished with their freedom”?<sup>58</sup>

There is a price for valor, even as there is a price for freedom. The price for standing up for freedom is often high. Sometimes it is the ultimate price, and, yes, sometimes those who are willing to stand up and pay the ultimate price of freedom are forgotten. But sometimes they are not. Sometimes they are remembered ever afterwards. Tacitus tells us that, in a parade in Rome, in the days of the empire, “The effigies of twenty highly distinguished families . . . headed the procession. But Cassius and Brutus were the most gloriously conspicuous—precisely because their statues were not to be seen.”<sup>59</sup>

Like valor, and like freedom, terror has its price. The desire for security against terror is shared by all, and there can be no doubt that some limits on our freedom, as the price of opposing terror, must be accepted by all. But there are those who, in the name of opposing terror, really oppose freedom. There are those who, in the guise of opponents of terror, would manipulate our laws to eviscerate our freedoms. Subtle, soothing, but potentially insidious, this, too, is a form of terror. And terror, in all its guises, must be opposed.

In the face of terror today, what will we do? Will we be content to watch the passing parade? Or are we willing to take the risk of becoming unseen statues? Do we still believe sufficiently in anything to be willing to stand up for it, and to fight for it? Are we willing to think for ourselves—even at the risk that thinking for ourselves might actually inspire us to do something for ourselves and for others? Are we prepared to do whatever it takes to choose reality over

55. AGRICOLA AND GERMANIA, *supra* note 8, at 53.

56. *Id.* at 80.

57. THE ANNALS, *supra* note 5, at 91.

58. AGRICOLA AND GERMANIA, *supra* note 8, at 62.

59. THE ANNALS, *supra* note 5, at 156.



appearance, and virtue over vice? Will we, in the end, have the courage to refuse to trade our freedom for a false security?

Our laws will mean nothing if there are not still those among us who are willing to make certain that they do mean something and that they mean what they say. The rule of law will become the misrule of lawlessness if we allow our desire for security to prevail over our need for freedom. The worst terror will come only if we succumb to the worst fears that are caused by terror.

What is the answer to the unanswered question I was asked on my final exam in "Western Civ" at Vanderbilt in 1967? What *was* Tacitus trying to tell the Romans in what he wrote about the Germans?

The answer is in one short sentence from *Germania* that Professor Hexter included in his textbook. It was the belief of the abiding Germans, said Tacitus, that, in battle, "To throw away one's shield is the supreme disgrace."<sup>60</sup>

Tacitus was telling the Romans not to throw away their shields. And, if he were here with us today, he would surely tell us, embattled as we are, to hold fast to our shields, and to stand and fight for our freedom. This is the lesson we learn by turning to Tacitus.

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60. Hexter, *supra* note 1, at 131.