

“The Voyage of the Mayflower”

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There I was. Locked up in a jail cell with eight strangers on May 9, 1970 at about 2 am. The cell was not meant to hold nine prisoners. There was a single cot and no chairs, so most of us had to stand or sit on the cold stone floor. We shared a single lidless toilet situated in the center of the cell.

How I found myself in this sad state and what ensued comprise one of the two shaggy dog stories that are the focus of this paper. And the military draft is central to both stories.

Part I. A Selective Look at Selective Service in America.

The United States first employed national conscription during the Civil War. In 1863, Congress devised an elaborate system for drafting men between twenty and forty-five years of age. Under it, men could avoid the draft by hiring a substitute or paying a commutation fee. About 2/3 of the Union Army soldiers procured through the draft were substitutes. Outrage over the inequities of the draft was widespread and culminated in the four-day Draft Riot of 1863, in which white rioters attacked federal buildings and African American workers in the streets of New York and over 100 people were killed.

The Selective Service Act was first enacted in 1917. The draft was used to raise troops during World Wars I and II and the Korean War and remained in place during the Vietnam War. The Vietnam War was unpopular and draft resistance reached its peak during that period. Draft-age young men across America sought to avoid or, in the parlance of the day, “dodge” the draft. They had several ways of doing so.

After turning age 18 during the 1960's and early 1970's, an American male would almost certainly be drafted into the Army as a lowly private unless he did any of the following: 1) Enter college or graduate school to qualify for the deferment accorded to higher education students; 2) Enlist in another branch of the military unlikely to land you in Vietnam, such as the National Guard or the Coast Guard; 3) Get accepted into one of the officer training programs offered by the various branches of the service; 4) Flunk the physical exam given to young men classified as draft eligible; 5) Emigrate to Canada or another country that wouldn't extradite you; or 6) Qualify as a conscientious objector to war on religious grounds. But there was also another way, as you will soon learn.

This paper recounts two true stories about the Vietnam War draft. Each story is bizarre. While not shared experiences, there are uncanny similarities. The first story belongs to Arlo Guthrie--folk singer, songwriter and son of the legendary Woodie Guthrie. The second story is mine.

Part II. Arlo's Story About the Draft

Arlo Guthrie's story is told in a talking blues song he released in 1967 called "Alice's Restaurant Massacre." According to the Smithsonian Magazine, "massacree" means, colloquially, a series of absurd events. The format is an 18 ½ minute spoken monologue backed by a guitar that is bookended at beginning and end by a sung refrain that includes the familiar phrase, "You can get anything you want at Alice's Restaurant." The story was expanded into a film that was directed by Arthur Penn and theatrically released in 1969.

The story begins with Arlo and his buddy in Stockbridge, Massachusetts looking forward to Thanksgiving dinner with their friend Alice who had a restaurant in town. As Arlo explains, "Alice's Restaurant isn't actually the name of the restaurant; it's just the name of the song." Arlo and his friend decide to do Alice a favor by taking a pile of garbage to the town dump. But the dump was closed for Thanksgiving, so they looked for another site. They came to a road, where off to the side was a 15-foot

cliff and at the bottom of the cliff was a pile of garbage. Deciding that one big pile was better than two little ones, they tossed their pile on top of the other.

After spending Thanksgiving at Alice's, Arlo received a telephone call the next morning from a local policeman named Officer Obie, who said that they found an envelope with Arlo's name under some illegally dumped garbage. Arlo says, "Officer Obie, I cannot tell a lie. I put that envelope under that garbage." Obie told him he had to report to the police station and then pick up the garbage. Upon arrival at the police station, Arlo was immediately handcuffed and arrested. He protested, "Officer, I can't pick up the garbage with these here handcuffs on." Obie replied, "shut up kid, and get in the back of the patrol car." From there, they drove to the scene of the crime, where all five members of the local police force were there to shoot 27 glossy photos, take imprints of tire tracks and footprints and gather other evidence. Then, Obie told Arlo, "kid, I'm gonna put you in a cell."

At the local jail, Obie took away Arlo's belt so he couldn't hang himself and removed the toilet seat from the cell so Arlo couldn't hit himself over the head and drown. Thankfully, Alice arrived about five hours later and bailed him out.

At the courthouse the next morning, Officer Obie had all his painstakingly developed evidence ready to show the judge, but realized the judge wasn't going to look at it and began to cry. The judge fined Arlo \$50 for littering and ordered him to take away the garbage.

The action now shifted to an Army Building on Whitehall Street in New York City, where Arlo appeared for a physical exam to determine his fitness for the Vietnam War draft. After the exam, he had one last interview with an official who said: "Kid we only got one question. Have you ever been arrested?" So Arlo told him the whole story about being convicted of littering in Stockbridge. The official told him to go sit on a bench that says "Group W." Group W was where they put you if you might not be moral enough to join the Army after committing your special crime. When they got to

Arlo, the sergeant on duty asked him if he had rehabilitated himself. To which Arlo replied, “you got a lot of god-damned gall to ask me if I’ve rehabilitated myself. . .because you want to know if I’m moral enough to join the army, burn women, kids, houses and villages after bein’ a litterbug.” The sergeant looked at Arlo and said, “kid, we don’t like your kind! We’re gonna send your fingerprints to Washington.” Although Arlo’s fingerprints may be, in his words, enshrined in some little folder in Washington, the Army never did draft him. Littering literally kept him out of the Army.

Years later, when Arlo learned that Richard Nixon had owned a copy of his 18 ½ minute song, he mused that this must have accounted for the 18 ½ minute gap in the Watergate tapes.

Part III. My Own Much Longer Story About the Draft

Subpart 1. Draft Anxieties in Law School

I entered the University of Virginia Law School in Charlottesville, Virginia in the fall of 1967 as a member of the class of 1970. During my first year, the Nixon administration cancelled draft deferments for graduate school students like me. The class of 1970 suffered substantial attrition over the next two years, as many of my classmates signed up for alternative forms of military service to avoid being drafted as Army infantrymen destined for the jungles of Vietnam. As a result, UVa Law, like other graduate schools, needed to replace a lot of lost tuition income. To do this, they would have to admit more women. Realizing this, a certain graduating senior at a women’s college in Boston decided to apply to law school instead of a graduate program in education. That woman wound up at UVa Law, where she and I met and eventually were married. I would never have known my wife Carol if Nixon hadn’t done me the two-edged favor of eliminating graduate school deferments.

Faced with the prospect of being drafted, I applied to the New Jersey National Guard, but it had a years-long waiting list. I also applied to Navy Officer Candidate School. I drove to Richmond, Virginia to take the Navy OCS written test, which I passed. Then, I was asked to complete a “Vocational Interest

Blank” that I was told was a survey and not a test and would have no bearing on my application. In it, I encountered questions like “Would you re-up when your tour of duty ends?” and “Would you rather be a poet or a drill sergeant?” Naively, I answered the questions honestly. A few weeks later, the Navy informed me that my OCS application had been rejected because I had failed the “Vocational Interest Test.” The Navy had understandably concluded that anyone who was gullible enough to fall for its simple trap was clearly not officer material.

Near the end of my second year of Law School, two things happened: First, my draft board reclassified me 1A. Shortly thereafter, I passed my physical exam and now could be called for induction any day. The second event was a ruling by the Second Circuit Federal Appeals Court in New York that the cancellation of graduate school deferments was illegal. That summer, I marched self-righteously into my local draft board in New Jersey with the Second Circuit opinion in hand and asked for reinstatement of my deferment until I was able to complete my third year of Law School. The official I met there said he couldn’t do that because New Jersey was in the Third Circuit, not the Second, and its draft boards could only follow rulings from the Third Circuit. However, he was a lawyer and was sympathetic. He told me I could buy time by changing my legal residence from New Jersey to Virginia. The paperwork involved in transferring my file would take at least a year. A draft board official with a heart was not what I had expected. So I changed my residence and returned to Law School in the fall of 1969 confident that I could complete my third and final year.

During that year, an article I wrote for the Virginia Law Review was published under the title “Grievance Response Mechanisms for Police Misconduct.” This was to add a touch of irony to my story as it unfolded.

In late 1969, Congress instituted a draft lottery as a first step in transitioning to an all-volunteer military. This was a potential game changer for hundreds of thousands of young men like me. Under the

lottery, all American men between ages 18 and 26 were to be randomly assigned a number from 1 to 366 according to their birthdays. The lottery was held on December 1, 1969 before a live national television audience. A whole generation of draft-eligible males was glued to the TV screen on the edges of their seats. The 366 days of the year were printed on slips of paper, which were placed in separate opaque plastic capsules. The capsules were mixed in a shoebox and dumped into a deep glass jar. General Lewis Hershey, then Director of the Selective Service System, drew capsules from the jar one at a time and opened them. September 1 was the first date announced—every one gasped. The process was agonizing. Each birth date announced that was not one's own brought a temporary sigh of relief, only to be followed by unbearable tension as the next capsule was drawn. My own birth date of December 19 ultimately resided inside the 270th capsule drawn. This meant I would not be drafted until every eligible man with a number from 1 through 269 was called for duty. If my number wasn't called during 1970, I would be forever exempt from the draft. I initially thought the odds of my being drafted were low, but that would change.

Subpart 2. The Voyage of the Mayflower.

In the spring of 1970, I decided that I needed a break. I knew that immediately after graduation I would start working at a Wall Street law firm during the day and studying for the New York bar exam at night. So I had a two-month window to enjoy myself before returning to the grind, and that meant reading novels and riding my motorcycle and not going to classes or doing much studying. I figured I couldn't screw up enough academically to lose my job offer.

Then came the events of May 1970. After President Nixon's April 30 announcement of the invasion of Cambodia, students protested at universities all over the country, including Virginia. At UVa, activists called for a student strike and boycott of classes.

On May 4, four protesting students at Kent State University were shot and killed by the Ohio National Guard, outraging university students everywhere. At UVA, some 1,500 students held a vigil in front of the renowned Rotunda building that was designed by Thomas Jefferson. A group of protesters marched to the University President's house to insist that he shut down the school and sign a telegram of protest to President Nixon. They also occupied the Naval ROTC center on campus until evicted by court order.

Needless to say, emotions were raw and the potential for violence was high as protesters kept upping the ante and continued to confront university and law enforcement authorities. The Law School administration encouraged law students to accept roles as "Legal Marshals" to help keep things peaceful. The Marshals' role was to act as sentries and help keep fellow students calm by offering advice where needed. The hope was that their conspicuous presence with armbands identifying them as Marshals would reduce the risk that protests would become violent. I signed up to be a Marshal.

The protests reached a crescendo on the night of May 6, when radical attorney William Kunstler and Yippie provocateur Jerry Rubin spoke at a rally in spacious University Hall before some 9,000 people, including me. Parenthetically, there were fewer than 10,000 students enrolled at UVa at the time. Apparently, a lot of out-of-towners had joined the show.

William Kunstler had defended the so-called Chicago Seven, including Rubin, in a five-month trial to adjudicate charges of conspiring to incite riots during the 1968 Democratic National Convention in Chicago. The trial turned into a circus covered nightly by the national television networks. Kunstler gained fame and notoriety by placing a Viet Cong flag on the defense table and having Judy Collins sing "Where Have All the Flowers Gone" from the witness stand. Ultimately, the jury convicted the defendants of some charges and acquitted them of others. The convictions were eventually overturned on appeal.

Jerry Rubin was born in Cincinnati, the son of a truck driver. He graduated from Walnut Hills High School and the University of Cincinnati. He went on to the University of California at Berkeley, but dropped out to pursue social activism. He co-founded the Youth International Party, whose members became known as Yippies. The Yippies sought to promote their radical agenda by turning their political protests into theatrical spectacles that would be covered by the media.

To digress forward in time for a moment, it is interesting to note that Kunstler continued to represent controversial clients throughout the remainder of his career. However, Rubin, ever the opportunist, embraced capitalism not long after his radical days, first as a stockbroker and then as a successful entrepreneur. He might have become an industry titan had he not been killed by an oncoming car while jaywalking across a Los Angeles freeway.

Getting back to the story, why were these two radical chic celebrities speaking at the University of Virginia—of all places—a mere two days after the Kent State killings? It seems implausible that they would choose a relatively conservative campus to shout their first public expressions of outrage after the Ohio tragedies. The fact is: it was a fluke of fate. Kunstler was going to be in town anyway. Months earlier, he had been engaged to speak at UVA to help raise funds for a new organization called the Virginia Progressive Party. But the course of events was to transform what would have been a low-key lecture before a sparse audience into a major anti-war address before a large crowd. And Jerry Rubin came along for the ride. The speech organizers had booked a classroom for the event. They now needed a basketball arena to accommodate the massive audience.

Inside the arena, Kunstler sported his signature look with his reading glasses perched like a tiara on top of his head. The affectation prevented his long mane from falling onto his face. He wore a jacket and tie. Rubin was totally disheveled with shaggy hair, straggly beard and wild eyes. He wore baggy Vietnamese pajamas. They both called for students to shut down the University to help force the Nixon

administration to end the Vietnam war. They said students had to liberate the places in which they had the power—campuses, starting with University President Edgar Shannon’s house. Kunstler was charismatic, whipping the crowd into a frenzy. Rubin, on the other hand, gradually lost most of his audience as he supplemented his anti-war message with an anarchistic attack on practically every American institution and tradition, including democracy, capitalism, religion and even the family. He ranted for more than an hour until someone killed the arena lights and the crowd exited in darkness.

Later that night, protesters incited by Kunstler stormed, but ultimately did not liberate, the President’s house and re-occupied the ROTC building.

The morning of May 8—two days after the Kunstler and Rubin speeches--began ominously for me. As I was driving by the basketball arena, I saw a sea of Virginia State Police cars in the large parking lot surrounding the building. It seemed that the University and/or local police had invited the State Police to contain the student protests, and the invitation had been accepted enthusiastically.

That night, I was hanging around my apartment with three other guys, when I received a telephone call from a fellow Legal Marshal. He urged me to get down to an area in the heart of the campus where a phalanx of State Police had charged protesting University students and made some arrests.

The four of us quickly proceeded to a main street about 200 yards from Thomas Jefferson’s Rotunda. Oddly, the street was empty and eerily quiet. In front of the Rotunda, we saw a few police officers and a couple of police cars with lights flashing parked next to a very large Mayflower moving van. To get a closer look, I left my three friends and moved forward about 50 yards to a spot near two young men whom I did not know or recognize.

Suddenly, three police officers started running in my direction. The two strangers began running away and two of the officers raced by me in hot pursuit. As I turned my head back from watching the two of them sprint away, I was confronted by the third officer--a large State Policeman who declared to

me, “You’re under arrest.” To which I replied as he hauled me by the arm toward the moving van: “For what?” “Unlawful assembly.” To which I replied to deaf ears: “Unlawful assembly? Since when is assembly unlawful? Besides, who was I assembling with?” I thought about asking him, “Haven’t you read my Law Review article on police misconduct?,” but decided that probably was not a good idea. He would have responded—as had Officer Obie to Arlo Guthrie--“Shut up, kid.”

Once we reached the Mayflower van, a photographer took a Polaroid of me with my arresting officer and I was escorted into the van, which was much more spacious than the police car Arlo had been pushed into. There, to my astonishment, were dozens of detainees, and for the next several hours we shared the stories of our arrests as the police outside corralled additional unfortunates to join us.

Here is what I learned from my fellow Mayflower prisoners. Early that evening, a group of student protesters tied up traffic at a main intersection on campus by flashing “Honk for Peace” placards to oncoming drivers. They also threw white frisbees in front of cars to make them slow down and honk. As the traffic thickened, scores of State Police appeared on the scene in full riot gear. Some official then literally read the Riot Act on a bullhorn, ordering the crowd to disperse. However, the order was inaudible and understood by no one, so the protesters stayed where they were. Shortly thereafter, the police charged, wearing helmets and visors, waving billy clubs and shields and leading dogs on leashes. The students ran and the police followed. Pandemonium ensued but it all ended very quickly. The police arrested everybody they could apprehend and marched them into the Mayflower van.

Those in the van included many of the protesters, as well as several Legal Marshals who were arrested while trying to broker calm between the police and protesters. Our new club also included many innocent bystanders. In addition to myself, there were: a father visiting his student son; a young couple in tuxedo and evening dress arrested as they were returning from a faculty cocktail party; the assistant director of University buildings and grounds who ventured out of his house to see what the

commotion was about; a young man in a pizza restaurant uniform who was arrested as he attempted a delivery at President Shannon's house across the street; a fellow Law student who disapproved of campus protests and reportedly told his arresting officer, "You can't arrest me, I approve of what you're doing;" and a number of guys who were dragged out of their fraternity houses where they had been enjoying Friday night beers. All in all, 68 people wound up in the van. In case you are wondering, the pizza had been devoured by other Mayflower inmates before my arrival.

Finally, in the very early morning of May 9, 1970, the moving van's engine was cranked up and the Voyage of the Mayflower began. We chugged along from the Rotunda to the Charlottesville police station on the other side of town. When we arrived, everyone was processed in a courtroom one-by-one and released on bail. Everyone, that is, except for me and eight others who were jailed for the rest of the night in that single cell with a toilet in the middle. Our toilet, like Arlo Guthrie's, was lidless but I don't think the lid had been removed just for this occasion to guard against prisoner suicides.

At the beginning of the next day, I and the other jailbirds were finally processed and released. I learned I had not been processed the night before because my arresting officer could not identify me from the Polaroid photo, in which I was shown wearing a plaid lumberjack shirt that I had removed in the court room.

I was given a copy of my arrest warrant, which ordered me to appear at the Charlottesville Police Court nine days later, although that date was later delayed indefinitely. It was signed by one J. F. Drexler, Jr., Virginia State Trooper, AKA, at least to me, Officer Obie. The warrant asserted that Robert Wyrick Olson, on the 9th day of May, 1970, "a number of persons being unlawfully or riotously assembled, the Sheriff of the County and his deputies and the Police officers of the City having gone among the persons assembled, and commanded them in the name of the State to disperse, did fail to disperse, in violation of the laws of the Commonwealth of Virginia." I later learned that I had been

charged under the recently enacted Virginia Riot Control Act, which allowed police to arrest persons in a group of more than two who continued to congregate following an order to disperse. So it was my movement down the street toward those two strangers that had spurred my arresting officer into action.

I was given a ride back to the Law School building, where a number of classmates were gathered on the front steps. They expectantly awaited what I had to say about my ordeal, but as I opened my mouth a bird dropped a large load of unpleasantness that splattered all over my lips. A fitting ending to a surreal experience.

Over the next few days, things calmed down and the University returned to normal, especially after President Shannon told a large crowd that he opposed continuation of the War in Vietnam and shared a letter he had sent criticizing governmental attacks on universities, students and the free press. In retrospect, I find it amazing that despite everything that had happened, not a single protester was killed or even injured during this period of intense unrest. Many were wrongfully arrested for sure, but violence did not occur apparently because protesters did not resist arrest but also because the police exercised restraint in carrying out their perceived duties.

Because of the disruptions of normal academic classes and studies, the Law School allowed graduating third-year students to take final exams at home and on a pass-fail basis. A relief for me because I had done barely enough studying to pass anything.

However, graduation didn't end the story for me. The charges brought against me under the Riot Control Act were still pending as I went off to New York City to start work.

Subpart 3. The Arrest Has Consequences

As noted, I initially thought my lottery number of 270 would probably keep me out of the draft, but by July 1970, the birth dates selected by the Selective Service had exceeded 200.

Then, something unexpected happened. I received a letter informing me that my application to join the New Jersey National Guard, filed two years previously, had been accepted. I of course preferred joining the National Guard to being drafted into the Army, but what if my draft number was high enough to get me through the rest of the year without being drafted? The managing partner of my new law firm consulted the head of the Selective Service System in Washington about my chances. His advice was: "Tell him to join the Guard. He's gonna be drafted."

So off I went to the National Guard office in Westfield, NJ, where I passed the written test, signed the enlistment contract in triplicate, and, with a group of other recruits, took the oath of loyalty and the traditional step forward. The Captain congratulated us and gave us our assignments. As a recent law school graduate, I expected some kind of desk job, but I was to be a jeep driver. Then I was sent to the Sergeant downstairs to answer some routine questions. I remember the question immediately after "Are you homosexual?" was "Have you ever been arrested?" I answered, "Yes." The Sergeant then asked, "What were the circumstances?" I said, "Uhh, it happened during a period of, uhh, campus unrest following the Kent State shootings." He said, "You're going to have to see the Captain. We don't much like your kind around here." Sound familiar, Arlo? Back upstairs, the Captain very politely said that the Guard couldn't accept me while a criminal action was pending. They would have to give me an "erroneous discharge." I never did understand what that term meant. Perhaps it was shorthand for "discharge due to erroneous induction," or something like that. Anyway, the Captain said to come back when I got the matter cleared up. So here we have another parallel with Alice's Restaurant. Arlo

Guthrie was rejected by the military because of a conviction for littering following a garbage run. I was rejected because of a charge of loitering following an order to disperse.

A couple of weeks later, another completely unexpected thing happened. President Nixon announced that there would be no further drafts through the end of 1970. They were stopping at lottery number 215. They would never get to my number of 270. Oh my! Good news, but what about the papers I had signed with the National Guard, the oath and all that. All the legal indicia of induction into the military were there. I now was confronted with my first real legal question of consequence. Was I in the military or not?

I decided I couldn't live with the uncertainty and called the Captain, saying "Remember me? The lawyer with the arrest record?" He says, "Yeah, I remember you." I say, "I've, uhh, decided not to join the National Guard after all." The Captain says, "OK." I say: "But what about all those contracts I signed?" He says: "We'll just disregard them."

And with that my tale ends, except to note three post-scripts. The first is that near the end of 1970 the criminal charges against me and the other 67 Mayflower Voyagers were dropped. The second is that in early 1971 the Virginia Supreme Court ruled that the Virginia Riot Control Act I was arrested under was on its face an unconstitutional restraint on the First Amendment right of assembly. And the third is that, just this year, the February issue of Virginia Magazine contained an article about a number of UVa graduates who married each other. In one of the entries, a couple married for 47 years recalls: "We were the first two students arrested at the 1970 Vietnam protest and were held in a Mayflower moving van until charged and released pending trial." The title of the article? "How We Met."

Part IV. Epilogue. Arlo and Me

At the end of the day, what did the stories of Arlo Guthrie and Bob Olson have in common? Most obviously, our failure to qualify for military service was more accidental than intentional. Arlo

tried and failed to flunk his draft physical by getting drunk the night before and feigning psychotic tendencies. I tried and failed to join the Navy and the National Guard as an alternative to being drafted. But ultimately our deliberate efforts were not a factor. We each by happenstance achieved what thousands of American young men in the 1960's and 1970's tried their hardest to do but couldn't—avoid the draft. Arlo Guthrie and I each did so by stumbling cluelessly into that outcome. The Army didn't want Arlo because he had been committed the morally deviant crime of littering. The Navy didn't want me because had I failed a written test I was told wasn't a test and the National Guard didn't want me because I had been arrested for riotous activity that was not riotous. Lewis Carroll and the Mad Hatter would have found all this entirely logical. I remember our respective stories as two gloriously absurd series of events. Each was, in Arlo's words, a massacree.