

Tulsa Law Review

Volume 40

Number 4 *The Scholarship of Lawrence M.
Friedman*

Volume 40 | Number 4

Summer 2005

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Recommended Citation

John T. Parry, *Progress and Justification in American Criminal Law*, 40 Tulsa L. Rev. 639 (2013).

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PROGRESS AND JUSTIFICATION IN AMERICAN CRIMINAL LAW

John T. Parry*

I am delighted and honored to join this celebration of the work of one of our most eminent legal historians, Lawrence Friedman. My contribution begins by considering aspects of Friedman's criminal law scholarship, with particular attention to his massive and magisterial *Crime and Punishment in American History* ("*Crime and Punishment*").¹ I want to say a little bit at a very general level about Friedman's achievement in *Crime and Punishment* and some of his other writings on criminal law before developing more pointed observations that grew out of, and were inspired by, my readings of his work. At times, my essay takes a highly speculative, perhaps even polemical tone. I hope readers will agree with me that one of the sincerest ways to honor a scholar's work is not simply to describe or celebrate it but rather to use and engage with it.

I. NARRATING THE HISTORY OF CRIME AND PUNISHMENT

Friedman's focus in his writings on crime is emphatically not on criminal law in its past or contemporary doctrinal intricacy, although he explores that intricacy at many points. Nor does he concentrate on the history of doctrine and the ways litigants, lawyers, and judges manipulate it, although he pays attention to all that.² Rather, he presents a social history of criminal justice policies and practices in the United States and shows particular concern for interpreting crime rates in the United States—especially rates of violent crime—and the societal and governmental responses to those rates. The results are consistently both sweeping and detailed—a broad perspective grounded in a complex array of facts. He also pays serious attention to comparative material,

* Visiting Professor, Lewis & Clark Law School; Associate Professor, University of Pittsburgh School of Law. Thanks to Paul Finkelman for inviting me to participate in this symposium. I am grateful for the questions and comments of other participants, in particular Lawrence Friedman, Pnina Lahav, and Jason Mazzone; for the thoughts and comments of Vivian Curran, Seth Kreimer, Marty Lederman, Erik Luna, Ruth Miller, and Sean O'Connor; and for the financial assistance of a Dean's Summer Scholarship Grant from the University of Pittsburgh School of Law.

1. Lawrence M. Friedman, *Crime and Punishment in American History* (Basic Bks. 1993).

2. See e.g. Lawrence M. Friedman, *Taking Law and Society Seriously*, 74 Chi.-Kent L. Rev. 529, 529 (1999) (arguing "law is a political, economic, and cultural subsystem, which varies with, and is determined by, the surrounding society," with the result that legal argument has little social importance); Friedman, *supra* n. 1, at 447 ("[T]he criminal justice system cannot compete with the culture, cannot go against the grain. In the battle of norms and goals, it is distinctly marginal; more than a spear-carrier, but very much less than a star."); see also *infra* n. 43.

particularly on comparative crime rates—material that tends to show the United States in a negative, or at least not admirable, light.³

Friedman's scholarship is provocative in the best sense of the word. From the law and society and social history perspectives, he challenges lawyers to think outside of doctrine and consider other forces that may have a more powerful impact on criminal law and practice. Similarly, he challenges policymakers to think outside of partisan politics and easy targets. More generally, he challenges readers from all perspectives to think about history not as a source of consensus truths or easy lessons, but as a more complex and fluid source of information, instruction, and concern.

One of the most admirable aspects of Friedman's immense body of work is that he does not practice what I call "this I believe" scholarship—that is, the statement of a vision (sometimes called a theory) about what law or society ought to look like with no concern for what legal and social conditions actually are (except to note that they do not measure up) and with no remotely plausible way of achieving the desired goal beyond simply the assertion that right-thinking people ought to share the vision. I do not mean to say that there are no politics in Friedman's work. He clearly cares about the political implications of his work. Neither can the fact that Friedman does history explain his aversion to the "this I believe" school. Many historians spend their careers spinning utopic or dystopic fantasies about the past and its relation to the present. What makes Friedman's work different is that he is grounded in his examination of social conditions, in something that we might want to call "reality" or facts (perhaps not even with quotation marks). And rather than provide reassuring or alarming tales, he leaves us with as many questions as answers, because, I suspect, he knows full well that framing and exploring the questions and recognizing nuance—not simply puffing out answers—is more often the serious work of the scholar.⁴

In that spirit, I want to explore some questions that arose from my reading of Friedman's work on criminal law. In particular, I would like to engage with him on two issues—one implicit in his work and the other far more explicit. The first is the idea of justification, and what it means for a rational, liberal, and progressive conception of

3. Lawrence M. Friedman, *American Law in the Twentieth Century* 205 (Yale U. Press 2002) [hereinafter Friedman, *Twentieth Century*]; Lawrence M. Friedman, *Some Remarks on Crime, Violence, History, and Culture*, 69 U. Colo. L. Rev. 1121, 1122-23 (1998) [hereinafter Friedman, *Some Remarks*]; Lawrence M. Friedman, *Dead Hands: Past and Present in Criminal Justice Policy*, 27 Cumb. L. Rev. 903, 916-17, 920 (1997) [hereinafter Friedman, *Dead Hands*]; Lawrence M. Friedman & George Fisher, *Some Thoughts About Crime and Punishment*, in *The Crime Conundrum: Essays on Criminal Justice* 1-2, 10 (Lawrence M. Friedman & George Fisher eds., Westview Press 1997) [hereinafter *The Crime Conundrum*]; Friedman, *supra* n. 1, at 451. I wonder, however, whether the stark contrast between a violent United States and other, more peaceful, developed countries can be overstated. Japan, for example, may not have the same murder rates as the United States, but it is hardly free of pervasive, organized, violent crime as well as systematic state coercion and violence. See Kenneth Szymkowiak & Patricia G. Steinhoff, *Wrapping Up in Something Long: Intimidation and Violence by Right-Wing Groups in Postwar Japan*, 7 *Terrorism & Political Violence* 265 (1995); Jeff Vize, *Torture, Forced Confessions, and Inhuman Punishments: Human Rights Abuses in the Japanese Penal System*, 20 *UCLA P. Basin L.J.* 329 (2003); see also John J. Donahue, *Some Perspectives on Crime and Criminal Justice Policy*, in *The Crime Conundrum*, *supra*, at 45, 46 (noting European property crime rates are "as high as or higher than those in the United States"). For more discussion of United States crime rates, see *infra* nn. 86-87 and accompanying text.

4. On a somewhat similar theme, see Jim Huffman's contribution to this symposium, James L. Huffman, *From Legal History to Legal Theory: Or Is It the Other Way Around?* 40 *Tulsa L. Rev.* 519 (2005).

criminal law and criminal justice. The second—and one with which Friedman openly wrestles—is the idea of progress itself. My discussion of justification will touch on two areas: provocation and the law of torture. I want to suggest not only that justification arguments pull against and undermine the ideal of a rational and progressive criminal law, but also that the resulting mess is something we must accept and that we should consider celebrating rather than bemoaning. As for progress, my concern is to bring out the anxiety produced by the tension between liberalism and concrete progress in the area of criminal justice, to consider the relationship between progress and authoritarian government, and to question the very ideal of progress in criminal law and in law generally.

II. SOME PROBLEMS WITH PROGRESS

The idea of progress is, of course, a problematic concept in American history. Progress is something we associate with enlightenment and modernity, and modernity has not been in fashion for quite some time in academia even as it retains its hold on a United States political discourse that dreams of bringing democracy and free markets to all sectors of our own society and everyone else's too.⁵ And apart from one's stance toward modernity, it remains the case that calling something "Whig history" is generally perceived by historians as fighting words. For his part, Friedman has been a critic of progress narratives. In *Crime and Punishment*, for example, he insists that the book is not a story of "progress" or "celebrat[ion]."⁶ Yet at the same time, he cannot help but note approvingly the changes that have taken place in the United States, particularly on issues relating to race and gender,⁷ and to decry the "backlash" against some of these changes.⁸ With more subtlety, the entire structure of the book seems aimed at forcing serious consideration by scholars and policymakers of the social history and sociology of crime and our responses to it, with the express goal of doing better, of achieving reform—which is a smaller, less utopian way of talking about progress.⁹

5. See e.g. Michel Foucault, *Discipline and Punish: The Birth of the Prison* 160 (Alan Sheridan trans., Pantheon Bks. 1977) (arguing "the progress of societies" was a discovery of the eighteenth century); Carl Schmitt, *The Concept of the Political* 73 (George Schwab trans., U. Chi. Press 1996) ("The enlightened eighteenth century believed in a clear and simple upward line of human progress. . . . The line moved between two points: from religious fanaticism to intellectual liberty, from dogma to criticism, from superstition to enlightenment, from darkness to light."); Sheldon S. Wolin, *Archaism, Modernity, and Democracy in America*, in *The Presence of the Past: Essays on the State and the Constitution* 66, 69-70 (Johns Hopkins Press 1989) [hereinafter *The Presence of the Past*] (describing postmodern skepticism about the claims of modernity).

6. Friedman, *supra* n. 1, at 12, 14.

7. See *id.* at 13 (noting "the culture of individualism . . . worked a revolution in the law of groups, races, and classes" that was "probably for the good"); *id.* at 14 (arguing changes in criminal justice have left us "considerably better off; but at a rather stiff price"); *id.* at 434 (noting the increased voice of women on criminal justice issues); see also Friedman, *Dead Hands*, *supra* n. 3, at 924 (noting "society is better today, more humane, more caring than it ever was in the nineteenth century; or the first part of this century"); Friedman & Fisher, *supra* n. 3, at 6 ("There is progress [on police violence], but it seems awfully slow."); *id.* at 16 (counseling those concerned with criminal justice polices to "be patient with the pace [of change]. Progress will be slow, and we must take heart at small successes.").

8. Friedman, *supra* n. 1, at 305, 404; see also *id.* at 319 (regretting that the contemporary prospects for abolishing or reducing the death penalty are "fairly bleak").

9. See *id.* at 356 (arguing the "war on drugs" has been an "[exercise] in futility" that ignores "sane voices" advocating "a more rational course of action"); see also Friedman & Fisher, *supra* n. 3, at 4:

There are good reasons to be suspicious of the kinds of things we often call “progress.” To believe in and work for progress, after all, we first have to define it, which almost always requires defining it against something else, and then we have to chart a path toward achieving it. By that point, we are already deep in problems.

Consider the following example. In early August of 2004, the *New York Times* ran a column by Nicholas D. Kristof with the provocative title, “Martyrs, Virgins and Grapes.”¹⁰ Kristof begins the column by relating that Muslims believe their martyrs will be received in paradise by a multitude of virgins, and he links this incentive to the September 11th attacks. But then Kristof reveals that “a growing body of rigorous scholarship” is challenging this kind of idea and charting a path “toward a reawakening of the Islamic world.”¹¹

To make a long story short, it turns out that Muslims do not know what the Koran really means, primarily because their interpretations are “frozen in the model of classical commentaries written nearly two centuries after the prophet’s death.”¹² Luckily for Muslims, some scholars are employing western research methods to reveal the true meaning of the Koran, and it turns out that all of the things we in the West do not like about Islam—a virgin-filled paradise for terrorist martyrs and the veil, for example—are simply misinterpretations. “Encouraging signs” exist of an “intellectual awakening” that will allow “the Islamic world to get on its feet again.”¹³

Kristof is spinning a story of progress. He claims good intentions: he does not want Muslim kids to be tempted to engage in suicide terrorism by the lure of virgins in paradise, he wants greater gender equality in the Muslim world, and he believes in free speech and debate on religious, scientific, and political topics. But look at how he does it. Western hermeneutics, which are more rigorous than archaic Muslim theological studies, will inscribe correct and liberating understandings of the Koran on a supine Islamic world. As a result, the Islamic world will open itself to forward-looking, western, liberal ideas, and will eventually get back “on its feet.”

Whatever voices of reason are likely to be heard will have to come from outside politics. Scholars who study the problem can provide these voices, as can professionals in criminal justice. Working together, academics and professionals must try to persuade a weary public and its wary representatives that marginal increases in deterrent power come at a very high price.

For what it is worth, although I am as likely as any law professor to propose doctrinal reforms, I suspect I am less interested in reform for the sake of progress in the sense that I use the word in this paper. Further, I see no reason why advocating or achieving progress should be a significant goal for legal academics. *See infra* n. 37.

10. Nicholas D. Kristof, *Martyrs, Virgins and Grapes*, 153 N.Y. Times A17 (Aug. 4, 2004).

11. *Id.*

12. *Id.*

13. *Id.* For a more sophisticated and nuanced but similar set of claims, see Max Rodenbeck, *Islam Confronts Its Demons*, 51 N.Y. Rev. of Bks. 14 (Apr. 29, 2004).

Contemporary scholars call this kind of thinking Orientalism.¹⁴ Kristof has a vision of a progressive western world that will act upon and change—civilize—an exotic, static, and emphatically not modern Muslim world. There is a clear line here from Rudyard Kipling to Kristof.¹⁵ More pointedly, it is this exotic, weirdly sexualized world (in which important decisions turn on the availability of virgins in paradise¹⁶), and not the modern, liberal and rational West, that produces terrorism and thus stands (or, rather, reclines) in need of progress. And, of course, this image helps “us” define ourselves—that is, we create ourselves from the contrast we draw between the free, forward-looking, and well-intentioned West and the backward-looking, terrorist-producing, repressed, and repressive Muslim world.¹⁷

A few more examples should confirm the complexity of the progress ideal. The first is the idea of toleration, which Friedman has commented on in his own work. Toleration is a goal and to some extent a characteristic of liberal, pluralist democracy. Michael Walzer, for example, argues that toleration makes peaceful coexistence—which he defines as a basic moral good—possible. Further, Walzer claims, “Toleration makes difference possible; difference makes toleration necessary.”¹⁸

14. Or more properly, defining and positioning the Orient as “in need of corrective study by the West” is a key aspect of Orientalism. See Edward W. Said, *Orientalism* 41 (Pantheon Bks. 1978); see also *id.* at 12, 86, 298 (providing more general descriptions of Orientalism). Also worth noting is Said’s famous critique of Bernard Lewis, in which he attributed to Lewis and to Orientalism as a discourse the idea that “Islam does not develop, and neither do Muslims; they merely are, and they are to be watched.” *Id.* at 317. In fact, of course, Islam and “the Muslim world” are not monolithic, and the forces of modernity operate in and on them as they do everywhere. See Mahmood Mamdani, *Good Muslim, Bad Muslim: A Political Perspective on Culture and Terrorism*, 104 *Am. Anthropologist* 766, 772 (2002) (“Contemporary ‘fundamentalism’ is a modern political project, not a traditional cultural leftover.”); Madhavi Sunder, *Piercing the Veil*, 112 *Yale L.J.* 1399 (2003) (focusing on activists in Muslim communities to describe a complex mix of religious and secular arguments for certain human rights); *infra* nn. 24-27 and accompanying text (discussing human rights discourse); see also Lawrence M. Friedman, *The Republic of Choice* 206 (Harv. U. Press 1990) (arguing fundamentalism and nationalism “are, in a real sense, deep passions that modernity makes possible, even though nationalists or fundamentalists reject modernity or limit its effects”); Rodenbeck, *supra* n. 13 (describing various movements and schools of thought that pull in different directions within Islam even as he claims the power to define “authentic Muslim modernists” as a category limited to those who are skeptics of “the whole Islamic tradition”). In this context, Kristof’s reference to the veil is particularly revealing. See Leila Ahmed, *The Discourse of the Veil*, in *Women and Gender in Islam: Historical Roots of a Modern Debate* 144, 165-68 (Yale U. Press 1992).

15. See Rudyard Kipling, *The White Man’s Burden* (1899), available at <http://www.online-literature.com/kipling/922/> (accessed Oct. 7, 2005). For another recent Kiplingesque argument, see Norman Podhoretz, *World War IV: How It Started, What It Means, and Why We Have to Win*, *Commentary* 17, 47 (Sept. 2004) (urging “a benevolent transformation of the Middle East” by the United States that would include “the reform and modernization of Islam”).

16. One wonders how Kristof would describe the motives of the many suicide bombers who are both Muslim and female. For a more useful discussion of suicide terrorism, see Elena A. Baylis, *The Inevitable Impunity of Suicide Terrorists*, in *Evil, Law, and the State: Perspectives on State Power and Violence* 111 (John T. Parry ed., forthcoming 2005) [hereinafter *Evil, Law, and the State*].

17. For a more sustained but similar analysis that focuses on the status of Arab-Americans after September 11th, see Leti Volpp, *The Citizen and the Terrorist*, 49 *UCLA L. Rev.* 1575 (2002). For a similar reading and comparison in the context of late Victorian representations of Europe and Asia, see Andrea Hibbard, *Monumental Decadence: The Great Exhibition and the Albert Memorial*, 7 *Australasian Victorian Stud. J.* 26, 32-33 (2001). For a discussion of the American South as the subject of a kind of Orientalism, see *infra* n. 36.

18. Michael Walzer, *On Toleration* xii (Yale U. Press 1997). For a somewhat different definition of toleration as a necessary way to harmonize “value-pluralism” and individual autonomy, see Joseph Raz, *The Morality of Freedom* 401-07 (Clarendon Press 1986).

Yet Walzer surely could have pushed the point further. Toleration does not only make space for difference; it defines it. The act of tolerating entails defining difference and defining groups: we are the people who believe X, we are different from the people who believe Y. Moreover, toleration is usually part of a power dynamic. Even as it defines difference, it also defines hierarchy. Tolerating is a way of acting on another group, of expressing domination and control: we are strong enough or secure enough to tolerate you. Indeed, toleration may work best when a dominant group sets the terms, which, of course, include preventing the dominated group from having enough space to challenge the dominant.¹⁹ As Friedman puts it, “toleration meant allowing. . . . It was always clear in the United States which norms were dominant, which culture defined the true nation, which people actually owned the house of America, and which people were the tolerated guests.”²⁰ Thus, toleration clearly has positive effects, but its overall impact is complicated. Progress toward an ideal of toleration (whatever the specific content of that ideal, because there are always limits to how much we tolerate) is also an insistence on the power to define the differences that get tolerated, the limits of toleration, and, by extension, the continued and now legitimated punishments for the things we do not tolerate.²¹

The welfare state provides another example. For many of us, the creation—or partial creation in the United States—of a welfare system, with its various safety nets relating to jobs, health, children, aging, etc., is a form of real progress, a triumph of humanitarian impulses. People are better off; they suffer less; there is less misery in the world. But welfare systems also reflect technocracy—the development and deployment of knowledge through rational, bureaucratic structures to achieve policy goals that are visible to the extent they manage or change the lives of persons.²² And, as Sheldon

19. Walzer goes some way toward this point, as when he notes that “[i]n ordinary speech, it is often said that toleration is always a relationship of inequality where the tolerated groups or individuals are cast in an inferior position.” Walzer, *supra* n. 18, at 52. He goes on to admit that toleration “[s]ometimes . . . works best when relations of political superiority and inferiority are clearly marked and commonly recognized.” *Id.*; see also *id.* at xi (“As an American Jew, I grew up thinking of myself as an object of toleration.”). Consider, as an example of this dynamic, John Rawls’s idea of “reasonable pluralism,” which he defined in opposition to “the fact of pluralism as such.” John Rawls, *Political Liberalism* 36 (Columbia U. Press 1993). That is, reasonable pluralism comprises “the doctrines that reasonable citizens affirm . . . not simply the upshot of self- and class interests, or of peoples’ understandable tendency to view the political world from a limited standpoint.” *Id.* at 36-37. Rawls—whose efforts to bring liberal theory to a culminating point exemplify the modern commitment to progress—advocated toleration of doctrines that meet the definition of reasonable pluralism, but he seems to have excluded any commitment that would use political power to insist on and impose its views and thereby challenge the political and social structure upon which he insisted. For Rawls, therefore, toleration applied to those who first accepted the dominance of reasonable pluralism. See *id.* at 60-62. For a more sympathetic and nuanced discussion of reasonable pluralism and public reason in Rawls’s thought, see Samuel Freeman, *Public Reason and Political Justifications*, 72 *Fordham L. Rev.* 2021 (2004).

20. Lawrence M. Friedman, *The Shattered Mirror: Identity, Authority, and Law*, 58 *Wash. & Lee L. Rev.* 23, 28 (2001).

21. And, of course, toleration is also vulnerable to criticism from the other direction—that it risks fostering relativism at the expense of essential cultural values that need to be preserved. See Stephen D. Smith, *Toleration and Liberal Commitments*, <http://law.bepress.com/cgi/viewcontent.cgi?article=1003&context=sandiegolwps> (Mar. 1, 2004) (associating this view with what he calls “illiberalism” while also arguing that “ultra-liberalism”—which seeks to treat all beliefs as equal—is untenable).

22. See Sheldon S. Wolin, *Democracy and the Welfare State: The Political and Theoretical Connection Between Staatsräson and Wohlfahrtsstaatsräson*, in *The Presence of the Past*, *supra* n. 5, at 151, 171-73. For a classic articulation of bureaucracy and its perils, see *From Max Weber: Essays in Sociology* 196-244 (H.H. Gerth & C. Wright Mills eds., Oxford U. Press 1946). For a powerful criticism of the legal doctrines that

Wolin has argued, the United States welfare system has increased the power of the government over—and, indeed, helps to define—marginal groups who “are kept suspended between hope and despair but not plunged into desperation.”²³ The progress of the welfare state, then, puts people under the control of a state that is capricious and rational at the same time, a result which few would describe as unqualifiedly good.

Finally, consider international human rights, which are in some sense the ultimate symbol of rational, western, progressive ideals. But to the extent human rights discourse defines human rights as a western achievement (even if described in universal terms) to be imposed on countries assumed to have no awareness or practice of rights, advocacy of international human rights is also a colonial and imperial project. Further, to the extent that acceptance of western human rights discourse is a price of (junior) membership in the western club, it is an imposition—again, a new and improved version of colonialism. Even the expansion of human rights norms into the economic realm risks reinforcing and legitimizing western economic power by accepting it as the baseline against which rights will operate.

I want to make clear that I am not trying to make a cultural relativism argument. Human rights norms already exist in non-western countries, where they are part and parcel of modernity and the politics of nation-states, just as in the West.²⁴ For that

support bureaucracy, see Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 Harv. L. Rev. 1276 (1984); see also Lawrence M. Friedman, *On Legal Development*, 24 Rutgers L. Rev. 11, 34 (1970) (noting the conflicts within bureaucracies between different rationalities). As this paper focuses on criminal law and criminal justice, it is worth noting that the prison system can be included in the list of institutions that comprise the welfare state in the sense that I have described it, but that linkage is less apparent today—although, of course, prisons still share the goal of managing and controlling persons and remain vulnerable to the criticism of welfare institutions that I advance here. See generally David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (U. Chi. Press 2001) [hereinafter Garland, *Culture of Control*]; see also Friedman, *supra* n. 14, at 146 (noting the link between the rise of disciplinary punishments and efforts to rationalize criminal justice); Garland, *Culture of Control*, *supra*, at 34 (describing as “high modernism” the “ideology that believes social problems are best managed by specialist bureaucracies that are directed by the state, informed by experts, and rationally directed towards particular tasks”); David Garland, *Penal Modernism and Postmodernism*, in *Punishment and Social Control* 181, 186-89 (Thomas C. Blomberg & Stanley Cohen eds., Aldine de Gruyter 1995) (describing “penal modernism”); Jonathan Simon, *Poor Discipline: Parole and the Social Control of the Underclass, 1890-1990* (U. Chi. Press 1993) (discussing in the context of parole the waning of modern ideas of punishment in favor of what the author describes as postmodern techniques of control). For more discussion of punishment issues, see *infra* nn. 85-114 and accompanying text.

23. Wolin, *supra* n. 22, at 161. Wolin asks, “[W]hat are the political implications of humanitarianism, of classifying citizens as needy and of making them needful objects of state power?” *Id.* at 154. See also Friedman, *Twentieth Century*, *supra* n. 3, at 536-38 (describing how welfare reform inscribes definitions of welfare recipients and cements their status as marginalized). For a more traditional analysis of the welfare state’s failings in the United Kingdom and United States, see Garland, *Culture of Control*, *supra* n. 22, at 92-94. For a discussion of criticisms of the correctional system that dovetail with Wolin’s criticism of the welfare state, see *id.* at 55-57 (discussing the American Friends Service Committee’s 1971 report, *Struggle for Justice*). My criticism is not intended as advocacy of privatization or as an expression of faith in market forces. Indeed, to the extent markets are dominated by large corporations, the problem of bureaucracy remains—see Frug, *supra* n. 22—hardly surprising given that bureaucracy reflects the ideals of modern society, not just those of the set of formal institutions we characterize as governmental.

24. For a discussion that highlights some of the ways in which people in countries seen as static, traditional, and non-western are in fact part of modern societies within which they advance human rights norms drawn from a variety of sources as part of a complex set of political rhetorics, see Sunder, *supra* n. 14. Where I differ from Sunder is, first, in her insistence that the state and religious institutions occupy separate spheres. While liberal theory seems to posit that religion and state are separate, religion is a central and always present—even if, or perhaps because, contested—component of the modern nation state. I also question Sunder’s decision to embed her analysis within a rhetoric of progress toward unquestioned and somehow post-liberal ideals of

matter, human rights norms often function in the West as much or more as a rhetorical device than as an effective constraint on behavior—as domestic police violence and the recent torture controversies underscore.²⁵ Thus, it is sometimes difficult to identify the countries in which these norms have the most practical effect.²⁶ Finally, it is worth considering why the international human rights community wants to bind all nations to a universal code—perhaps with good intentions, but perhaps also from a desire to rationalize and control (shades of Kipling again, on both counts).²⁷ I am not claiming

individualism and democracy—even though these ideals are themselves components of the liberal project and in that sense are also techniques of social control.

25. For discussion of torture by Japan, see Vize, *supra* n. 3. For discussion of torture by Britain, France, Israel, and the United States, see *infra* nn. 65-79 and accompanying text. For discussion of police violence in the United States, see John T. Parry, *Judicial Restraints on Illegal State Violence: Israel and the United States*, 35 Vand. J. Transnatl. L. 73 (2002) [hereinafter Parry, *Judicial Restraints*], and sources cited therein. Against the reality of widespread coercive interrogation in the United States and by United States personnel, consider our rhetoric against torture. I do not mean merely claims by administration officials that the United States does not use torture or that the United States opposes torture. See John T. Parry, *Escalation and Necessity: Defining Torture at Home and Abroad*, in *Torture: A Collection* 145, 145-46 (Sanford Levinson ed., Oxford U. Press 2004) [hereinafter Parry, *Escalation and Necessity*]. The United States has also publicly ratified the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (“Convention”). As if to underscore the rhetorical nature of this act, however, when the Senate gave its consent to the Convention, it did what it usually has done in recent years with human rights treaties: it included a declaration that the Convention is not self-executing (which means it cannot be the source of legal rights without implementing legislation) and that in any event the rights described in the Convention go no further than the rights already established by the Constitution. See 136 Cong. Rec. 36192-36193 (1990) (pts. I(2), III(1)). As a result, the Convention is law but not-law, and to the extent it is law, it is defined as redundant (again as a kind of not-law or at least as needless law). Treating the Convention this way furthers nationalist goals by celebrating the Constitution as already giving us the rights that international law is only now establishing and by discrediting international law as unnecessary. For a convincing defense of the constitutionality of this practice, see Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. 399 (2000). For a description and analysis of the U.N.’s response, see Elena A. Baylis, *General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties*, 17 Berkeley J. Intl. L. 277 (1999). For an overview of issues relating to self-execution, see Carlos M. Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Intl. L. 695 (1995). Worth noting as well is a pair of statements in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), that seem to indicate the Supreme Court’s acceptance of non-self-execution declarations. First, the Court observed that “the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing.” *Id.* at 2763 (citation omitted). That declaration, in turn, supported the Court’s self-consciously cautious stance toward recognizing causes of action under the Alien Tort Statute, 28 U.S.C. § 1350. Second, the Court stated:

[A]lthough the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts. Accordingly, Alvarez cannot say that the [Covenant itself] establish[es] the relevant and applicable rule of international law.

Sosa, 124 S. Ct. at 2767 (citation omitted).

26. Cf. Leti Volpp, *Feminism Versus Multiculturalism*, 101 Colum. L. Rev. 1181 (2001) (noting, among other things, how a focus on Third World cultures as sites of violence against women simultaneously characterizes the United States as less defined by such problems and obscures the comparable rates of violence against women that exist in the United States).

27. For recent discussions of these issues, see Mashood A. Baderin, *International Human Rights and Islamic Law* 23-32 (Oxford U. Press 2003); David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* 9-35, 141-44 (Princeton U. Press 2004); Heidi Morrison, *Beyond Universalism*, 1 Muslim World J. Hum. Rights, issue 1, art. 2 (2004) (available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1006&context=mwjhr>); Sundhya Pahuja, ‘This is the World: Have Faith,’ 15 Eur. J. Intl. L. 381 (2004); Marianna Valverde, *Review Essay*, 1 L., Culture & the Humanities 119, 128-31 (2005). For critical discussions of the political theory of human rights, see Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* 121 (Daniel Heller-Roazen trans., Stan. U. Press 1998) (arguing “the spaces, the liberties, and the rights won by individuals in their conflicts with central powers always simultaneously prepared a tacit but

international human rights are bad; in most cases I am all for them. But what we cannot do is pretend that human rights discourse and the liberal individualism it rests upon are neutral, universal, or necessarily separate from western dominance—or even that they are in fact liberating in some objective sense.

Progress, in short, cannot happen without observation, classification, and rationalization—the creation of knowledge, organizational frameworks, and structures that allow the domination and manipulation of people. We all do it in our work, all the time. We study, we reason, we understand, and we become the experts, the professionals, the people to whom others go for knowledge about a particular thing or doctrine or period. Moreover, these structures of knowledge may claim to, but do not in fact, operate along a disinterested arc of applied expertise. The distinctions and categories we create and work within impose differences that themselves reflect and reinforce power relationships. Put differently, progress is almost always about exercising power on people we have defined to need our help—that is, as objects of surveillance, understanding, and control.²⁸ Historical narratives of progress perform this process by defining the objects of power, legitimating the exercise of power on them, and articulating the goals that have been met and that remain to be achieved.²⁹ These observations do not mean we should stop doing history or, for that matter, that we should

increasing inscription of individuals' lives within the state order, thus offering a new and more dreadful foundation for the very sovereign power from which they wanted to liberate themselves"); Roberto Buonamano, *Humanity and Inhumanity: State Power and the Force of Law in the Prescription of Juridical Norms*, in *Evil, Law, and the State*, *supra* n. 16, at 159, 169 (concluding human rights are "not a benign development of a humanistic ideal that proclaims the sacrosanctity of human life, nor the final exposition of a philosophical position on the liberty of the individual against the intrusive effects of state sovereignty; rather, [they are] an effect of the form of power exercised within the institution of the modern liberal state and through the instrument of international law."). For a forceful rejection of such claims, see Volker Heins, *Giorgio Agamben and the Current State of Affairs in Humanitarian Law and Human Rights Policy*, 6 *German L.J.* 845 (2005). For a more traditional appeal for sensitivity to substantive cultural norms in the process of imposing western rule of law values, see Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the Rule of Law*, 101 *Mich. L. Rev.* 2275 (2003). Friedman has long been interested in modernity and law's relation to it, as well as in the imposition or adoption of western legal norms on or in other countries. See Lawrence M. Friedman, *Total Justice* (Russell Sage Found. 1985); Friedman, *On Legal Development*, *supra* n. 22.

28. See Foucault, *supra* n. 5, at 148-49, 160-61; Michel Foucault, *The History of Sexuality Volume 1: An Introduction* 92-102 (Robert Hurley trans., Allen Lane 1978) [hereinafter Foucault, *History of Sexuality*]; Michel Foucault, "Society Must Be Defended": *Lectures at the College de France, 1975-1976*, at 7-10, 29-39 (David Macey trans, Picador 2003) [hereinafter Foucault, *Society Must Be Defended*]. For useful discussions and critiques of Foucault's articulation of biopolitics and the power-knowledge relationship, see Nancy Fraser, *Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory* 17-66 (U. Minn. Press 1989); David Garland, *Punishment and Modern Society: A Study in Social Theory* 151-92 (U. Chi. Press 1990); Sheldon S. Wolin, *On the Theory and Practice of Power*, in *After Foucault: Humanistic Knowledge, Postmodern Challenges* 179 (Jonathan Arac ed., Rutgers U. Press 1988) [hereinafter *After Foucault*].

29. See H.D. Harootunian, *Foucault, Genealogy, History: The Pursuit of Otherness*, in *After Foucault*, *supra* n. 28, at 110, 113:

What distinguished [Foucault's] so-called histories from the conventional practice was his decision to see history as both a form of knowledge and power at the same time, like any other discourse. By apprehending the historian's practice in this way, he was able to show how an activity that appealed to knowing the truth about the past was merely a mask for a will to domination. The desire to know the past was driven, not by a disinterested quest for knowledge and truth, but by the urge to domesticate and control it in order to validate the present.

Worth noting is that historians in the United States have long been concerned, sometimes critically and sometimes not, with issues of objectivity, presentism, and progress. See e.g. Peter Novick, *That Noble Dream: The "Objectivity Question" and the American Historical Profession* (Cambridge U. Press 1988); see also *supra* n. 7 and accompanying text (discussing Friedman as a critic of progress narratives).

stop seeking changes in economic, political, and social conditions. But at a minimum we must realize that the articulation of objectives and the linkage of them with technologies of progress are all too often taken as foundational rather than as contestable assertions.³⁰

So far, my critique of progress follows some standard and perhaps even dated moves that emphasize particular aspects of complex ideas and phenomena. Yet my overall focus on criminal law makes the ground worth going over again. The need to question “progress” and its close relative, “reform,” is particularly salient when discussing state power and violence, particularly in its most open and obvious forms, such as criminal justice (not to mention foreign policy and international affairs, which often involve the application of criminal justice-like norms on a broader stage).

III. JUSTIFICATION AND CONFLICT

A. *Provocation*

In criminal law, justification turns doctrinally on the idea that a person accused of a criminal act did the right thing even though she broke the law. That is, she admits not only that her conduct ordinarily would be considered illegal, but also that she acted with a *mens rea* sufficient to support a conviction; yet she insists she should not be held responsible or punished because her actions were justified—they were the right and proper thing to do. Thus, although justification is sometimes described as turning on a balance of harms, we do better to think of it as a moral judgment about proper behavior that creates a legitimate, if imprecise, exception to relatively formal rules of criminal liability.³¹

Consider the example of the provocation doctrine, which traditionally reduces an unlawful killing from murder to voluntary manslaughter. At common law, only a limited number of things qualified as legally adequate provocation, among them a man discovering his wife in the act of committing adultery, with the result that if he killed his wife or her lover the killings would be only manslaughter. Although provocation doctrine has been reformed and now tends to turn on a reasonableness standard, juries still frequently choose manslaughter over murder for men who kill their wives or their wives' lovers after discovering the affair.³²

30. Cf. Schmitt, *supra* n. 5, at 76, arguing the enlightenment triumphed over

the absolute state and a feudal aristocracy; and with the disappearance of the enemy it has lost its original meaning. . . . Economy is no longer *eo ipso* freedom; technology does not serve comforts only, but just as much the production of dangerous weapons and instruments. Progress no longer produces *eo ipso* the humanitarian and moral perfection which was considered progress in the eighteenth century.

31. See *United States v. Schoon*, 971 F.2d 193, 200 (9th Cir. 1991) (Fernandez, J., concurring); George P. Fletcher, *Rethinking Criminal Law* 792 (Little, Brown & Co. 1978); John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 *Hous. L. Rev.* 397, 432-46 (1999).

32. For a good overview of the doctrine in this context, see Cynthia Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* 17-45 (NYU Press 2003). For an explanation of the common law rule, see Francis Wharton, *A Treatise on the Criminal Law of the United States* 237 (James Kay, Jun. & Bro. 1846) (describing the provocation produced when “a man finds another in the act of adultery with his wife” as of “so grievous a nature as the law reasonably concludes cannot be borne in the first transport of passion; where the injury is irreparable and can never be compensated”). For a critical analysis of reforms in provocation law, see Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 *Yale L.J.*

Moreover, as Friedman notes in *Crime and Punishment*, beginning in the mid to late nineteenth century, husbands who killed their wives' lovers also invoked the so-called "honor" or "unwritten law" defense.³³ The honor defense typically blended provocation with a claim of temporary insanity.³⁴ And unlike provocation, which usually resulted only in reduction of the degree of homicide,³⁵ the unwritten law was a complete defense—though one might be tempted to categorize it as an appeal to jury nullification rather than as a legitimate legal claim.³⁶

1331 (1997). Provocation claims arise in many contexts beyond sexual relationships, but my discussion will focus on this narrower group of claims. I also realize that provocation is not always described as a partial justification, and my use of the term is somewhat colloquial—an assertion of how provocation claims are often assessed in the context of sexual infidelity—and is not meant as a claim of proper doctrinal classification. As Nourse explains in detail, provocation claims in this context lead juries to make normative choices about relationships and gender roles, *see id.* at 1333-38, 1392-94, and it is that insight which leads me to talk about provocation as a justification and not merely as an excuse, because it focuses on proper conduct within a relationship. *See also* R.A. Duff, *Rethinking Justifications*, 39 *Tulsa L. Rev.* 829 (2004) (arguing for a fairly large definition of what counts as a justification but also urging less attention to the distinction between justification and excuse); Jeremy Horder, *Provocation and Responsibility* 111-36 (Clarendon Press 1992) (explaining the justificatory aspects of provocation). Compare Oliver L. Barbour, *The Magistrates' Criminal Law: A Practical Treatise on the Jurisdiction, Duty, and Authority of Justices of the Peace in the State of New York in Criminal Cases* 49 (Wm. & A. Gould & Co. 1841) (stating a husband's killing of his wife's lover "in the first transport of passion . . . is excusable"), with Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 *Buff. Crim. L. Rev.* 691, 724 n.129 (2003) (describing an 1804 treatise on Kentucky criminal law as treating a husband finding his wife committing adultery as "nearly a justification for the killing"). As for the honor defense, the fact of complete acquittal and the whiff of jury nullification more strongly support the conclusion that the defense is all about a moral judgment, and in particular the judgment the defendant acted as a man should act (although, of course, one could still use the language of excuse to claim that juries simply decided that men could not be expected to control their passions in this context and so should be excused, even if what they did was wrong). *See* Jeremy D. Weinstein, Student Author, *Adultery, Law, and the State: A History*, 38 *Hastings L.J.* 195, 227-38 (1986) (providing a history of the unwritten law and characterizing it as a justification); *cf.* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 *Harv. L. Rev.* 413, 429-35 (1999) (discussing the "true man" or honor doctrine primarily in the context of the no-retreat rule).

33. *See* Friedman, *supra* n. 1, at 221-22.

34. *See id.* at 146-47.

35. In at least one state, New York, provocation could also justify a complete acquittal on homicide charges. For a discussion of the New York statute and its application, *see* Barbour, *supra* n. 32 at 47-49. Wharton quoted the New York statute, *see* Wharton, *supra* n. 32, at 220-21, but he ignored its significance in his discussion of provocation. *See id.* at 234 (stating provocation can never justify or excuse a homicide).

36. In Georgia, New Mexico, Texas, and Utah, however, some version of the honor defense was codified. *See* Weinstein, *supra* n. 32, at 227-38; *see also* Friedman, *supra* n. 1, at 426 (noting a Delaware statute that reduced manslaughter from a felony to a misdemeanor when a husband killed "a person found in the act of adultery with his wife"). It is worth noting here how discussions, including Friedman's, of the relationship between "honor" and criminal law doctrine are often set in a sectional context, so that honor is seen as a Southern (and sometimes Western) concern, by contrast to the more rational North. *See id.* at 75 (describing the antebellum South as "feudal" and "backward"); *id.* at 178 (claiming the antebellum South was obsessed with honor, as exemplified by dueling, and thus was "prelegal, prerational, aristocratic"); *id.* at 188-89 (insisting lynching was a Southern practice distinct from other American manifestations of vigilante justice); Friedman, *Some Remarks*, *supra* n. 3, at 1129-30 (suggesting Southern culture breeds violence); *see also* Kahan, *supra* n. 32, at 432-35 (discussing the influence of slave and frontier cultures in developing ideas of honor in the South and West that led to different doctrines on the duty to retreat). Yet "honor" is a concept that people in many parts of the United States still take seriously, especially in the context of gender and sexual relations, and many honor defense cases, including most of the early, significant cases, took place in the North. More rational Northern law could display a tendency to "orientalize" the South by speaking of honor as a peculiarly Southern obsession in need of correction. Going further, I want to suggest that just as many in the United States and Western Europe see the Muslim world as an exotic other; the South fills the same role within the United States. It is a traditional society that needs to become modern (even though it has grappled with modernity for just as long as the rest of the country), and it is the locus of institutionalized racism and perhaps, too, of particularly pernicious forms of sexism (thus absolving other regions of the country). Although this

Seen in this way, provocation doctrine, particularly as applied to marital violence, does not accord with the substantive goals that we generally associate with progress in criminal law doctrine (and the honor defense is decidedly retrograde).³⁷ Against the rationality of legal rules (the creation of which is another progressive goal), these claims create exceptions for, and partially or completely justify, violence fueled by emotion and sexual jealousy. They entrench and endorse norms about gender roles and relationships that put women in a subordinate position defined by male control of their bodies and their disparate vulnerability to violence.

Yet the story of provocation and the honor defense is more complicated. Consider the 1844 case of Amelia Norman. Norman was seduced in New York City by a man named Henry Ballard. They had a child together, but he abandoned her soon thereafter. When he refused to provide any support for her or their child, she tracked him down and stabbed him. Norman's trial for attempted murder became a sensation, and the New York papers ran extensive excerpts of the proceedings. Although she never denied her act, the jury acquitted her in a matter of minutes, and the papers celebrated her freedom while disparaging her seducer.³⁸

Norman triumphed because her lawyers used the honor defense. The claim of provocation was not sufficient to support the admission of evidence about Ballard's seduction and mistreatment of Norman, because the judge was concerned that Ballard's actions were not close enough in time to support a heat of passion claim. To get around that problem, her lawyers also contended that the seduction had driven her insane. The insanity claim allowed the jury to learn enough about Norman's history to conclude that she had been wronged and that Ballard was the true villain.

Norman's case became the template for legal change. Her trial served as the catalyst for reform of civil and criminal laws relating to seduction, and several women who killed, or attempted to kill, their seducers used the honor defense with a surprising degree of success.³⁹ But Norman's case was also critical for the development of the

version of the American South no longer exists (except perhaps as self-caricature), if it ever fully did, and the days in which we could measure progress by contrasting a positive vision of the rest of the country with a negative vision of the South are long gone, the "South" persists for many people as a reference point and a thing to be acted on and against, and thus as a contrast with, and method of, defining the "progressive" parts of the country. (And, too, the mythological "South" also becomes a positive touchstone of identity for large numbers of people, including many who have little objective claim to its supposed traditions and character.)

37. Throughout this discussion, I use the word "progress" solely to refer to the effort to assess criminal law doctrines to determine their consistency with progressive values and to improve doctrines by making them more rational and better able to generate what progress seekers define as substantively good results. Importantly, although I tend to agree with the substantive results that progress seekers desire, I do not mean to use "progress" in this discussion as a personal, normative assertion of how the criminal law actually should look. Cf. Paul Kahn, *The Cultural Study of Law* (U. Chi. Press 1999) (distinguishing between a cultural study of law and scholarship that is committed to legal reform). Similarly, the proposal I make for the application of criminal law defenses is not intended to generate substantively good results; I seek instead to move criminal law out of progress discourse altogether (in part, admittedly, because of a normative concern about the rationalizing aspect of progress and a sense that partial achievement of the substantive aims of progress may not be worth the cost).

38. For a more complete discussion of the facts and proceedings, as well as an extensive analysis of the case, the discourse of sentimentalism that informed it, and its legal and literary aftermath, see Andrea L. Hibbard & John T. Parry, *Law, Seduction, and the Sentimental Heroine: The Case of Amelia Norman*, (American Literature (forthcoming 2006)).

39. See *id.* Friedman suggests that the honor defense did not work for women because "[m]ost women who killed former lovers were, in fact, convicted." Friedman, *supra* n. 1, at 221. Yet of the twelve female honor

male honor defense. Norman's prosecution appears to have been only the second publicized case in which defense counsel specifically used the provocation/insanity claim that formed the doctrinal basis of the honor defense, and it served as a key precedent in the 1859 trial of Congressman Daniel Sickles, a case that Friedman highlights for giving the defense "a dramatic push forward."⁴⁰

To some extent, Norman merely took advantage of, and thereby reinforced, gender norms that cast her as a vulnerable victim of seduction. Yet she also contested norms that would have put her, at best, on the margins of the law's protections as both a violent and a fallen woman. The pressure her case put on these norms was not just momentary; it was sustained. In cases like Norman's, in other words, the common law provocation doctrine and its cousin, the honor defense, served as vehicles for the confrontation between and partial working out of changing and conflicting norms about gender and violence. These doctrines provided a space for the articulation and evaluation of emotional and moral claims and even, sometimes, for the achievement of moral reform goals, both doctrinally and culturally.

Compare that process to the reformed provocation doctrine, which no longer has a special category for male marital violence (and which also, of course, rejects the honor defense), but which nonetheless licenses male violence on an arguably wider scale than the common law because it applies in any relationship whenever provocation is reasonable. Put differently, the doctrine appears neutral, an example of rational progress or reform (after all, it turns on "reasonableness" and moves away from overt male bias).⁴¹ Yet we should not mistake the doctrine for reality. The fact that criminal law doctrine allows only reasonable provocation to reduce murder to manslaughter does not translate into less marital violence or prevent juries from accepting male ownership of female sexuality.⁴² At law and in the broader culture, change goes on, but the substantive progress promised by criminal law reformers is more often an illusion.⁴³

cases reviewed by Robert Ireland, seven resulted in acquittals, with one hung jury, three convictions, and one woman found insane and committed to an asylum. Robert M. Ireland, *Frenzied and Fallen Females: Women and Sexual Dishonor in the Nineteenth-Century United States*, 3 *J. Women's Hist.* 95, 98 (1992).

40. Friedman, *supra* n. 1, at 221; see Hibbard & Parry, *supra* n. 38; Robert M. Ireland, *The Libertine Must Die: Sexual Dishonor and the Unwritten Law in the Nineteenth-Century United States*, 23 *J. Soc. Hist.* 27, 31 (1989) (describing the Sickles trial as "the definitive statement of the higher law as it applied to libertines" because it used "the classic method of . . . plead[ing] temporary insanity").

41. Of course, rational progress or reform could also lead to abolishing the provocation defense altogether. See Horder, *supra* n. 32, at 192-97.

42. It might be equally accurate to speak of the contemporary state's—rather than, or in addition to, men's—ownership of women's sexuality. The debate over abortion, for example, is in part about the government's ability to define a series of consequences, social roles, and even an appropriate consciousness for women who become pregnant, whether or not they choose to have an abortion. Or consider David Harris's account of how United States customs officials selected minority women for intrusive searches at disproportionate rates in the 1990s. The search techniques used on these women included penetration, use of laxatives, and disregard or even disbelief of pregnancy and menstrual cycles. See David A. Harris, *Profiles in Injustice: Why Racial Profiling Cannot Work* 208-13, 216-17 (New Press 2002); see also *id.* at 218-20 (noting the customs service modified its profiling policy in response to criticism). As a result, at the border—the precise point where the symbolic and physical aspects of freedom and citizenship may be most significant—women citizens learned that their ability to enter or leave the country came at the price of making themselves available for inspection at a rate that signaled the state's greater interest in, or need to control, their bodies as compared to men's bodies.

43. I am not arguing that law, legal doctrine, or legal argument are irrelevant to cultural or social change. Friedman sometimes suggests that doctrine is necessarily subservient to social forces, see *supra* n. 2, although

Traditionally, defenses that justify or excuse have made room in the criminal process for emotions and moral claims as part of a larger evaluation of the defendant's character, conduct, and choices.⁴⁴ As such, they work against the idea of progress in criminal law. Try as we might to develop more rational approaches to these defenses—as with the reform of provocation doctrine—the best we are likely to achieve is the substitution of concepts such as “reasonableness” or “deterrence,” which seek to mask normative content and judgments.⁴⁵ But rationality does not deliver substantive progress. The results under reasonableness tests sometimes will accord with the desires of reformers, but sometimes they will not. Reasonableness and deterrence rhetoric may simply entrench the status quo by “concealing the patterning of the law on the contestable social norms of the dominant social groups from whose ranks most judges, legislators, and politically influential citizens come”⁴⁶—a result that will only incompletely serve the goal of substantive progress.

And, critically, reasonableness tests suggest a society in which only illegal behavior is unreasonable, while anything that is not illegal is, by definition, reasonable. So, with provocation, a husband guilty only of manslaughter, not murder, for killing his adulterous wife is a man who has acted reasonably, even though he will suffer some punishment. Similarly, a person who uses a handgun to kill an intruder in his home and successfully pleads self-defense is the very definition of the reasonable man.⁴⁷ Reasonableness tests thus aid progress only in the sense that they drive moral claims out of the criminal law (or conceal their use) and seek to construct a world in which only legal arguments count in the construction of norms. The resulting norms, however, will only accord accidentally with substantive reform goals.

his views are in fact more nuanced. See Harry V. Ball & Lawrence M. Friedman, *The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View*, 17 *Stan. L. Rev.* 197, 217 (1965) (“The very fact that a criminal statute has been enacted by the legislature is a powerful factor in making the proscribed conduct illegitimate in the eyes of a potential actor, even when the actor disagrees with the purpose of the law.”); see also Mary L. Dudziak, *Law, Modernization, and the Question of Agency in American Legal History*, 40 *Tulsa L. Rev.* 591 (2005); Huffman, *supra* n. 4. I find more convincing the view that law is part of the cultural processes that constitute social relations, so that it creates as well as reflects change. See Austin Sarat & Jonathan Simon, *Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, in *Cultural Analysis, Cultural Studies, and the Law: Moving Beyond Legal Realism* 1, 14 (Austin Sarat & Jonathan Simon eds., Duke U. Press 2003); see also Stephen M. Best, *The Fugitive's Properties* 110 (U. Chi. Press 2004) (arguing “legal forms and legal procedures play a compositional role in modern culture, and, reciprocally, literary and cultural texts assist in the fashioning of new social identities”); Frug, *supra* n. 22, at 1289 (“Society is constituted, in part, by law, and law is constituted, in part, by society.”).

44. See Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 *Colum. L. Rev.* 269 (1996); Nourse, *supra* n. 32, at 1390-92; Parry, *supra* n. 31, at 432-39. Although I tend in this article to treat reason and emotion as paired opposites, emotional responses to events often reflect reasoned or even reasonable assessments. The distance between emotion and reason is in any event not distinct; nor are assessments of events necessarily classifiable solely as emotional or as rational. See generally Kahan & Nussbaum, *supra*.

45. See Kahan, *supra* n. 32 (discussing deterrence); Lee, *supra* n. 32 (discussing reasonableness).

46. Kahan, *supra* n. 32, at 486; see also Friedman, *supra* n. 20, at 38-39 (arguing the commitment to “objective rationality . . . by itself does not guarantee rational results, measured objectively”).

47. For a discussion of the “reasonable man” and the persistence of gender bias in criminal doctrine, see Lee, *supra* n. 32. For a discussion of gender bias in the related context of tort doctrine, see Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 *U. Pa. L. Rev.* 463 (1998); see also *id.* at 489-90 (discussing the “reasonable man” standard).

Against this progressive vision, we should consider letting moral and emotional claims have a more prominent place in the decision of cases, as they had in Norman's case. The considerations that will often be the deciding factors in any event could then be confronted, argued over, and perhaps even resolved—if only provisionally. Opponents of this move sometimes argue that the distasteful spectacle of normative conflict undermines the rule of law by licensing ad hoc decisions and even legal chaos.⁴⁸ Under these views, the legislature (if anywhere) is the more appropriate place for moral debates.⁴⁹

Yet without the exceptions created by these defenses, the criminal law risks losing legitimacy because it shows itself unresponsive to the conflicts and complexities of human experience, which go well beyond the language of reasonableness or deterrence. Despite rhetoric to the contrary, rule of law values in criminal law do not require clear, formal, and rationally-justified rules.⁵⁰ Indeed, the ideal of the rule of law is not very useful if it cannot make room for change, flexibility, and interaction with non-legal norms, all of which are necessary to making and keeping a satisfactory legal system in operation over time—which I would argue is a good functional definition of the rule of law even if it eschews ideals of reason and progress.⁵¹

48. See e.g. *U.S. v. Moylan*, 417 F.2d 1002, 1009 (4th Cir. 1969) (arguing the necessity defense risks chaos and anarchy); *U.S. v. Jacobs*, 704 F. Supp. 629, 630 (E.D.N.C. 1988) (same); Francis A. Allen, *The Habits of Legality: Criminal Justice and the Rule of Law* 22 (Oxford U. Press 1996) (worrying justification claims may “[validate] disobedience of penal commands on ad hoc determinations by courts”); Jerome Hall, *General Principles of Criminal Law* 55 (2d ed., Bobbs-Merrill Co. 1960) (voicing similar concerns).

49. Cf. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 1001 (1992) (Scalia, J., dissenting) (“Value judgments, after all, should be voted on, not dictated.”). In this way, rule of law formalists echo and reinforce the law-politics distinction that sits at the heart of, and bedevils, American conceptions of the judicial role in a constitutional democracy that practices judicial review. See *Marbury v. Madison*, 5 U.S. 137, 165-66, 170-71 (1803). Compare this approach with Vivian Grosswald Curran, *Politicizing the Crime Against Humanity: The French Example*, 78 Notre Dame L. Rev. 677, 678 (2003) (“It is misleading to discuss law as being ‘politicized’ inasmuch as this implies an a priori ‘un-politicized’ concept of law. Such a concept is both inaccurate and incoherent because, although law and politics are not identical, they are inseparable.”). Further, and despite the respect for legislation that some formalists profess, the law-politics distinction and the identification of legislatures as the site for moral debates that risk passionate disagreement also support the idea that the reasoned decisions of courts better exemplify “law” than do the less-reasoned, perhaps even emotional or herd-like results of the legislative process. See *Calder v. Bull*, 3 U.S. 386, 388 (1798) (opinion of Chase, J.) (“An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.”); see also Christopher L. Eisgruber, *Constitutional Self-Government* 46-78 (Harv. U. Press 2001) (arguing the achievement of democratic self-government requires modifying the identification of democracy with popular or legislative majorities in favor of a conception that defines courts exercising the power of judicial review as democratic actors); Richard H. Pildes, *Democracy and Disorder*, 68 U. Chi. L. Rev. 695, 714 (2001) (arguing a majority of the current Supreme Court sees democracy—particularly electoral politics—as in need of judicially-imposed “order, stability, and channeled, constrained forms of engagement”). The claim that elite courts can discern and protect the deep commitments of the people as well as or better than legislative majorities is one of the most difficult in the liberal constitutional tradition. Resolving the issue simply by defining judicial review as democratic risks echoing the claim that authoritarian rule is democratic when it results from an election, or even acclamation (although I am not suggesting that the two claims simply reduce to being the same things). Cf. Carl Schmitt, *The Crisis of Parliamentary Democracy* 16 (Ellen Kennedy trans., 2d ed., MIT Press 1985) (insisting on the conceptual separation of democracy and parliamentarism and claiming “[t]he will of the people can be expressed just as well and perhaps better through acclamation, through something taken for granted, an obvious and unchallenged presence, than through the statistical apparatus [of voting] that has been constructed with such meticulousness”).

50. See Parry, *supra* n. 31, at 448-53.

51. See *id.* at 454-57; see also Jeremy Horder, *Criminal Law and Legal Positivism*, 8 Leg. Theory 221 (2002) (suggesting efforts to remove judicial discretion from criminal law are usually misguided and motivated

The more serious objections to giving moral and emotional claims an explicit role in the articulation and application of legal doctrine are first, that judges and juries will fail to resolve issues and may only deepen the conflict,⁵² and second, that resolutions based on emotional and moral claims will be substantively undesirable. Put plainly, even if it is possible to litigate these claims to a resolution in this way, we may not like the results and may even find ourselves in worse shape.

Although these objections concern me, they do not prove that we should remain wedded to the rationalizing goals and language of an earlier generation of criminal law reformers. First, reasonableness tests and similar rhetorics of dispassion already provide us with results that frustrate substantive progress, and there is some value in displaying rather than masking the bases for these results. Should we not know the content of the norms that will be used to judge our behavior? Second, it is far from clear that emotional and moral arguments that would frustrate substantive reform goals will in fact win out. Dan Kahan relates the story of a Maryland judge who gave an eighteen month work release sentence to a man who was found guilty of voluntary manslaughter for shooting his adulterous wife execution style while she slept. The judge explained the lenient sentence by expressing sympathy for the defendant's plight and his approval of inflicting "some corporal punishment" on the wife. Precisely because the judge came clean and did not couch his action in terms of reasonableness or deterrence, newspapers, protestors and advocacy groups, the state legislature, and even the governing body of the Maryland judiciary weighed in with protests and substantive proposals designed to articulate and entrench different, more progress-oriented, norms.⁵³

Of course, this is but one example and could easily be contested by other examples that show the use of emotional and moral claims to support norms that many reformers would find undesirable.⁵⁴ Norman's case, for example, served as a precedent to justify violence by men and women. Indeed, one might compare the number of men who killed their wives and were acquitted or convicted only of manslaughter under the common law

by unwarranted concerns about and faith in the criminal law's ability to guide behavior); cf. Bram Ivan, *Legitimacy and Violence: On the Relation Between Law and Justice According to Rawls and Derrida*, in *Evil, Law, and the State*, *supra* n. 16, at 199, 207-08, arguing

a deconstructive, textual approach to law can be fruitful. Deconstruction, when conceived of as a textual analysis, comes to stand for the practice of interpreting and reinterpreting the laws so that a space may be opened for a new and hopefully better interpretation of these laws. It is important to realize that this act of deconstruction is a doing, a practice that wants to make a difference that goes beyond the merely theoretical or institutional.

If the goal is to keep a satisfactory system in operation over the long term, more sophisticated (or cynical) observers might want to embrace moral and emotional claims in limited contexts as a safety or emergency valve that serves, in turn, as a legitimization strategy for the entire criminal justice system. See Parry, *supra* n. 31, at 457-63 (discussing legitimacy and legitimation).

52. *Compare Casey*, 505 U.S. at 867 (plurality) (claiming the Supreme Court must sometimes "[call] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution"), with *id.* at 995 (Scalia, J., concurring in part and dissenting in part) (arguing *Roe v. Wade* did not resolve the abortion debate but instead inflamed national politics and made them more divisive). It probably goes without saying that my claims about appropriate argument in criminal cases fly in the face of Rawlsian "public reason" constraints on argument to the extent they would apply to criminal law discourse. See Kahan, *supra* n. 32, at 417, 478-83; Rawls, *supra* n. 19, at 212-54.

53. See Kahan, *supra* n. 32, at 490-91.

54. See *id.* at 492-93. In the face of this possibility, Kahan urges a pragmatic strategy for deploying emotional and moral claims. See *id.* at 495-97.

provocation defense or the unwritten law to the number of women who killed their husbands or seducers and were acquitted or convicted only of manslaughter—and the probable resulting disparity in favor of male violence may have been a factor in the reform of provocation doctrine. That calculus requires some context, however. The results of those cases probably reflect, albeit imperfectly, what were then the prevailing, if not coherent, social norms. Those norms were in the process of being challenged by reformers. Yet by choosing to drive the debate over those norms underground rather than putting it on display, the reformers may have gained a tactical victory but lost the larger battle. Where we end up, then, is with the realization that masking normative conflict through “reasonableness” or “deterrence,” although a progressive move in some sense, is unlikely to deliver substantive ideals of progress, even as we recognize that unleashing moral and emotional claims may also fail to achieve that goal—although this move at least has the virtue of clarity.

Finally, all of these objections derive from a continued faith that progress is possible and desirable in criminal law. Change is certain, and certain, too, is that any change will be influenced by, and in turn will influence, the broader culture.⁵⁵ But as I have already suggested, working for progress requires domination and elimination of other views. To adapt Robert Cover, if law as a creation of the state is jurispathic, then progress may be a mass murderer.⁵⁶ And it is not even clear in many cases what course progress requires—as should be evident from my discussion of provocation. In the end, criminal law and particularly criminal defenses are messy, open-ended, and in tension with notions of rational, substantive progress. For that reason, they also create—again, adapting Cover—a jurisgenerative space for the articulation and acceptance of norms that are less under the state’s control.⁵⁷ Whether that is a good thing is a question that links closely to one’s belief in or skepticism about progress.⁵⁸

55. See Friedman, *Twentieth Century*, *supra* n. 3, at 607 (suggesting the story of American law in the twenty-first century will be “about growth, transformation, adaptation—a story about change. More than that is impossible to say.”); *supra* n. 43 (discussing the relationship between legal and cultural change).

56. See Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 *Harv. L. Rev.* 4, 40, 53 (1983).

57. See *id.* at 11 (describing “jurisgenesis” as “the creation of legal meaning” and arguing it is a social process that does not necessarily include the state, at least at first). I do not mean to imply that these non-state norms are somehow the creations of free, autonomous individuals. As Cover makes clear, they are social norms and thus are subject to the same analysis and objections as norms formally announced by the state. What I am after is preventing a state monopoly on the articulation of binding norms (a monopoly that is one ideal of the modern, progress-oriented state) and, even more, bringing normative conflict into the open rather than hiding it.

58. Most criminal cases, of course, do not go to trial. Over 90% of federal criminal cases end with guilty pleas, and the numbers are similar in most states. See Julian A. Cook, III, *All Aboard! The Supreme Court, Guilty Pleas, and the Railroad of Criminal Defendants*, 75 *U. Colo. L. Rev.* 863, 866 (2004); Friedman, *supra* n. 1, at 390-91. The prevalence of guilty pleas undermines the ability of criminal cases to serve as sites for the display and possible provisional resolution of social conflict, and in so doing they further the rationalization of the criminal process into another place where individuals interact with the state as a bureaucracy that dispenses benefits and burdens and in which normative conflict is suppressed as irrational and inefficient. See Cook, *supra*, at 868 (describing plea bargains as “inequitable but efficient”). At the same time, the guilty plea underscores the majesty and primacy of the state and its processes. See *U.S. v. Hyde*, 520 U.S. 670, 676 (1997) (expressing concern that too lenient a standard for withdrawal of guilty pleas would “[debase] the judicial proceeding”). In keeping with the theme of this article, the dominance of guilty pleas only highlights the value of having the remaining criminal trials provide opportunities for displaying, participating in, and sometimes resolving normative conflicts.

B. Torture

I would like now to shift my discussion of justification to the law of torture. Torture is generally considered to be a crime under international law and the laws of most countries, including the United States. Critically, under international law—and specifically under the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (“Convention”)—there can be no justification, no emergency situation that would justify its use.⁵⁹ After the Senate consented to the Convention and the President ratified it, if not before, the same would appear to be true for the United States.⁶⁰

I want to argue that this perception of the law of torture is false. Torture, or more properly, conduct of the kind that most people likely would consider to be torture, is permitted in some circumstances under international law and the laws of most countries, including the United States. The language of the Convention notwithstanding, the key legal doctrine that enables the use of torture is justification or necessity.

Start first with the Convention. Although torture is banned absolutely, with no possibility of justification, the Convention also takes account of a different category of state violence: “other cruel, inhuman, or degrading treatment or punishment.”⁶¹ This category is left undefined by the Convention but is best described as bad conduct that is “not torture.” States must “undertake to prevent” it, but the “no justification” clause of the Convention does not apply.⁶² The clear implication is that violent treatment of prisoners or others that does not rise to the level of torture can be justifiable under international law.⁶³ All that is left for a state that wishes to justify its violence is to play a definitional game: whatever it may have done, it has not tortured. This is a move that should be familiar by now, as the Bush administration and others famously have used it to justify coercive interrogation.⁶⁴

59. See *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* pt. 1, art. 2, ¶ 2 (Dec. 10, 1984) [hereinafter *Convention*] (available at <http://www.un.org/documents/ga/res/39/a39r046.htm>).

60. See U.S. Department of State, *Initial Report of the United States of America to the U.N. Committee Against Torture* intro. [¶ 6] (Oct. 15, 1999), http://niic.org/Misc/URLShell.aspx?SRC=Catalog&REFF=http://niic.org/Library/015618&ID=015618&TYPE=HTML&URL=http://www.state.gov/www/global/human_rights/torture_toc99.html (accessed Oct. 7, 2005) (“Torture is prohibited by law throughout the United States. It is categorically denounced as a matter of policy and as a tool of state authority. . . . No exceptional circumstances may be invoked as a justification for torture.”).

61. *Convention*, *supra* n. 59, at pt. 1, art. 16, ¶ 1.

62. *Id.* (expressly applying arts. 10-13, but omitting art. 2).

63. For more complete discussions, including consideration of other international agreements, see John T. Parry, “Just for Fun”: *Understanding Torture and Understanding Abu Ghraib*, 1 J. Natl. Sec. L. & Policy ___ (forthcoming 2005); Parry, *Escalation and Necessity*, *supra* n. 25, at 149. Of particular importance, the Geneva Conventions impose what appears to be an absolute ban on coercion—not just torture—for people who fall within their coverage. See Jordan J. Paust, *Post 9-11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 Notre Dame L. Rev. 1335, 1342, 1351, 1357 (2004).

64. See e.g. Memo. from Off. of Leg. Counsel, to Alberto R. Gonzales, Counsel to Pres., *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002) [hereinafter *Memorandum*] (engaging in extensive analysis of the distinction between torture and other cruel, inhuman, or degrading treatment or punishment); Working Group Report, *Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations* (Apr. 4, 2003) (same). These documents are collected in *The Torture Papers: The Road to Abu Ghraib* (Karen J. Greenberg & Joshua L. Dratel eds., Cambridge U. Press 2005). Even the more recent Office of Legal Counsel opinion, which

Under international law, the term “torture” is reserved for the intentional infliction of “severe pain or suffering.”⁶⁵ This category may not include, for example, all forms of beatings or isolated practices—such as wall-standing (being forced to stand spread-eagled on one’s toes with fingers on the wall above one’s head, so that the body weight is on the toes and fingers). As the European Court of Human Rights concluded, it also does not include Britain’s practice of subjecting suspected IRA members to the combination of wall-standing for hours, hooding, continuous loud and hissing noise, sleep deprivation, and restricted food and water.⁶⁶ Because persons subjected to these tactics often provide information, and because under the definitional game they have not been tortured, Israel and the United States—and, one can assume, other countries—have adopted many of these practices.⁶⁷

Turn now to domestic law. Britain practiced what we might colloquially call torture in Northern Ireland, even if the European Court of Human Rights concluded it was not. Similarly, France used torture in Algeria and Vietnam.⁶⁸ Were these practices illegal as a matter of each country’s domestic law? Apparently they were, yet some combination of lawyers, policymakers, and military leaders in both countries made plausible, rational arguments that torture—or, more frequently, forms of coercive interrogation that they argued were something less than torture—was justifiable after the fact or even generally legal under the circumstances.⁶⁹

Israel provides another good example. In a widely noted decision, the Supreme Court of Israel ruled that the coercive interrogation practices used by the General Security Service on Palestinians suspected of terrorism were illegal. Two aspects of that

supersedes the 2002 opinion and recognizes a broader definition of torture, nonetheless insists that torture is an intentionally narrow category that must be distinguished from cruel, inhuman, or degrading treatment. See Memo. from Off. of Leg. Counsel, to James B. Comey, Dep. Atty. Gen., *Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A*, at 2, 6-10, <http://www.usdoj.gov/olc/dagmemo.pdf> (Dec. 30, 2004). As my discussion indicates, Israel and Britain also have made this argument. The popularity of the definitional game also supports my point about the distinction between rhetoric and reality in the western discourse of human rights. See *supra* n. 25 and accompanying text.

65. *Convention, supra* n. 59, at pt.1, art. 1, ¶ 1; see also *Ireland v. United Kingdom*, 2 Eur. Ct. H.R. 25, ¶ 167 (1980) (holding conduct is torture only if it exhibits “particular intensity and cruelty”).

66. See *id.* at ¶¶ 96, 167. For more detail on Britain’s practices, see John Conroy, *Unspeakable Acts, Ordinary People: The Dynamics of Torture* 4-8 (Alfred A. Knopf 2000).

67. See John T. Parry, *What is Torture, Are We Doing It, and What if We Are?* 64 U. Pitt. L. Rev. 237, 242, 252-53 (2003).

68. See Conroy, *supra* n. 66, at 31-32, 112-13 (discussing Britain); Curran, *supra* n. 49, at 696-97 (discussing French sources on torture in Algeria); Rita Maran, *Torture: The Role of Ideology in the French-Algerian War* (Praeger 1989); Douglas Porch, *The French Secret Services: From the Dreyfus Affair to the Gulf War* 302, 381-84 (Farrar, Straus & Giroux 1995).

69. For British efforts to justify torture in Northern Ireland, see Conroy, *supra* n. 66, at 42-43, 45-46, 188. Many French soldiers and politicians apparently believed the torture of Algerians was justified. See Maran, *supra* n. 68; Porch, *supra* n. 68, at 302. In addition, Vivian Curran describes the Cour de cassation’s interpretation of the crime against humanity under French law as applying only to “crimes committed ‘in the name of a State practicing a policy of ideological hegemony,’” a definition that was “deemed limited to fascist-totalitarian states” and that was adopted to prevent analogies to French conduct in Algeria during trials of Nazis and their French collaborators. Curran, *supra* n. 49, at 688 (emphasis omitted) (citations omitted). That is, although contemporary French law might not allow justification of torture, it does seek to repress discussion of France’s use of it in the past. Curran also notes that in 2002, nearly five hundred retired French generals signed a manifesto in support of the army’s conduct in Algeria, and she opines that “[t]hey are among what appears to be a small minority in France today that believes France’s war in Algeria had legitimate and just goals.” *Id.* at 706.

decision are critical. First, the Court ruled that these practices—which it was careful not to classify as torture—were illegal because the legislature had not specifically authorized them, not because they were categorically illegal regardless of what the legislature thought. (And the Court’s refusal to categorize these practices as torture could make it easier for the legislature to authorize them). Second, the Court made clear that the necessity or justification defense would be available for an official who used coercion. In other words, even if torture is not justified in advance, it could be justifiable after the fact, depending on the circumstances.⁷⁰ If a torturer walks free, it is hard to maintain that torture is categorically illegal.

We now arrive at the United States, where coercive interrogation is an ongoing issue.⁷¹ Although there have been no cases on the issue, the necessity defense is presumptively available to government officials prosecuted for engaging in or authorizing torture (or other coercive techniques) for the purpose of interrogation.⁷² But U.S. law may go further. First, at least in the context of interrogation, there is no clear and absolute individual constitutional right to be free from torture. The United States Supreme Court has all but made clear that the self-incrimination clause is only a trial right, with the result that it applies only to efforts to introduce coerced testimony in a legal proceeding.⁷³ Restrictions on coercive interrogation will thus be governed primarily by substantive due process doctrine. As the Court has held, both the “shocks the conscience” test and the “fundamental rights” analysis allow rights’ claims to be overcome by a sufficient government interest—that is, by a sufficient justification—and in *Chavez v. Martinez*⁷⁴ three justices reasonably asserted that these principles would apply to coercive interrogation, with little effective dispute from the rest of the Court. Thus, in cases where the government can articulate a compelling need for information that is likely to be in the possession of a particular suspect or detainee, constitutional doctrine supports the conclusion that such a person may have no right against being tortured. Or, more realistically, if there were an absolute right not to be “tortured,” it

70. H.C. 5100/94, *Pub. Comm. Against Torture in Israel v. The State of Israel*, 53(4) P.D. 817 (1999), reprinted in 38 I.L.M. 1471, 1478, 1480-86 (1999). For extensive and more celebratory analysis of Public Committee, particularly as it contrasts with United States law, see Parry, *Judicial Restraints*, *supra* n. 25. For discussion of Israeli interrogation practices prior to Public Committee, see Conroy, *supra* n. 66, at 212-14; Parry, *Judicial Restraints*, *supra* n. 25.

71. For a discussion of torture in the United States or by United States forces that was written before the September 11 attacks, see Conroy, *supra* n. 66, at 32-34, 41, 60, 68-71, 116-18. For discussion of United States practices in the post-September 11th “war on terror,” see Parry, *Escalation and Necessity*, *supra* n. 25, at 145, 154.

72. This is certainly the position of the Bush administration, at least until the public found out. See *Memorandum*, *supra* n. 64, at 39-41; Working Group Report, *supra* n. 64, at 25-26. For an argument that the necessity defense should be available in rare cases, see John T. Parry & Welsh S. White, *Interrogating Suspected Terrorists: Should Torture Be An Option?* 63 U. Pitt. L. Rev. 743 (2002); see also *id.* at 745 n. 8 (collecting authorities that admit the possibility of justifying torture in rare cases).

73. See *Chavez v. Martinez*, 538 U.S. 760 (2003). For analysis of this aspect of *Chavez*, see Carolyn J. Frantz, *Chavez v. Martinez’s Constitutional Division of Labor*, 2003 S. Ct. Rev. 269, and John T. Parry, *Constitutional Interpretation, Coercive Interrogation, and Civil Rights Litigation after Chavez v. Martinez*, 39 Ga. L. Rev. 733 (2005).

74. 538 U.S. at 774-76 (Thomas, J., joined by Rehnquist, C.J., & Scalia, J.). Justices Stevens, Kennedy, and Ginsburg provided the strongest opposition but did not come to grips with the specifics of Justice Thomas’s analysis.

would not extend to coercive interrogation that technically falls short of legal definitions of torture.⁷⁵

While this analysis has been derided by many commentators, additional arguments also support the possibility of torture under U.S. law. Government lawyers have argued, for example, that the Constitution's vesting of the President with the commander-in-chief power gives him "the entire charge of hostile operations,"⁷⁶ including the power to interrogate enemy forces for useful information. They have also contended that the Constitution gives the President the power "to ensure the security of [the] United States in situations of grave and unforeseen emergencies."⁷⁷ Although I do not agree with these arguments at such a level of generality, they are not wholly frivolous. The Supreme Court has not definitively and specifically rejected them, and history provides a bit of support for them. As the Department of Defense's (largely discredited) Working Group put it, "Numerous Presidents have ordered the capture, detention, and questioning of enemy combatants during virtually every major conflict in the Nation's history"⁷⁸

75. See Parry, *supra* n. 63. For a comprehensive argument against this kind of claim, see Seth F. Kreimer, "Too Close to the Rack and the Screw": *Constitutional Constraints on Torture in the War on Terror*, 6 U. Pa. J. Const. L. 278 (2003). The 2004 detention cases do not necessarily undermine this analysis, even though those decisions may have been influenced by the Abu Ghraib "revelations." The *Hamdi v. Rumsfeld* plurality stated that "indefinite detention [of citizen enemy combatants] for the purpose of interrogation is not authorized" by any relevant federal statute, 124 S. Ct. 2633, 2641 (2004), and seemed to say there is no inherent executive emergency power to detain indefinitely, *see id.* at 2641-42, 2650, but it said nothing about inherent power to detain for a limited period or about the conduct of interrogation during a limited detention (except to the extent that such interrogation may be limited to "appropriate" actions by relevant legislation, as was the case in *Hamdi*, and therefore possibly limited by the Geneva Conventions and other sources of domestic and international law that the United States recognizes). Justice Souter, joined by Justice Ginsburg, was willing in principle to recognize "an emergency power of necessity . . . limited by the emergency" that would justify unauthorized executive detention of a citizen who is "an imminent threat to the safety of the Nation and its people"—hardly a position that categorically forbids coercive interrogation during a limited detention. *Id.* at 2659. In dissent, Justice Thomas called for recognition of a broader constitutional executive power to act in cases of emergency—a position that also does not categorically forbid coercive interrogation. *Id.* at 2674-82. Justice Scalia, joined by Justice Stevens, rejected an inherent emergency power to detain a citizen indefinitely, but it is far from clear that his opinion should also be read to reject the power to detain and, perhaps, coercively interrogate an alien. *See id.* at 2673 (stating his views "apply only to citizens, accused of being enemy combatants, who are detained within the territorial jurisdiction of a federal court"). Note, however, that Justice Stevens's dissent in *Rumsfeld v. Padilla*, which Justices Souter, Ginsburg, and Breyer joined, cited the government's desire "'to . . . find out everything [Padilla] knows so that hopefully we can stop other terrorist attacks,'" 124 S. Ct. 2711, 2735 n. 9 (2004), and asserted Padilla's right "to a hearing on the justification for his detention," with the further comment that "[u]nconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber." *Id.* at 2735. More importantly, *Rasul v. Bush*, 542 U.S. 466 (2004), which held that aliens in United States custody at Guantanamo Bay may seek habeas corpus review of the legality of their detentions, makes clear that the executive branch will have to provide some justification for detention. Taken together, the opinions suggest a moderate receptiveness to claims of a limited and justified emergency power to detain and interrogate but also signal a clear preference for congressional authorization and participation. I would argue further that, together with *Chavez*, the opinions also suggest openness—albeit troubled—to coercion under limited conditions.

76. Working Group Report, *supra* n. 64, at 20 (quoting *Hamilton v. Dillin*, 88 U.S. 73, 87 (1874)).

77. *Id.* at 23.

78. *Id.* at 24; *see also supra* n. 75 (discussing *Hamdi*, 542 U.S. 507). For discussions of the constitutional status of emergency power claims, see Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?* 112 Yale L.J. 1011 (2003); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 Yale L.J. 1385 (1989); Michael Stokes Paulsen, *The Constitution of Necessity*, 79 Notre Dame L. Rev. 1257 (2004). For an excellent theoretical criticism of the Bush administration's commander-in-chief and emergency power arguments, see Kim Lane Scheppelle, *Law in a Time of Emergency: States of Exception and the Temptation of 9/11*, 6 U. Pa. J. Const. L. 1001 (2004). For a defense of certain aspects of the Bush

In short, international law makes room for the justification of coercive interrogation, and domestic law—particularly in the United States—could be interpreted to go even farther. Few would describe this legal framework as progressive or as reflecting progress, particularly once we leave international law behind and consider the details of U.S. law. Yet highly trained lawyers have made good faith legal arguments for necessity exceptions and emergency power, and many law professors who have considered the issue agree that coercion could be justifiable in specific cases.⁷⁹

With torture, we see justification claims working in two ways: as an ordinary defense, but also as a source of state power (in which case torture becomes not a crime but rather a legitimate state action). Using justification as a basis for state power is not as hard a move in the United States as one might first think. Law enforcement authority, for example, is defined constitutionally more by what the police cannot do than by what they can. Put differently, law enforcement officials have discretion to do whatever the Constitution does not forbid, with additional powers and limits derived from ideas about the nature of executive authority, general statutory authorizations, common law, and the enactment of specific criminal statutes.⁸⁰

To some extent, justification arguments for expanding executive power can be couched in rational language, for example as reasonable, modulated, and temporary responses to extraordinary threats.⁸¹ I would argue, however, that justification as a source of state power takes a different form in popular understandings of law, power, and criminal justice. To the extent people think of the outside world (at whatever scale) as hostile or violent, they are more likely to approve of violent state action that transcends the ordinary boundaries of what is legal. Thus, people in some communities are willing to overlook, and even welcome, police violence if they believe it benefits them; the muted popular reaction (as opposed to the academic and journalistic reaction) to Abu Ghraib suggests a similar view with respect to the U.S. military's role in the so-called "war on terror."⁸² Critically, these views do not turn on rational weighing of costs and

administration's emergency power claims, see John Yoo, *Transferring Terrorists*, 79 Notre Dame L. Rev. 1183, 1198-1222 (2004).

79. See *supra* n. 72. I want to stress that not all torture is legal under this analysis, only torture that can be justified. So, torture for fun, for humiliation, to serve as an example to others, as a form of discrimination, or for punishment would not be justifiable under this analysis, although this distinction might not matter for torture that was inflicted for one of these purposes *and* for obtaining useful information under sufficiently compelling circumstances.

80. For a more complete version of this analysis and a comparison to the very different Israeli model, see Parry, *Judicial Restraints*, *supra* n. 25, at 122-25. See also *Sosa*, 124 S. Ct. at 2768 (rejecting the idea that an "officially sanctioned [detention] exceeding positive authorization to detain" is arbitrary).

81. See *supra* n. 75 (discussing *Hamdi*, 542 U.S. 507).

82. On the acceptance by some communities of police violence, see Lou Cannon, *One Bad Cop*, N.Y. Times Mag. § 6, 62 (Oct. 1, 2000). See also Conroy, *supra* n. 66, at 111 (discussing acceptance of torture in Argentina); *id.* at 136-37, 187 (discussing acceptance of torture by British media). A political cartoon on the nomination of Alberto Gonzales for Attorney General captured the point nicely. The cartoon shows the democratic party—represented by a donkey—asking President Bush, "Why on earth would you nominate an attorney general who wrote the memo denigrating the Geneva Convention & endorsing torture? Won't you risk a backlash from law-abiding Americans everywhere, rising up in moral outrage?" President Bush looks at the donkey and thinks, "Boy, the democrats really are out of touch." Matt Davies, *The Journal News* (Westchester County, N.Y.) (Nov. 13, 2004) (available at <http://www.thejournalnews.com/cartoons/davies/111304.html>). Despite concern over government policies on torture, the Senate confirmed Gonzalez by a vote of sixty to thirty-six, a wider margin than his predecessor, John Ashcroft, received. See Charles Babington & Dan Eggen, *Senate Confirms Gonzales, 60 to 36*, Wash. Post A1 (Feb. 4, 2005).

benefits or on sustained technical analysis. They turn instead on normative stances, based in part on prejudice but also on emotional commitments to family or community or country (to the extent prejudice and emotional commitments can be separated at all). Although reformers can achieve some success in managing or suppressing moral and emotional claims in the courtroom, it is difficult to imagine how to banish these claims from politics, particularly when they play into the hands of state officials who are more than willing to expand their authority to use violence.⁸³

Plainly, this is not a substantively progressive vision, although it is progressive to the extent that popular attitudes may provide officials with power that they will use in rational and technocratic ways. It is also essentially the same analysis that I just used for provocation and common law defenses, and so I may have undone here whatever “progress” I made earlier. I will, however, make one claim in favor of this vision. If we are to be a society that mobilizes violence against perceived threats, whether internal or external, and if the definition of those threats turns on irrational or emotional or prejudicial attitudes or beliefs—both of which are, I think, true to at least a significant extent—then we should confront and display those facts. Rather than letting ourselves believe that we are simply fighting crime or terrorism, we should realize that part of what we are doing involves the defining and subjugation of outside groups along some combination of national, racial, ethnic, class, and religious lines. Once again, allowing the language of morality and emotion (and, therefore, prejudice as well) into the discourse of justification risks—perhaps even begs—social conflict, but it also prevents the denial and suppression of that conflict.⁸⁴

83. This intuition, of course, feeds liberal theories of political structure and judicial review that seek to insulate categories of important substantive issues from popular control. See e.g. Eisgruber, *supra* n. 49, at 60-62, 194 (arguing voters cannot be trusted with final decisions on moral issues because they tend to be unreflective, not responsible, and ignorant); cf. Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28, 42-43 (2004) (providing a general discussion of the perceived benefits of democracy and of conceptions of what democracy is). My quarrel with such theories is less over this move in general (although as the text makes clear, I quarrel with it to some extent), than over the claim that the resulting institutions are “democratic,” unless the goal is simply to define democracy as what we do. Cf. *supra* n. 49 and accompanying text.

84. Worth considering in this context are the ways we transmit knowledge about criminal law and criminal justice, and in the process reinforce social conflicts and tensions. One way is scholarly; we read, we talk, we theorize, we write, and in this way we construct narratives of what criminal law is, how it functions, what is good or bad about it, and so on. These narratives, of course, embody a particular set of perspectives, quite often the perspectives of people with little experience in the criminal justice system or, if they have experience, it is solely as professional participants. Sometimes the voice of the criminal, the victim, the witness, or the juror is heard, but we often have trouble fitting those voices into our scholarly and professional narratives. Other ways to transmit this knowledge are less formal. In *Profiles in Injustice*, David Harris describes how some African-American parents have “the Talk” with their children about the police and law enforcement. See Harris, *supra* n. 42, at 109-14. Many white parents probably convey a different message of trust and faith in the system to their children. Prisons may be the sites where the greatest and most accurate transmission of knowledge about criminal justice take place. And, of course, there are thousands of other conversations in which people of all backgrounds narrate their experiences with the criminal justice system, not to mention the messages of popular culture. How do we incorporate these accounts into our scholarly and professional narratives? Yet if we fail to do so, how can we consider—as Friedman properly urges us to—the social history and sociology of crime and criminal law and the conflicts within our society? And even when we include these voices, the possible strangeness of their narratives to scholars of legal doctrines risks exoticizing the criminal justice experience and the people caught within it.

IV. PROGRESS, PUNISHMENT, AND CRIMINAL JUSTICE

I expect that I have said enough to force some ambivalence about progress, yet perhaps also more than enough to make readers reluctant to choose an alternative doctrinal structure that promises social conflicts with, at best, only provisional and partial solutions to some of those conflicts. If we broaden the focus away from doctrine and to the criminal justice system as a whole, however, I hope to confirm that the desire for progress is at least as problematic in criminal law as it is in the areas I touched on at the beginning of this paper.

In the context of criminal justice, those who seek substantive progress may wish to define it in terms of such things as elimination of the death penalty, reduction of punitive sentences, increased treatment and rehabilitation options, and incentives for at-risk groups to reduce behavior that is criminal or that leads to law-breaking. Yet if their goals are to be sustainable as a workable political program, progress seekers must also deliver reduced crime rates (and not merely promise them contingent upon a massive and never-to-be-obtained reprioritization of social resources).

As Friedman recognizes in *Crime and Punishment* and other writings, figuring out the sources of criminal behavior and addressing them can be a difficult task.⁸⁵ This problem remains even as we experience the lowest crime rates in the past thirty years.⁸⁶ Certainly, progress-seekers can take little credit for this reduction, as it came at the same time that spending on social welfare declined and funding for rehabilitation inside and outside of prison remained precarious. Some of the decrease over the past decade may simply indicate that some amount of crime is directly linked to economic conditions. In any event, crime rates have not dropped to anything close to negligible levels, and they could rise again.⁸⁷ Either way, we remain confronted with the problem of achieving progress in crime prevention.

I would argue that we do in fact know one reasonably good way to prevent crime—that is, to achieve progress in that sense. Simply put, it is the creation and reassertion of authority and social control, by the government, private and quasi-public associations, communities, and families. Social control can take a variety of forms, of course. One way to achieve it is by reasserting traditional models of community surveillance in schools, churches, and other groups—a model that many social conservatives appear to embrace and which makes many progress-seekers queasy.⁸⁸ If

85. Friedman, *supra* n. 1, at 453-63; Friedman, *Dead Hands*, *supra* n. 3; Friedman, *Some Remarks*, *supra* n. 3.

86. Bureau of Justice Statistics, *Violent and Property Crime Remain at Lowest Rates in 30 Years* (Sept. 12, 2004) (copy on file with *Tulsa Law Review*); see also Dan Eggen, *Violent Crime Decreased 3% Last Year*, *FBI Reports*, Wash. Post A2 (Oct. 26, 2004).

87. Indeed, the decrease in crime rates appears to have leveled off, and the murder rate has increased six percent since 2000. *Id.* Crime rates, of course, are manipulable. The more conduct deemed criminal, the higher crime rates will be, the more of a “crisis” we will have, and the more we will need to crack down. And, if many low-level crimes—for example, certain drug crimes—were redefined as “not criminal” (whether or not still illegal in some way), crime rates in the United States would plummet.

88. See Garland, *Culture of Control*, *supra* n. 22, at 99 (“Neo-conservatism introduced into political culture a strikingly *anti-modern* concern for the themes of tradition, order, hierarchy, and authority. . . . By the 1980s, the demand to get ‘back to basics[,]’ to restore ‘family values’ and to re-impose ‘individual responsibility’ had become familiar themes on both sides of the Atlantic.” (emphasis in original)).

Friedman is correct, however, that we live in a “horizontal society,” where lines of authority in families, associations, and communities are unclear and weakened, governments may have to do much of the work.⁸⁹

David Garland has charted a different method: the movement away from rehabilitation and toward control of prisoners and protection of the public (a move that he calls late modern or postmodern). Control under this contemporary approach is not about shaping criminals into citizens but rather looks back to more traditional, hierarchical ways of exercising power through incapacitation and as an incentive for individuals to change their behaviors.⁹⁰ The obvious problem with forms of governmental control similar to this, especially if generalized, is that they run into claimed liberal commitments to such things as individual rights and nondiscrimination. Put differently, some social control strategies may achieve progress in the sense of increased rationalization and state authority, and in terms of decreased crime rates, but they seem to undercut the substantive rights’ goals of progress. Those who do not want this increased level of social control may have to accept, as Friedman suggests, relatively high crime rates (or at least a structural bias in their favor) as the price we pay for what we define as freedom, equality, and individualism in society.⁹¹

Yet increased social control can take more nuanced and progressive forms. Friedman himself has suggested “[s]tronger family services, greater economic opportunit[ies], and improved schooling.”⁹² And, in a recent article, Christopher Slobogin resurrects and develops the argument that criminal law should shift away from punishing past acts and instead seek to prevent future antisocial or dangerous behavior. Central to his argument is the claim that “a preventive regime is much better at assimilating the proliferation of scientific findings that call into question humans’ ability to control their actions.”⁹³

Slobogin’s impressive proposal thus depends on a belief in the progressive accumulation of scientific knowledge about human behavior and in our ability to put that information to beneficial use—that is, to treat rather than punish people who engage in antisocial acts, to shape better members of our communities by making them understand the consequences of their actions, and, where possible, to restore them to society as productive individuals.⁹⁴ Importantly, Slobogin does not extend his proposal to include

89. Friedman, *supra* n. 20, at 30-32; Lawrence M. Friedman, *The Horizontal Society* (Yale U. Press 1999). The idea of the horizontal society also pervades Friedman’s earlier *Republic of Choice*, *supra* n. 14.

90. Garland, *Culture of Control*, *supra* n. 22, at 8-20.

91. See Friedman, *Dead Hands*, *supra* n. 3, at 925; Friedman, *supra* n. 1, at 464; cf. Garland, *Culture of Control*, *supra* n. 22, at 128 (discussing theories that “begin from the premise that crime is a normal, commonplace . . . aspect of modern society”). At the same time, the failure of governments to impose this level of control has played a role in the rise of the so-called “private police,” with corresponding implications for individual rights and equality norms. See David A. Sklansky, *The Private Police*, 46 UCLA L. Rev. 1165 (1999).

92. Friedman & Fisher, *supra* n. 3, at 11; see also *id.* at 10 (discussing the role of communities, including “community shaming”). Restorative justice theories also hold out the possibility of more nuanced approaches to the problem of increased social control and, under some formulations, work against centralization of power in the state. For a variety of perspectives and criticisms, see Symposium, *The Utah Restorative Justice Conference*, 2003 Utah L. Rev. 1-562.

93. Christopher Slobogin, *The Civilization of the Criminal Law*, 58 Vand. L. Rev. 121, 130 (2005).

94. See *e.g. id.* at 144, 147-49.

some of its logical possibilities. For example, he shies away from claiming that all DSM disorders are grounds for intervention,⁹⁵ and he would require, as a prerequisite for intervention, “a harmful or potentially harmful act that is both nonaccidental and unjustified.”⁹⁶ Finally, he does not claim that intervention or even the identification of risky individuals should turn on heredity, although his discussion of the scientific background for his proposal includes hereditary factors as a possible biological cause of criminal behavior (and concern about inherited traits seems a logical consequence of a scientifically-based preventive model).

Despite those caveats, the necessary process for achieving the goals that Slobogin outlines is to create a therapeutic state that annexes a large proportion of what is currently a quasi-public system of mental health assessment and treatment. Having occupied this territory, the state will intervene in our lives—or at least in the lives of those of us who engage in harmful or antisocial acts—with the goal of knowing and dominating us, in order to shape and mold us in rational ways that go beyond its traditional methods of social control. Desirable or not, such a process can only be described as authoritarian to a degree that traditional punishment is not. In other words, progress toward better-adjusted citizens and a safe society arguably requires progress toward greater state authority to intervene in and control—to rationalize—our lives.⁹⁷ Because I have less faith than Slobogin in scientific discourse, particularly in the behavioral sciences, and in its ability to assess how to treat and—a necessary corollary—who is worth treating, I doubt the ability of preventive criminal justice to do anything more than increase state power over us.⁹⁸ But this objection may be naïve. Perhaps it is simply a matter, not so much of increasing state power, but rather of changing the ways in which it is exercised, so that the issue is as much the quality of power as its quantity. Indeed, Slobogin urges a move from punishment to discipline and regulation that Foucault contended had already taken place (for the first time, at least) by the nineteenth century.⁹⁹ Slobogin’s proposal is thus an excellent description of where our faith in

95. *Id.* at 125-26.

96. *Id.* at 135.

97. These criticisms are not new; they were made in the 1970s and 1980s of rehabilitative approaches to punishment. For the classic critique, see Francis A. Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* 44-54 (Yale U. Press 1981). For a good review, expansion, and assessment of the continuing validity of these claims, see Richard C. Boldt, *Rehabilitative Punishment and the Drug Court Movement*, 76 Wash. U. L.Q. 1205, 1219-45 (1998). Worth noting is that rehabilitative approaches are not monolithic, and one can distinguish broadly between facilitative rehabilitation, in which prisoners choose to participate in programs and release is not conditioned on rehabilitation, and coercive rehabilitation, in which prisoners are forced to participate in programs and may not be released until they are deemed to be rehabilitated. See Allen, *supra*, at 83 (citing Norval Morris, *The Future of Imprisonment* 27 (U. of Chi. Press 1974)). Slobogin’s approach seems to fall on the coercive end of the continuum. See Slobogin, *supra* n. 93.

98. As Allen put it, in the practice of rehabilitation, “[I]ines between therapy and repression tend to fade” and one sees “a drastic enlargement of state concerns.” Allen, *supra* n. 97, at 46-47. For a more targeted doctrinal and retributivist objection to the use of the criminal justice system for preventive detention, see Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 Harv. L. Rev. 1429 (2001).

99. Foucault, *supra* n. 5; Foucault, *Society Must be Defended*, *supra* n. 28, at 241-54. Allen’s *Decline of the Rehabilitative Ideal*, *supra* n. 97, and Garland’s *Culture of Control*, *supra* n. 22, chart what is arguably a breakdown of the disciplinary model at the government level and a return to more traditional forms of punishment in the second half of the twentieth century. For a nice summary of research that modifies the Foucauldian model, at least in the United Kingdom context (with application to the United States as well), to

progress repeatedly pushes us, and of the inevitable conflicts within progressive goals as we seek to do better at crime control.

As Slobogin points out, moreover, punishment by incarceration does a bad job deterring criminal activity (unless the goal is simply to deter by warehousing criminals deemed unable to function in society).¹⁰⁰ Similar insights have driven earlier efforts to develop the preventive model. Indeed, Slobogin seems to recognize that his proposal would revive, to a greater extent than many other preventive and rehabilitative approaches, what Enrico Ferri called the “positive school of criminal law,” which sought “to study the natural genesis of criminality in the criminal, and in the physical and social conditions of his life, so as to apply the most effectual remedies to the various causes of crime.”¹⁰¹ Ferri argued that punishment does not deter and, particularly, that increasing the severity of punishment is ineffective at fighting rising crime rates.¹⁰² Against what he saw as an irrational desire to punish, Ferri combined progressive, rational scientific and statistical analysis with skepticism about free will.¹⁰³ His goal was “a moral and preventive system, based on the natural laws of biology, psychology, and sociology.”¹⁰⁴ Achieving this goal required classifying criminals as normal or abnormal, and if abnormal, according to whether the abnormality was “congenital or contracted, capable or incapable of rectification.”¹⁰⁵ To that end, Ferri identified five classes of criminals: moral or insane, born, habitual, occasional, and by passion.¹⁰⁶ Treatment or punishment would turn less on the crime and more on the offender, in particular on which of these categories the offender most resembled, and only the incurable would receive prolonged confinement. Indeed, Ferri’s proposals ranged far beyond criminology; he believed, for example, that “[i]n the society of the future, the necessity for penal justice will be reduced to the extent that social justice grows intensively and extensively.”¹⁰⁷

emphasize the decline of punishment as a public spectacle as much as the shift to discipline, see Jonathan H. Grossman, *The Art of Alibi: English Law Courts and the Novel 7-16* (Johns Hopkins U. Press 2002).

100. Slobogin, *supra* n. 93, at 140-42.

101. Enrico Ferri, *Criminal Sociology* xvi (W.D. Morrison ed., D. Appleton & Co. 1897); see also *The Positive School of Criminology: Three Lectures by Enrico Ferri* 76 (Stanley E. Grupp ed., Ernest Untermyer trans., U. Pitt. Press 1968) [hereinafter *The Positive School*] (“Every crime, from the smallest to the most atrocious, is the result of the interaction of these three causes, the anthropological condition of the criminal, the telluric environment in which he is living, and the social environment in which he is born, living, and operating.”). The version of *Criminal Sociology* from which I quote is a partial translation of the third edition and the first version to appear in English. The fourth edition was published in English in 1917. See Stanley E. Grupp, *Introduction*, in *The Positive School*, *supra*, at 1, 24-25 n. 19. Slobogin highlights Ferri as “perhaps the earliest” advocate of the preventive approach. See Slobogin, *supra* n. 93, at 127 n. 32.

102. See Ferri, *supra* n. 101, at 82-110.

103. See *id.* at 54-63; see also *The Positive School*, *supra* n. 101, at 53-64; *id.* at 100 (decrying “the blind worship of punishment”). Ferri compared the classical school of criminology (represented by Cesare Beccaria) to pre-modern medicine, although he recognized its historical importance as, “in the name of individualism and natural rights, . . . a protest against the barbarian penalties of the Middle Ages.” *Id.* at 99-100.

104. Ferri, *supra* n. 101, at 108.

105. *Id.* at 6-7; see also *id.* at 226 (stating a prisoner is a patient “more or less curable”).

106. Ferri, *supra* n. 101, at 23-44; *The Positive School*, *supra* n. 101, at 91-93. Ferri, who was deeply influenced by Cesare Lombroso, coined the term “born criminal.” See Mary Gibson, *Born to Crime: Cesare Lombroso and the Origins of Biological Criminology* 22 (Praeger 2002). In the fifth edition of *Criminal Sociology*, Ferri added a sixth category: the involuntary criminal. Grupp, *supra* n. 101, at 23-24.

107. *The Positive School*, *supra* n. 101, at 94. Ferri proposed a long list of social, political, scientific, administrative, and educational reforms that he claimed would reduce crime. Ferri, *supra* n. 101, at 114-32.

Ferri and his fellow positivists had enormous influence on early twentieth century criminology.¹⁰⁸ Despite their reformist goals, however, they are not always remembered with affection. The founder of the positive school, Cesare Lombroso, was deeply influenced by craniology, and Ferri endorsed its validity, although he also looked to other scientific analysis and claimed that “the psychological study of the criminal” was “by far the more important.”¹⁰⁹ More generally, their claim that crime can have biological causes led many positivists to endorse eugenics.¹¹⁰ Many Italian positivists also followed a political arc similar to Ferri’s. Initially a socialist, by the end of his life, Ferri was a fascist. He served on the committee that drafted Mussolini’s criminal code, which incorporated several positivist principles.¹¹¹

I want to make clear that I am not claiming positive criminology led inexorably to fascism (or, for that matter, to socialism) or to eugenics. Nor am I leveling similar charges against contemporary preventive approaches. Historical context matters, and it includes changes in the claims that science makes, as well as differences between and changes over time in political cultures.¹¹² Yet we should not ignore the possibility of historicizing preventive approaches to crime, which reveals them to be modern phenomena that bring rational, scientific approaches to bear on the problem of crime in a way that fits naturally with the growing authority of modern states.¹¹³ As I argued

108. See Peter D’Agostino, *Craniums, Criminals, and the ‘Cursed Race’: Italian Anthropology in American Racial Thought, 1861-1924*, 44 *Comp. Stud. in Socy. & Hist.* 319 (2002); Gibson, *supra* n. 106, at 247-50; Richard F. Wetzell, *Inventing the Criminal: A History of German Criminology, 1880-1945*, at 31-71 (UNC Press 2000) (discussing France as well as Germany with a focus on the influence of Lombroso’s theories of biological criminality); see also Friedman, *Twentieth Century*, *supra* n. 3, at 108-10 (discussing the influence of hereditary theories of crime on United States law). For an example of the American reception of Ferri, see C.R. Henderson, *Book Review*, 1 *Am. J. Sociology* 785, 787 (1896) (describing *Criminal Sociology* as “truly an original scientific work” and “as distinctly a new thing as the dramas of Shakespeare were new”). The American Institute for Criminal Law and Criminology and its *Journal of Criminal Law & Criminology* were deeply influenced in their early years by the positive school. See D’Agostino, *supra*, at 329, 341 n. 31. Somewhat more recently, Ferri was lauded as “a scholar of eminent stature” and “the father of modern criminology,” and the positive school was described as “so significant in today’s thinking.” Henry M. Muller, *Book Review*, 34 *Am. Sociological Rev.* 979, 979 (1969). For discussion of the ongoing importance of positivism, see Stanley Cohen, *Against Criminology* 4 (Transaction Bks. 1988) (arguing “[t]he whole of the past century of criminology can be understood as a series of creative, even brilliant, yet eventually repetitive variations on . . . the positivist paradigm”).

109. Ferri, *supra* n. 101, at 7-9; see also *The Positive School*, *supra* n. 101, at 80-85 (emphasizing the importance of economic, social, and geographic influences).

110. D’Agostino, *supra* n. 108; Gibson, *supra* n. 106, at 236-40. Ferri believed that racial characteristics were one of many factors that would explain differences among regions and countries in crime rates and types of crimes. *The Positive School*, *supra* n. 101, at 78-81. For an effort to explain Ferri’s racial views in light of “the intellectual climate of the time in which he wrote,” see Grupp, *supra* n. 101, at 4.

111. See Gibson, *supra* n. 106, at 234-35; Sarah Musio, *La Vicenda del Codice Rocco nell’Italia Repubblicana (The History of the Rocco Code in the Italian Republic)*, ch. 1, § 3, <http://dex1.tsd.unifi.it/altrodire/law-ways/musio/nav.htm?cap1.htm#3> (accessed Oct. 7, 2005); Thorsten Sellin, *Enrico Ferri: Pioneer of Criminology*, in *The Positive School*, *supra* n. 101, at 13, 31-32.

112. Slobogin contends, for example, that contemporary science has gotten better at assessing and predicting behavior, and readers will not be surprised to learn that craniology is absent from his proposal. See Slobogin, *supra* n. 93, at 144-50; see also Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 *Nw. U. L. Rev.* 1, 6-11 (2003).

113. See Wetzell, *supra* n. 108, at 31 (“the late nineteenth-century birth of criminology was in many respects a general Western European [read, modern] phenomenon”); *id.* at 34 (distinguishing between classical criminology, which was concerned with protecting the individual against the state, and late nineteenth-century criminology, which “was concerned with better protecting society against crime by extending the state’s punitive powers”—including the power to rehabilitate). For discussion of these issues in the context of

already, a preventive approach to crime that uses science and medicine as models and seeks to treat (and thus both regulate and discipline) criminals rather than punish them is necessarily authoritarian in a way that traditional models of crime control are not. Notably, moreover, this designation is independent of the question whether such approaches would make us better off as individuals and as a society (as indeed they might).¹¹⁴

In the ongoing task of crime control, in short, and whether we opt for traditional forms of hierarchical power, socio-economic reform, or prevention, we are talking about authority—usually state authority. I would like to take the argument a couple of very speculative steps further as a way of concluding—and as a way of returning to Friedman's work, for my speculations will be in some tension with his argument in *The Republic of Choice*. In that book, Friedman explores the extent to which “the functioning of authority and law [in western legal culture] to a large degree depends on (or is thought to depend on) choice or consent—free, voluntary acts of those subject to authority and law.”¹¹⁵ My claim here is that, for many people, the turn to social control is a good thing and a sufficient goal by itself. I do not mean simply the return to some set of mythical traditional values or the desire to subordinate or medicalize others. What I mean, rather, is that a significant portion of the population of this country wants authority, and particularly wants not just others to be subject to that authority but also to be subject to it themselves.¹¹⁶

The desire for authority—to have choice constrained or taken away—may not be a constant and may not always have existed in the way it exists in this moment in United States history. Its strength will vary partly in response to other cultural factors, and it will interact and conflict with other forces. But it is also a force that shapes our culture, including our attitudes about crime and criminal justice. Interestingly, moreover, at a

Turkey's self-conscious modernization in the early twentieth century (which included adoption of the Italian Rocco Code), see Ruth A. Miller, *Sin, Scandal, and Disaster: Politics and Crime in Contemporary Turkey*, in *Evil, Law, and the State*, *supra* n. 16, at 47, 48-52.

114. When I call the preventive approach authoritarian, I do not mean that it has no concern for individuals. Quite the contrary; individuals are of great concern to the preventive approach (and, I would argue, concern about the character of the individual, as a member of society, is a great concern of many authoritarian approaches). Thus, Slobogin argues:

As modern rehabilitative efforts routinely demonstrate, a regime based on prediction does not have to insult the notion that past choices have consequences and that the offender is responsible and held accountable for them. There is a difference in message, however. The punishment model says to the offender: “You have done something bad, for which you must pay.” The prevention model says: “You have done something harmful, which you must not let happen again.” In terms of how they treat their children, many parents would probably prefer the latter message to the former; arguably government officials in charge of responding to antisocial behavior should as well.

Slobogin, *supra* n. 93, at 132-33 (emphasis in original) (footnotes omitted). Slobogin also argues that, to the extent any criminal law regime plays a role in shaping character, “[a]n individualized prevention regime . . . would be much better [than a punishment regime] at developing good judgment.” *Id.* at 143.

115. Friedman, *supra* n. 14, at 19 (emphasis omitted).

116. Cf. Jean & John Comaroff, *Criminal Obsessions after Foucault: Postcoloniality, Policing, and the Metaphysics of Disorder*, 30 *Critical Inquiry* 800, 822, 824 (2004) (arguing “there is plentiful evidence in popular fantasy [in South Africa and elsewhere] of a nostalgia for authoritative, even authoritarian government” and contending this phenomenon is “decidedly post-Foucaultian” because “disorder . . . seems to exceed the capacity of the state to discipline and punish”); Simon, *supra* n. 22, at 248 (“Much of contemporary penal innovation takes the form of a nostalgia for the trappings of a disciplinary society.”).

time of low crime rates, the desire for authority remains strong because of the perceived threat of terrorism. Many people in this country embrace the restraints of the “war on terror,” and not just because they are afraid of something called terrorism. Authority and control code as comfort and safety—and, therefore, a form of happiness and pleasure—for many people much of the time.¹¹⁷

Going further, I would like to stress again that progress as I have discussed it here, and as it applies to criminal law, is not just an ideal of release and freedom but also, simultaneously, a practice of control. Freedom cannot exist without control, and there is no control without freedom. The ideas depend on each other for their meaning and to exist at all as concepts. In some sense they are the same concept, a particular way of thinking about the conditions of human existence. Progress must grapple with both concepts, and extending one requires extending the other. So, for us to desire and even achieve freedom, we have to experience control. Within imposed control we find freedom from fear and anxiety and from choice and uncertainty.¹¹⁸ Freedom without control, even if it were possible, would be too terrifying to endure.

Although this ostensibly descriptive claim is decidedly not liberal, it is not as foreign to contemporary strands of liberal theory as one might first expect. Stephen Holmes, for example, stresses “the restrictive, or even anti-individualistic, element within liberalism itself.”¹¹⁹ Similarly, Joseph Raz recognizes that although autonomy requires “an adequate range of choices,”¹²⁰ it remains a matter of degree, and “[a]n autonomous personality can only develop and flourish against a background of biological and social constraints which fix some of its human needs.”¹²¹ Raz also recognizes that autonomy exists in tension with government coercion, but he contends that by definition, the coercion of the liberal state is not problematic because “its coercive measures do not express an insult to the autonomy of individuals [as] they are motivated not by lack of

117. So far, my argument can be seen as consistent with Friedman’s to the extent that I am talking about a choice to embrace and be subject to authority. Friedman recognizes the desire of some people for authority, and he repeatedly stresses that he is talking about a discourse of choice, so that the reality of choice may be, and at least sometimes is, far more constrained and even inconsequential. See Friedman, *supra* n. 14, at 45-47, 61, 74, 128-32. For both of us, choice is not an absolute presence or absence but rather a shifting point along the continuum between autonomy and control.

118. As a corollary, I should note my skepticism about the unadorned contention “that there is [no] human being who does not desire choice,” unless that claim is made at a high level of abstraction. Sunder, *supra* n. 14, at 1459 (quoting Martha C. Nussbaum, *Sex & Social Justice* 11 (Oxford U. Press 1999)); see also *id.* at 1459-64 (critiquing claims like Nussbaum’s on grounds somewhat different from those I advance). One need not join Lila Abu-Lughod in questioning whether “liberation [is] even a goal for which all women or people strive.” Lila Abu-Lughod, *Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others*, 104 *Am. Anthropologist* 783, 788 (2002). It is enough to note that liberation not only exists in relationship to control and that it is a continuum, not a simple presence or absence, but also that the meaning of liberation and its resulting value is not fixed. Liberation and freedom mean different things in different times and places, not just because of culture but because of differences in personal and material circumstances and, for that matter, in the ways in which liberation presents itself in people’s lives (that is, liberation as an achievement, as a gift, as a requirement, and so on). Further, to the extent every human being desires choice, freedom, or liberation, we might just as plausibly say that such a desire is inextricably linked with, and cannot function without, a desire to be controlled, not to have to choose, or at least to be constrained in one’s choices and freedoms.

119. Stephen Holmes, *The Anatomy of Antiliberalism* 236 (Harv. U. Press 1993).

120. Raz, *supra* n. 18, at 373.

121. *Id.* at 155-56.

respect for individual autonomy but by concern for it.”¹²² He goes on to insist—using criminal law as an example—that the state should foster “valuable autonomy,”¹²³ with the result that it may restrict the autonomy of some and adopt “paternalist” measures “which encourage the adoption of valuable ends and discourage the pursuit of base ones.”¹²⁴ Autonomy then, especially in practice, must depend on state power, and it can exist only so long as it is directed toward approved goals that the state inevitably will participate in defining. As Holmes puts it, “Liberty . . . is inextricably entwined with authority”¹²⁵ In short, only within the embrace of state power can we be guided toward “valuable autonomy” and thus be truly free. My larger point in this essay, however, is not the necessity of state power and control but rather the fact that many people like that control, and not so much instrumentally as aesthetically and morally.

Finally, we also have to ask whether there is any option apart from control. After all, if freedom and control are entwined, then we are not those mythical creatures called fully autonomous, self-actualizing individuals.¹²⁶ To a significant degree, we are all shaped, subjected to surveillance, and controlled by public and private institutions and by our friends, neighbors, and families. We, in turn, as members of these groups, do the same to others. Our choices, when we have them, are often about trading among the disciplines and freedoms of market, community, and family and between those options and the discipline, regulation, and freedom (or, sometimes, the punishments) of state authority. Within these constraints, people discover a range of experiences and emotions, from fulfillment to alienation, from meaning and purpose to nihilism, rage, or ennui.¹²⁷ Sometimes we resist, and sometimes resistance makes a difference. Under

122. *Id.* at 157.

123. *Id.* at 412.

124. *Id.* at 423; compare *supra* n. 114.

125. Holmes, *supra* n. 119, at 204. To some extent, of course, I have merely restated a tension in contemporary liberal theory. Liberal theorists do not agree on the scope of the state’s proper power to endorse substantive goals, but it is worth underscoring the point that one cannot be a liberal or have a liberal theory without the state power that defines and makes that possible, so that liberalism is not only a theory of the state but also necessarily legitimates, even if grudgingly, power and control and their use against individuals. For related discussions, see Agamben, *supra* n. 27, at 121, 126-35; Buonamano, *supra* n. 27.

126. See Friedman, *supra* n. 20, at 38-39 (suggesting choice is as much a feeling as a reality, that “the freedom to choose is almost always within certain limits, and those limits often are both unconscious and quite restricted,” and that many things we think are choices are socially determined). Remember in this context that a preference for prevention instead of punishment likely will rest on scientific claims about the primacy of determinism over free will and seeks to change behavior through therapeutic intervention, and those claims and goals rest in tension with liberal ideas of autonomy. See Ferri, *supra* n. 101, at 54-63; Slobogin, *supra* n. 93, at 157-65; Slobogin, *A Jurisprudence of Dangerousness*, *supra* n. 112, at 18-34. For more critical assessments of this tension, see Allen, *supra* n. 97, at 44-46, and Boldt, *supra* n. 97, at 1238-45. I am not trying to argue that lack of autonomy is either good or bad, although I would like to suggest that it is not necessarily bad (which is itself comforting to the extent that autonomy is necessarily constrained). Raz, for example, not only recognizes that autonomy functions in relationship to social, biological, and governmental constraints, see *supra* nn. 120-24 and accompanying text, but also admits that autonomy is not required for self-realization. Raz, *supra* n. 18, at 375; see also Friedman, *supra* n. 14, at 62 (noting the culture of choice and individualism is distinct from libertarianism); *supra* n. 114 (discussing authority and individualism).

127. Compare Eyal Flowers, *The Modern Self in the Labyrinth: Politics and the Entrapment Imagination* 8 (Harv. U. Press 2004) (noting that “increasingly, this world offers its inhabitants either the individual response of coping with its dehumanization, or destructive, violent eruptions in the form of riots and terror”), with Ellen Bayuk Rosenman, *Unauthorized Pleasures: Accounts of Victorian Erotic Experience* 121 (Cornell U. Press 2003) (discussing “pleasurable negotiations,” which are “bargains made with the dominant ideology that, in

this view—call it the authority model—law is simply a part of the larger exercise of power. Sometimes we like how law channels power, and sometimes we do not, but in either case our assessment is not usually very important. Power, in this model, need not be unchanging or monolithic, and it operates in complex and sometimes conflicting ways, all through human agency. Nor is it necessarily bad. Yet it is not dressed up in progress as a substantive, reform project even if sometimes it seems to flow in that direction. It does not make room for the performance or resolution of social conflict in any transformative sense, although from time to time that might happen. Power, authority, and control are just social facts, and what is more, many people like it that way. But, something will lead you to say, that cannot be true.