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Criminal Justice and the Public Imagination

Erik Luna*

As this symposium demonstrates, criminology has much to offer criminal law and procedure. But there are limits to this endeavor, such as when public policy is distorted by powerful emotions that ignore the lessons of legal doctrine and social science. This article presents one possible response in such circumstances: expanding the interdisciplinary relationship to include literary and cultural materials usually associated with the humanities. These works can inspire the public imagination in ways that law and criminology cannot, at times offering an alternative narrative to counter emotion-driven claims of necessity, for instance, and raising the exact type of questions that legal doctrine and social science can help answer. As a case in point, the article considers the post-9/11 narrative of fear that paved the way for various deviations in criminal law and procedure. It then suggests that dystopian fiction provided an alternative image of authoritarian abuses to contrast with the representations of government.

I. INTRODUCTION

It has been more than four decades since renowned educator Clark Kerr heralded the end of the classic university. Rather than a single group of scholars and students working as one, the new model of higher education was a *multiversity*, a dynamic institution composed of numerous communities.[1] Its edges were blurry and interests varied; it examined the remote past and distant future while challenging the present; and it both generously served and harshly criticized society. The model has problems, of course, some of which stem from its sheer enormity and disjointed nature, prompting Kerr's quip that the university had become a collection of schools and departments united in frustration over campus parking.[2] Still, the institution as a whole was "extraordinarily flexible,

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* Professor of Law, Washington and Lee University School of Law. Many thanks to David Harris, Wayne McCormack, and John Winterdyk for their comments, and to Daniel Goldman and Thomas J. Moran for their research assistance.

[1] "It is not one community but several—the community of the undergraduate and the community of the graduate; the community of the humanist, the community of the social scientist, and the community of the scientist; the communities of the professional schools; the community of all the nonacademic personnel; the community of the administrators." CLARK KERR, THE USES OF THE UNIVERSITY 14 (5th ed. 2001).

[2] *Id.* at 15.

decentralized, competitive—and productive," a place where "[t]he new can be tried" and "the old tested with considerable skill and alacrity."[3]

Indeed, the modern university's breadth made possible symbiotic relationships among sometimes disparate disciplines, resulting in lively, productive interaction and collaboration. The silo mentality that once prevailed in higher education gave way to a more open-minded, comprehensive approach toward topics of mutual interest in otherwise distinct fields, fostering some of the most significant disciplinary advances in recent times.[4] Such cross-fertilization has been particularly valuable in the natural sciences, where biology, chemistry, and physics have combined to form hybrids like biophysics and neuroscience. Interdisciplinarity has also had an enormous impact on the social sciences and humanities, especially in combination with the study of law, which has long been viewed as an arena of allied disciplines examining "the whole field of man as social being."[5] Some argue that law is an inherently parasitic discipline,[6] and today the "law and" phenomenon[7] is so pervasive that it is hard to identify purely doctrinal scholars, individuals whose work does not draw upon, or at least dabble with, non-legal fields. The interdisciplinary study of criminal law and procedure has been no exception, and in fact, it was among the first legal areas to actively pursue the insights of allied disciplines.[8]

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[3] CLARK KERR, THE GREAT TRANSFORMATION IN HIGHER EDUCATION, 1960–1980, at 127 (1991).

[4] *See, e.g.*, Thomas Bender, *Response to Social Science Research Council, Negotiating a Passage between Disciplinary Boundaries*, *in* AMERICAN HIGHER EDUCATION TRANSFORMED, 1945–2005: DOCUMENTING THE NATIONAL DISCOURSE 284, 287 (Wilson Smith & Thomas Bender eds., 4th ed. 2008):

> [O]ne can argue that most of the important disciplinary innovations of the past century, and especially the past half-century, derive from the incorporation of concepts or methods from other disciplines. That is a powerful argument against disciplinary parochialism, or, to put it more positively, a call to a disciplinary cosmopolitanism that allows and encourages serious participation in a more general intellectual culture.

[5] *See, e.g.*, *History of the Law School*, U. of Chi. L. Sch., *available at* http://www.law.uchicago.edu/school/history (last visited Sept. 1, 2009) (quoting William Rainey Harper circa 1900).

[6] *See, e.g.*, Richard A. Epstein, *Does Literature Work as Social Science?: The Case of George Orwell*, *in* ON NINETEEN EIGHTY-FOUR: ORWELL AND OUR FUTURE 49, 49 (Abbot Gleason et al. eds., 2005) ("Law is a parasitic discipline. It attaches to all human endeavors that involve either disputes or cooperation between two or more people, which is to say that it touches all aspects of human life, either as an unwelcome intruder or as an indispensable aid."). *See also* Anthony Bradney, *Law as a Parasitic Discipline*, 25 J. L. & SOC'Y 71 (1998); George L. Priest, *Social Science Theory and Legal Education: The Law School as University*, 33 J. LEGAL EDUC. 437 (1983). *But cf.* Roger C. Cramton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1, 15–16 (1986).

[7] For example, law and economics, law and psychology, law and philosophy, etc.

[8] *See, e.g.*, Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 OHIO ST. J. CRIM. L. 217 (describing the history of criminal law texts synthesizing cases and social science materials).

Leon Radzinowicz, one of the twentieth century's foremost criminologists, noted in 1940 that "human thought long ago realized that the study of criminal law alone cannot provide all the information necessary for a proper understanding of the phenomena of crime."[9] The endeavor had been impeded by an "atomization" of the subject matter and a failure to recognize legal doctrine "as dependent and functional rather than as creative."[10] According to Radzinowicz, criminological research was crucial in deciding, *inter alia*: what to criminalize and how much to punish; how law enforcement should be deployed and what limitations should be placed on its power; how the legal process should be structured and what varieties of courts should be available; whether expert testimony should be allowed and what weight it should be given; and how much discretionary authority should be allocated to prosecutors, defense attorneys, judges, and juries.[11]

Since then, generations of criminal justice scholars have explored the intersection between legal doctrine and social science.[12] In this spirit, the current issue of the *Ohio State Journal of Criminal Law* seeks a fresh examination of the relationship between legal doctrine and social science, asking what criminal law and procedure can learn from criminology. Undoubtedly, my fellow symposium participants will offer important insights on an ever-evolving intersection, that area where criminology enlightens the legal analysis of crime, punishment, and the relevant processes. Like others, I support the endeavor and will continue to draw upon this interdisciplinary work in my own studies. The following merely suggests some limits as to what criminology can do for law, not in terms of the theoretical and empirical knowledge it provides, but instead the impact that *any* social or natural science can have on criminal justice policies and practices.

Some research may be effectively inaccessible to both policymakers and the public, due in no small part to the monastic life of the university professor, the peculiar nature of scholarly publication, and the technical language of most academic writing.[13] But valuable criminological work may also be marginalized by human passions that subvert the authority of fact and reason. Strong emotions,

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[9] L. Radzinowicz & J.W.C. Turner, *The Language of Criminal Science*, 7 CAMBRIDGE L.J. 224, 224 (1940).

[10] *See id.* at 226–27, 237.

[11] *See id.* at 234–35.

[12] *Cf.* Ellen G. Cohn & David P. Farrington, *Crime and Justice and the Criminal Justice and Criminology Literature*, 20 CRIME & JUST. 265 (1996) (empirical study of most-cited criminal justice scholars).

[13] *See, e.g.*, Julius G. Getman, *Voices*, 66 TEX. L. REV. 577 (1988). For instance, the rhetorical style of legal writing

> tends to be formal, erudite, and old-fashioned. Its passages often are interspersed with terms of art and Latin phrases, as though its user were removed from and slightly above the general concerns of humanity. Indeed, the focus on general rules, which is one of the contributions of professional voice, ensures the use of language that removes some of the feeling and empathy that are part of ordinary human discourse.

Id. at 578.

particularly fear and hatred, have a remarkable tendency to disengage rational thought processes in favor of visceral responses, often punitive in nature. The history of "moral panics" attests to the power of fear and hatred in social and political action, including the creation and enforcement of criminal law.[14] Against this background, the present piece examines whether materials found in other disciplines can inspire the public imagination, even in times of high anxiety, with the goal of placing distortive emotions in perspective and facilitating sound public policy.

The next part discusses the impact of criminological research on criminal law and procedure doctrine, suggesting that any beneficial interaction can be jeopardized when emotion drives criminal justice policy. The article then explores the potential of an interdisciplinary response in such circumstances, beginning with a brief overview of the law and literature movement. It considers whether literary and cultural works can impact public discourse and decision-making about criminal justice, including the possibility that a particular genre, dystopian fiction, can provide insight when legal doctrine and social science have limited influence on the oppressive tendencies of law enforcement.

America's "war on terror" offers a case-in-point, with post-9/11 policies and practices propelled by a narrative of fear and producing significant deviations in criminal law and procedure. The article suggests that a contemporary piece of dystopian fiction offered an alternative narrative of authoritarian abuses to contrast with government fear-mongering and claims of necessity. Though highly debatable whether any particular counter-narrative could bring about the public's rethinking of anti-terrorism efforts, the work was representative of the possibilities provided by a broader interdisciplinary approach to criminal justice, one that does not seek to replace the connection between law and social science but instead complements and even facilitates this important intersection.

II. CRIME AND SOCIAL SCIENCE

In light of the collection's theme, it is altogether fitting that the symposium editor is David Harris, the nation's leading authority on "racial profiling"[15]—the use of race and ethnicity to single out individuals for heightened police surveillance and investigation—a topic that, perhaps more than any other in recent times, demonstrates the impact social science can have on the law. In the mid-1990s, litigation-inspired empirical studies concluded that minority motorists were being stopped at a disproportionate rate on the New Jersey Turnpike and Maryland's I-95, even though minorities were not more likely to be violating the

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[14] *See infra* notes 66–67 and accompanying text.

[15] *See, e.g.*, DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2002).

law.[16] Subsequent cases and reports examined racial profiling throughout the nation, some corroborating the phenomenon.[17] Although the methodology and conclusions have been criticized,[18] these studies made it hard for politicians to deny flatly that discrimination was occurring on the streets and highways, ultimately leading to compulsory data collection, new police guidelines, and bans on racial profiling.[19]

Criminological research is also changing the process of eyewitness identifications in pretrial lineups, showups, and photo arrays, and the assessment of subsequent witness testimony in court. Historically, the fingering of the alleged offender by an eyewitness provides the most powerful moment in a criminal trial, effectively convicting the defendant.[20] And yet "[t]he vagaries of eyewitness identification are well-known," the Supreme Court opined more than four decades ago, with "the annals of criminal law . . . rife with instances of mistaken identification."[21] For years, social scientists have researched the relevant processes and emphasized the danger of eyewitness error,[22] but change has only come in the

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[16] *See, e.g.*, *id.* at 53–72 (discussing racial profiling studies); State v. Soto, 734 A.2d 350, 352–53 (N.J. Super. Ct. Law Div. 1996) (detailing results of statistical study of New Jersey Turnpike); John Lamberth, *Driving While Black: A Statistician Proves That Prejudice Still Rules the Road*, WASH. POST, Aug. 16, 1998, at C1.

[17] For a recent racial profiling study, see IAN AYRES & JONATHAN BOROWSKY, ACLU OF S. CAL., A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT (2008), *available at* http://www.aclu-sc.org/documents/view/47. *See, e.g.*, *Racial Profiling Data Collection Resource Center, DOJ Investigations*, *available at* http://www.racialprofilinganalysis.neu.edu/legislation/doj.php (last visited Aug. 22, 2009) [hereinafter *DOJ Investigations*]; *Racial Profiling Data Collection Resource Center, Federal and State Litigation*, *available at* http://www.racialprofilinganalysis.neu.edu/legislation/litigation.php (last visited Aug. 22, 2009).

[18] *See, e.g.*, R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 STAN. L. REV. 571 (2003); Katherine Y. Barnes, *Assessing the Counterfactual: The Efficacy of Drug Interdiction Absent Racial Profiling*, 54 DUKE L.J. 1089 (2005); Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275 (2004); Stephan Michelson, *Driving While Black: A Skeptical Note*, 44 JURIMETRICS J. 161 (2004). *See also* Heather Mac Donald, *The Myth of Racial Profiling*, CITY J., Spring 2001, at 14, *available at* http://www.city-journal.org/html/11_2_the_myth.html; Joel Rubin, *LAPD Rejects Finding of Bias*, L.A. TIMES, Jan. 14, 2009, at B4.

[19] *See, e.g.*, *DOJ Investigations*, *supra* note 17; *Racial Profiling Data Collection Resource Center, Legislation*, *available at* http://www.racialprofilinganalysis.neu.edu/legislation/ (last visited Sept. 1, 2009).

[20] *See, e.g.*, Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) ("[E]yewitness identification evidence has a powerful impact on juries."); United States v. Langford, 802 F.2d 1176, 1182 (9th Cir. 1986) ("[J]uries almost unquestioningly accept eyewitness testimony.") (citing *Watkins*).

[21] United States v. Wade, 388 U.S. 218, 228 (1967).

[22] *See, e.g.*, BRIAN L. CUTLER & STEVEN D. PENROD, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW (1995); ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY

wake of modern DNA testing and the proliferation of innocence projects around the nation, confirming that false identification has been a primary source of wrongful convictions.[23] Today, a number of jurisdictions have adopted new identification procedures—like requiring that witnesses be informed that the suspect may not be present and ensuring that lineup administrators are unaware of which individual is the suspect—thereby employing scientific research to increase accuracy and limit the possibility of misidentification.[24]

Another relatively recent example involves a much-debated criminological hypothesis: the so-called "broken windows" theory. First articulated by James Q. Wilson and George L. Kelling in 1982,[25] the theory proposes that low-level criminality and threats to the quality of life—vandalism, littering, panhandling, loitering, and so on—not only beget more of the same but may also set the stage for more serious crimes and violence, driving respectable folks from affected neighborhoods. Conversely, cracking down on these petty offenses supposedly inhibits anti-social behavior, providing law-abiding community members a reason to stay. In the succeeding years, the theory was put into effect in cities across the nation. For instance, New York City implemented a "zero tolerance" policy on vandals, turnstile jumpers, public drinkers, and aggressive panhandlers, while young toughs in Chicago were rousted from street corners pursuant to a gang-loitering statute. Broken windows-based policing was lauded for reducing crime in urban areas,[26] a claim championed by at least a few researchers.[27] Other social

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(rev. ed. 1996); Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCHOL. 277 (2003).

[23] *See* BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000); Arye Rattner, *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, 12 LAW & HUM. BEHAV. 283 (1988); Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603 (1998). *Cf.* EDWIN M. BORCHARD, CONVICTING THE INNOCENT (1932).

[24] *See, e.g.*, 725 ILL. COMP. STAT. 5/107A-5 (2003); N.C. GEN. STAT. § 15A-284.52; U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999), *available at* http://www.ncjrs.gov/pdffiles1/nij/178240.pdf; N.J. ATT'Y GEN., GUIDELINES FOR PREPARING AND CONDUCTING PHOTO AND LIVE LINEUP IDENTIFICATION PROCEDURES (2001), *available at* http://www.nj.gov/lps/dcj/agguide/photoid.pdf; WIS. ATT'Y GEN., MODEL POLICY AND PROCEDURE FOR EYEWITNESSES IDENTIFICATION (2005), *available at* http://www.doj.state.wi.us/dles/tns/EyewitnessPublic.pdf.

[25] *See* James Q. Wilson & George L. Kelling, *Broken Windows*, THE ATLANTIC MONTHLY, Mar. 1982, at 29.

[26] *See, e.g.*, WILLIAM BRATTON & PETER KNOBLER, TURNAROUND: HOW AMERICA'S TOP COP REVERSED THE CRIME EPIDEMIC (1998); GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES (1996).

[27] *See, e.g.*, WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS (1990); Hope Corman & Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 J.L. & ECON. 235 (2005); Kees Keizer et al., *The Spreading of Disorder*, SCI., Dec. 12, 2008, at 1681; George L. Kelling & William H. Sousa, Jr., *Do Police Matter?: An Analysis of the Impact of New York City's Police Reforms*, CIVIC REP., Dec. 2001, *available at* www.manhattan-institute.org/pdf/cr_22.pdf.

scientists challenged the theory with their own studies, refuting any connection between belligerent enforcement strategies and lower crime rates.[28]

The broken windows experience thus exemplifies the potential influence of criminology on the enactment and implementation of law, and the controversy this may engender. Social scientists can disagree on the effects of a given criminal justice policy, the differences attributable to any number of sources—from the employment of distinct models and assumptions, to the host of errors that occur in empirical work. But the interaction between criminology and criminal law and procedure brings up a separate point of contention, one of equal importance: Given a particular criminological theory or body of empiricism, what should be done as a matter of legislation and enforcement? The question was raised with the broken windows theory and its various applications. For several years, scholars sparred over the constitutionality of Chicago's gang-loitering ordinance,[29] with all sides claiming a superior understanding of the issues in terms of doctrine and social science.

In *Chicago v. Morales*, the Supreme Court struck down the law as unconstitutionally vague.[30] Along the way, it noted "the myriad factors that influence levels of violence," making it "difficult to evaluate the probative value of this statistical evidence, or to reach any firm conclusion about the ordinance's efficacy."[31] This fleeting reference aside, however, the Court sometimes decides legal issues steeped in criminological work without any mention of the scholarly background. When *Miranda v. Arizona* was under reconsideration in 2000—

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[28] *See, e.g.*, Jeffrey A. Fagan & Garth Davies, *Policing Guns: Order Maintenance and Crime Control in New York*, *in* GUNS, CRIME, AND PUNISHMENT IN AMERICA 191 (Bernard E. Harcourt ed., 2003); BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING (2001); Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271 (2006); Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163 (2004).

[29] *Compare* Dan M. Kahan & Tracey L. Meares, *Foreword*: *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998), Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of* Chicago v. Morales, 1998 U. CHI. LEGAL F. 197, *and* Tracey L. Meares & Dan M. Kahan, *Black, White and Gray: A Reply to Alschuler and Schulhofer*, 1998 U. CHI. LEGAL F. 245, *with* Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215, Dorothy E. Roberts, *Foreword*: *Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775 (1999), David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059 (1999). *See also* URGENT TIMES: POLICING AND RIGHTS IN INNER-CITY COMMUNITIES (Tracey L. Meares & Dan M. Kahan eds., 1999).

[30] City of Chicago v. Morales, 527 U.S. 41 (1999).

[31] *Id.* at 49 n.7 (citing and quoting Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 296 (1998)). *But see id.* at 99–100 (Thomas, J., dissenting) (discussing evidence supporting ordinance).

specifically, whether its historic formulation of required warnings for custodial interrogation could be supplanted by a statutory balancing test for voluntary confessions—the Justices made no mention of the vast body of research on police interrogation since the Court's original decision.[32]

Other times, an opinion's doctrinal analysis begs for empirical support, but it fails to cite relevant research (or, conversely, the absence of such work). Consider the operative standard for state action in Fourth Amendment cases—stemming from the Court's 1966 decision in *Katz v. United States*—which asks whether "society is prepared to recognize as 'reasonable'"[33] an individual's expectation of privacy. Although the standard would seem to demand data on society's privacy expectations, the Court has taken a distinctly non-scientific approach to the preliminary question of search and seizure analysis.[34] Another example emerged just this past term, when the Supreme Court refused to apply the exclusionary rule to unlawful searches resulting from law enforcement negligence.[35] That decision, *Herring v. United States*, was premised on what would appear to be an empirical question—whether evidentiary suppression in such circumstances produces

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[32] *See* Dickerson v. United States, 530 U.S. 428 (2000). Among the criminological issues was whether *Miranda* impaired law enforcement's ability to obtain confessions and therefore decreased the clearance rate for crime. *Compare* Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda's *Defenders*, 90 NW. U. L. Rev. 1084 (1996), Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839 (1996), Paul G. Cassell & Richard Fowles, *Falling Clearance Rates After* Miranda*: Coincidence or Consequence?*, 50 STAN. L. REV. 1181 (1998), Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda's *Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998), *and* Paul G. Cassell, Miranda's *Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996), *with* John J. Donohue III, *Did* Miranda *Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998), Stephen J. Schulhofer, Miranda *and Clearance Rates*, 91 NW. U. L. REV. 278 (1996), Stephen J. Schulhofer, Miranda's *Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996), George C. Thomas III, *Is Miranda a Real-World Failure?: A Plea for More (and Better) Empirical Evidence*, 43 UCLA L. REV. 821 (1996), *and* George C. Thomas III, *Plain Talk About the* Miranda *Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. REV. 933 (1996).

[33] Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

[34] *See, e.g.*, Erik Luna, *The* Katz *Jury*, 41 U.C. DAVIS L. REV. 839 (2008). For an excellent study attempting to assess society's privacy expectations, see Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727 (1993). *Cf.* Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?:* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) (empirical study challenging Court's assumption regarding the views of reasonable jurors in police pursuit case).

[35] *See* Herring v. United States, 129 S. Ct. 695 (2009).

appreciable deterrence of unlawful police behavior[36]—and yet the Court made no reference to any data or research.[37]

To be sure, criminology is no substitute for legal analysis and argument. It does not replace the doctrine of criminal law and procedure, grounded in notions of precedent and common-law reasoning, canons of statutory interpretation, theories of constitutional law, and so on. But social science research can enhance the process, informing criminal justice actors of the effects of their decisions as well as supporting or challenging any analytical assumptions. This point was made a few years ago by Tracey Meares and Bernard Harcourt, two scholars who had disagreed on issues of criminal justice, including the broken windows theory. Nonetheless, they joined together to call for a jurisprudence that "places empirical and social scientific evidence at the very heart of constitutional adjudication," an approach that would more openly discuss the bases for factual claims and normative conclusions, and provide a clearer reflection of the choices made in the decision-making process.[38] Although not a panacea, this social science "infusion" could bring to light possible prejudice, Meares and Harcourt conclude, and thereby make criminal justice decision-makers more accountable for their judgments.[39]

In general, then, it can be said that criminological theory and empiricism have much to offer criminal law and procedure doctrine, and the incorporation of the former into the latter should be fostered by scholars, legal professionals, and policymakers. But there are some practical limits to the impact of social science in criminal justice policy. As mentioned above, the public and its elected representatives may have trouble assimilating scientific theories and empirical studies into their decision-making processes, due to the density of the work or the difficulty in translating it into mental images and practical guidance. On occasion, however, the problem may exist on an affective level, with criminal justice decisions distorted by powerful emotions that pay no heed to the lessons of legal doctrine, let alone those of social science. In both circumstances, one possible response would expand the interdisciplinary relationship beyond law and criminology, using the materials and approaches typically associated with the humanities and, in particular, those disciplines concerned with literature and culture.

Once again, racial profiling offers a good example. In his work, Professor Harris has used real-world stories to "bring to life" the data on racial profiling and

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[36] *See id.* at 699–700.

[37] The deficiency can be compared to the case that established this line of analysis, United States v. Leon, 468 U.S. 897 (1984), where both majority and dissenting opinions grounded their arguments in empirical evidence. *See id.* at 907 n.6; *id.* at 950–51 (Brennan, J., dissenting).

[38] Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 735 (2000).

[39] *Id.* at 797–98.

communicate the harrowing nature of the events and their aftermath.[40] Although race-based policing traces back through U.S. history,[41] most of the nation only started to take notice when the media began disseminating contemporary narratives of racial profiling—especially cases where the victims were celebrities or the officer's behavior was exceedingly obnoxious—giving credence to a phenomenon that had become well known in minority communities: D.W.B. ("Driving While Black").[42] This type of story-telling may influence minds in a way that criminological theory and empirics cannot. Narrative can provide a basis for empathy with those embroiled in the criminal justice system, conveying the nasty reality of criminal law and procedure on the streets and in courtrooms. While the study of legal doctrine can be like chewing on sawdust, to use Franz Kafka's phrase,[43] stories can make the issues concrete and compelling to the common citizen and offer a contrast to the official representation of a rational, almost mechanical criminal justice system. In this fashion, racial profiling narratives brought to life legal arguments and criminological research, producing a concurrence of public opinion and political drive at the turn of the millennium: racial profiling exists, it is wrong, and it should end.[44]

Immediately after the attacks of September 11, 2001, however, this sentiment changed dramatically. A majority of Americans now supported racial profiling, at least when the targets were individuals of Middle-Eastern descent,[45] and federal law enforcement proceeded to do just that. Moreover, the executive branch adopted a number of anti-terrorism policies and practices of questionable constitutionality and reminiscent of authoritarian criminal justice systems of the past. This often occurred with little debate or in-depth argument, and with limited (if any) public understanding of the relevant legal doctrine or insights from allied disciplines. Although the scholarly study of terrorism increased exponentially after 9/11,[46] this literature largely failed to influence the common citizen, whose

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[40] David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 269 (1999).

[41] *See, e.g.*, Erik Luna, *Foreword: The New Face of Racial Profiling*, 2004 UTAH L. REV. 905, 906; Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 334–36 (1998).

[42] *See, e.g.*, Samuel R. Gross, *The Rhetoric of Racial Profiling*, *in* SOCIAL CONSCIOUSNESS IN LEGAL DECISIONMAKING: PSYCHOLOGICAL PERSPECTIVES 35 (Richard L. Wiener et al. eds., 2007); Luna, *Racial Profiling*, *supra* note 41, at 906–07. In Latino communities, the phenomenon has been referred to as "driving while brown." *See, e.g.*, Anthony E. Mucchetti, *Driving While Brown: A Proposal for Ending Racial Profiling in Emerging Latino Communities*, 8 HARV. LATINO L. REV. 1 (2005).

[43] *See* MAX BROD, FRANZ KAFKA: A BIOGRAPHY 41 (1995) (1937). *See also* IAN WARD, LAW AND LITERATURE: POSSIBILITIES AND PERSPECTIVES ix (1995).

[44] *See, e.g.*, Gross, *supra* note 42; Luna, *Racial Profiling*, *supra* note 41, at 905–06.

[45] *See, e.g.*, Gross *supra* note 42.

[46] *See, e.g.*, Mathieu Deflem, *Introduction: Towards a Criminological Sociology of Terrorism and Counter-Terrorism*, *in* TERRORISM AND COUNTER-TERRORISM: CRIMINOLOGICAL PERSPECTIVES 1 (Mathieu Deflem ed., 2004) (discussing increase in social science scholarship since 9/11).

evaluation of government policy and practice was shaped not by reason, but by base emotions, fear being chief among them. In times like these, the populace can be especially susceptible to the worst kind of demagoguery, with tales of horror prefaced by promises of greater security through reduced liberty. Legal doctrine and social science may have little impact on public discourse when the people's collective judgment has been overwhelmed by intense emotions and government claims of necessity.

The problem generalizes, as strong negative emotions like fear and anger can impact all sorts of public policies. Leading scholars from both law and social science, such as Cass Sunstein and Paul Slovic, have explored how emotion and various cognitive biases and heuristics can affect risk assessment and response.[47] People tend to evaluate risks based on the prevalence of mental associations—the more available and horrific the image, the greater the perceived risk and the more fervent the call for action. The media plays a leading role in this process, amplifying the image with each broadcast and publication. At times, it can create a misperception of popular consensus on the danger, the need for action, or the propriety of a given response. Consider, for instance, the 1979 accident at the Three Mile Island nuclear power plant, which neither killed nor injured a single person. The combination of public fear and political pandering resulted in stiff regulations, increased opposition to nuclear energy, and a global reduction in the use of nuclear reactors.[48] The consequences have proven significant, with nuclear power rendered less viable as an energy source and alternative to those fuels that create genuine problems.[49]

Criminal justice has been impacted in a somewhat similar fashion, best exemplified by America's increasingly harsh approach to crime. For several decades, the United States has been on a punishment spree of unparalleled proportions, sentencing more people and for longer periods of time. The prison population has increased by about two million inmates since the early 1970s; the average federal sentence has doubled since 1980; and now more than one in every ninety-nine Americans is incarcerated, the highest percentage in the world and many times larger than the ratio found in other Western nations.[50] All told, the

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[47] *See, e.g.*, PAUL SLOVIC, THE PERCEPTION OF RISK (2000); CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE (2005) [hereinafter SUNSTEIN, LAWS]. It should be noted, however, that Slovic and Sunstein have important areas of disagreement. *See, e.g.*, Dan M. Kahan et al., *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071 (2006) (book review); Dan M. Kahan & Paul Slovic, *Cultural Evaluations of Risk: "Values" or "Blunders"?*, 119 HARV. L. REV. F. 166 (2006); Cass R. Sunstein, *Misfearing: A Reply*, 119 HARV. L. REV. 1110 (2006).

[48] *See, e.g.*, Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119, 1130 (2002) (reviewing SLOVIC, *supra* note 47) [hereinafter Sunstein, *Fear*].

[49] The principal example being the pollution associated with fossil fuel and the nation's dysfunctional relationship with major petroleum-producing nations.

[50] *See, e.g.*, Heather C. West & William J. Sabol, *Prisoners in 2007*, BUREAU OF JUST. STAT. BULL., Dec. 2008, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p07.pdf; Adam Liptak, *More*

United States has become the single most punitive nation in the developed world.[51] Yet most scholarship has concluded that increases in punishment do not effectively reduce crime or increase public safety. For example, empirical research has refuted the alleged benefits from two of the most discussed sentencing regimes: recidivist statutes such as California's "three strikes and you're out" law and obligatory punishment schemes like the federal five-year mandatory minimum sentence for crack cocaine possession.[52] Even those researchers who have found a deterrent or incapacitative effect from mass incarceration nonetheless conclude that the drop in crime rates is mostly a function of other factors, such as economic prosperity.[53] The social consequences of America's punitiveness are substantial, however, with some states spending more on prison than higher education,[54] and certain areas (especially poor, mostly minority communities) suffering utter devastation from the loss of people, resources, and respect for law.[55]

Why would Americans and their elected representatives back such policies? The answer is complex, but one prominent account involves the public's emotional, sometimes media-driven response to crime combined with the self-serving nature of government officials. In a series of articles, Sara Sun Beale has examined the non-legal factors that influence criminal law and its increasing

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Than 1 in 100 Adults Are Now in Prison in U.S., N.Y. TIMES, Feb. 29, 2008, at A14; *Defendants Sentenced in U.S. District Courts*, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE [hereinafter SOURCEBOOK], *available at* http://www.albany.edu/sourcebook/pdf/t5252007.pdf; Paul J. Hofer & Courtney Semisch, *Examining Changes in Federal Sentence Severity: 1980-1998*, 12 FED. SENT'G REP. 12 (1999).

[51] *See, e.g.*, Michael Tonry & David P. Farrington, *Punishment and Crime Across Space and Time*, *in* 33 CRIME & JUST. 1, 6 (Michael Tonry and David P. Farrington eds., 2006); Alfred Blumstein et al., *Cross-National Measures of Punitiveness*, *in* 33 CRIME & JUST. 347 (Michael Tonry & David P. Farrington eds., 2006); Richard S. Frase, *Historical and Comparative Perspectives on the Exceptional Severity of Sentencing in the United States*, 36 GEO. WASH. INT'L L. REV. 227 (2004) (reviewing JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2004)); SENTENCING AND SANCTIONS IN WESTERN COUNTRIES (Michael Tonry & Richard S. Frase eds., 2001).

[52] *See, e.g.*, FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 85–105 (2001); JONATHAN P. CAULKINS ET AL., MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY? 143–44 (1997). *But compare* Brian P. Janiskee & Edward J. Erler, *Crime, Punishment, and* Romero*: An Analysis of the Case Against California's Three Strikes Law*, 39 DUQ. L. REV. 43 (2000), *with* Franklin E. Zimring & Sam Kamin, *Facts, Fallacies, and California's Three Strikes*, 40 DUQ. L. REV. 605 (2002).

[53] *See* William Spelman, *The Limited Importance of Prison Expansion*, *in* THE CRIME DROP IN AMERICA 97 (Alfred Blumstein & Joel Wallman eds., rev. ed. 2006); Levitt,*supra* note 28. *See generally* FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE v–vi (2007); Ryan S. King et al., *Incarceration and Crime: A Complex Relationship*, THE SENTENCING PROJECT 4 (2005), *available at* http://www.sentencingproject.org/Admin/Documents/publications/inc_iandc_complex.pdf.

[54] *See* N.C. Aizenman, *New High in U.S. Prison Numbers: Growth Attributed to More Stringent Sentencing Laws*, WASH. POST, Feb. 29, 2008, at A1.

[55] *See* Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173 (2008).

punitiveness.[56] Over the years, opinion polls reflected the public's fear of crime, a belief that crime was increasing, and a conviction that long sentences reduce crime—even when crime rates were decreasing, and despite the aforementioned studies on the relative ineffectiveness of incarceration.[57] To a significant extent, popular views on crime are impacted by its representation in the media, which is the public's primary source of information on criminal justice issues.[58] Although people tend to view the major media outlets as being fair and accurate in their news coverage, economic concerns inevitably influence the selection of stories, as well as their content and style of delivery. Beale's work confirms the old news adage that "if it bleeds, it leads," with stories of crime and violence correlated with market share and thus advertising revenues. Through the media's depiction, crime becomes more salient to audience members, who then view crime as a more serious problem than indicated by the statistics.[59]

Although differing on the precise mechanism, scholars agree that the media portrayal of crime increases the public's demand for punitive policies—which, in turn, provides populist incentives to lawmakers, who then create new crimes and increase punishments. Such responses are easy for the public to grasp, generate few opponents (other than civil liberties groups), allow the public to voice their moral outrage, and, most importantly, bestow upon a campaigning politician the gravitas of being "tough on crime," a time-tested way to win an election.[60] Law enforcement also has an interest in get-tough policies, namely, the expansion of its power. The more crimes on the books and the harsher the punishments, the more power police and prosecutors can exercise throughout the criminal process.[61] For instance, harsh sentences bound by mandatory minimums provide the government enormous leverage to extract plea bargains and information from defendants, leading to more convictions and closed cases. Combine these elements—a public frightened by crime, media outlets that exacerbate society's fears, and government

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[56] *See* Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397 (2006) [hereinafter Beale, *News Media's Influence*]; Sara Sun Beale, *Still Tough on Crime?: Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413; Sara Sun Beale, *What's Law Got to Do with It?: The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997). *See also* Robert Reiner, *Media-Made Criminality: The Representation of Crime in the Mass Media*, *in* THE OXFORD HANDBOOK OF CRIMINOLOGY 302 (Mike Maguire et al. eds., 4th ed. 2007).

[57] *See* Beale, *News Media's Influence*, *supra* note 56, at 418–20.

[58] *See id.* at 441–62.

[59] *Id.* at 442.

[60] *See, e.g.*, Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719–24 (2005).

[61] William Stuntz's work has been especially insightful on these issues. *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780 (2006).

officials willing to play on those emotions—and you may create a virtual breeding ground for problematic criminal laws and procedures, flawed as a jurisprudential matter and unsupported by social science.

The chain of events can begin with a single harrowing event that captures the media's attention and the public's imagination, like the 1993 kidnapping and murder of twelve-year-old Polly Klaas.[62] The story horrified not only the victim's hometown of Petaluma, California, but also the entire country, receiving national news coverage and stimulating a surge of public fear of crime and violence, all in spite of declining crime rates. Prior to the incident, a "three strikes and you're out" bill had stalled in committee and appeared unlikely to receive even a general legislative vote. But when the story broke that the purported killer had an extensive rap-sheet, California lawmakers raced to revive the anti-recidivist proposal and express their adamant support. Many used the incident and the ensuing public fear to their political advantage, making "three strikes" the catch-phrase of choice during the 1994 campaign. No politician dared oppose the law. One state senator confessed, "I don't think we have any choice [but to pass it]," while another candidly admitted, "I'm going to vote for these turkeys because constituents want me to."[63] In a perverse twist, the second largest financial supporter of three strikes was a group interested in more inmates and penitentiaries: the state prison guard union.[64]

The end result was a recidivist statute without theoretical or empirical support. It is neither consistent with retributive principles, nor effective at reducing future crime. Rather, the law was symbolic, a political recognition of public fear—and an arational one at that. Markus Dubber described certain recidivist laws as exercises of state power "without reference to rational constraints, as if in a rational vacuum."[65] California's law is a prime example of a moral panic, a phenomenon that social scientists describe as an intense outburst of emotions impeding reasoned deliberation and decision-making, often with

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[62] *See* Erik G. Luna, *Foreword: Three Strikes in a Nutshell*, 20 T. JEFFERSON L. REV. 1, 3–7 (1998) [hereinafter Luna, *Three Strikes*] (describing background of three strikes law). As enacted, California's law provides enhanced punishment for recidivists who have been previously convicted of serious or violent felonies. *See id.* at 9–12; CAL. PENAL CODE § 667 (1999) (codified legislation); CAL. PENAL CODE § 1170.12 (2004) (codified ballot initiative). Its most severe provision requires a twenty-five year mandatory sentence for any felony committed by an individual with two prior predicate felony convictions.

[63] Luna, *Three Strikes*, *supra* note 62, at 5 n.37.

[64] *See* Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 436 n.242 (1997) (noting that the California Correctional Peace Officers Association (CCPOA) donated the second-highest amount in support of the Three Strikes bill); Fox Butterfield, *Political Gains By Prison Guards*, N.Y. TIMES, Nov. 7, 1995, at A1 ("[The CCPOA] has transformed itself into the most politically influential union in the state . . . to push not only for better benefits for its members but also for ever more prisons and tougher sentencing laws.").

[65] Markus Dirk Dubber, *Recidivist Statutes as Arational Punishment*, 43 BUFF. L. REV. 689, 689 (1995).

implications for criminal justice.[66] In these circumstances, people might lack the type of information that checks fear, like the infrequency of the threat or the limited harm it poses. Instead, a process known as "deviancy amplification"[67] may take hold. Maybe a minor or rare threat is deemed grave and frequent, with some group demonized as a result. The public demands action, and the government responds with tough laws and stern enforcement.

In this way, exaggerated public fear can generate support for authoritarian action. Fear makes a citizenry politically manipulable and more inclined to accept superficial arguments in support of harsh, far-reaching measures, with people even embracing their own repression based on guarantees of safety and stability.[68] This is not to say that emotions are to be avoided or that they only have negative repercussions for public policy. Emotions are pervasive and play a powerful role in the way we view the world, often for the better. The difficult issue is the interaction between emotions and values, and the ultimate impact on public policy.[69] Although sound decision-making does not merely convert passion into law, it is not always easy to recognize and respond properly to unhelpful emotions. How can we limit the negative impact of intense feelings about criminal justice, particularly the sidelining of legal analysis and social science?

Public information and discussion provide the simplest response to unjustifiable fears, but the educational approach is sometimes ineffective.[70] This may be particularly true if the state has an interest in fanning the fear, and the news

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[66] During the 1970s, sociologist Stanley Cohen articulated a theory of moral panics, when a "condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests." STANLEY COHEN, FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS 9 (1972).

[67] *See id.*; LESLIE T. WILKINS, SOCIAL DEVIANCE: SOCIAL POLICY, ACTION, AND RESEARCH (1964) (coining term "deviance amplification spiral").

[68] *See, e.g.*, DAVID S. MASON, THE END OF THE AMERICAN CENTURY 58 (2009) (quoting communications scholar George Gerbner's 1981 congressional testimony).

[69] Susan Bandes put the issue quite well:

> Neither emotion nor value is inert; both shape and are shaped by social milieu. For example, the ongoing national debate in the wake of the September 11 terrorist attacks has caused many people to reevaluate not just their beliefs about issues like racial profiling and torture, but also their underlying values about the balance between civil liberty and security. Our fears may influence us to condone indefinite detention or harsh interrogation; our capacity for empathy and compassion might lead us to be concerned about the fate of those detained or outraged about our government's role in the abuse of prisoners. People interpret factual data in light of their values, but ideally their values also evolve in response to the understandings of the data that emerge as part of the social process of deliberation . . . . Government policy should not *simply* reflect emotion, but emotion per se is not the problem. The challenge is to encourage the helpful emotions, and discourage, educate, or cabin the unhelpful ones.

Susan A. Bandes, *Emotions, Values, and the Construction of Risk*, 156 U. PA. L. REV. PENNumbra 421, 425, 427 (2008).

[70] *See* Sunstein, *Fear*, *supra* note 48, at 1168.

media is complicit to some extent, such as when crime stories provoke high anxiety (and high news ratings). Other responses are also possible, like lawsuits by civil liberties organizations to contest government abuses. Here, I would like to consider a different option: utilizing works of literature and culture to inspire the public imagination and counter fear-provoking, rationality-impeding narratives. The materials of an entirely different discipline may provide further insight on the collaboration between criminal law and procedure and criminology. The question is whether literary and cultural works could help defuse moral panics, allowing the fruitful interdisciplinarity of law and social sciences to return from the sideline.

The next section begins with a mild, and mildly paradoxical, claim: One's understanding of reality can be enhanced by the imaginary, fictional accounts of life and law, which can be compared with the prevailing vision of criminal justice. These works confront the public with differing pictures, one that purports to be the real world and another that maintains no such pretense, stirring individuals to ask questions of those in power and to probe their own understanding of reality and truth.[71] This basic claim may be unobjectionable, but the piece continues with a far more speculative contention: Provocative fiction can provide a counter-narrative that helps shock the senses of an unduly compliant public, relating the consequences of a people cowed by fear and willing to trade their rights for safety. Fiction may contest overwrought media portrayals of crime, inflammatory claims of politicians seeking reelection or higher office, and government officials acting in pursuit of greater power. When individuals are presented with conflicting but equally disturbing images—the narrative of fear and the counter-narrative of authoritarianism—they may dispute government claims and ask the exact kind of questions that thoughtful legal analysis and social science research can help answer.

III. CRIME AND FICTION

A. *Law and Literature*

The use of parables and metaphors, "saying one thing and meaning another,"[72] is a time-honored means to elucidate issues of law and justice. But it was not until the turn of the previous century that scholars attempted in earnest to formalize the relationship between jurisprudence and literary works. Benjamin Cardozo and John Wigmore endorsed this linkage—Cardozo exploring the literary quality of judicial opinions, and Wigmore arguing that lawyers should be familiar

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[71] In Hawthorne's words, "It is only through the medium of the imagination that we can lessen those iron fetters, which we call truth and reality, and make ourselves even partially sensible what prisoners we are." NATHANIEL HAWTHORNE, *The New Adam and Eve*, *in* MOSSES FROM AN OLD MANSE 195 (2003) (1864).

[72] ROBERT FROST, *The Constant Symbol*, *in* THE POEMS OF ROBERT FROST, xv–xvi (1946). *Cf.* JAMES BOYD WHITE, THE EDGE OF MEANING 191 (2001).

with law-themed novels as a way to understand the human condition.[73] For the most part, however, the modern law and literature movement is traced to the 1973 publication of James Boyd White's *The Legal Imagination*,[74] a textbook that challenged people to see law as an art, which can be informed by literature's humanistic, anti-formalistic, mind-expanding possibilities. It sought to examine law from the outside, to compare and contrast it to other intellectual pursuits, and to see what is provided by literature but left out from legal analysis and texts.[75]

Other academics joined the discussion,[76] pondering the relevance of literary theory to the study of law and analysis of legal issues. The law-literature enterprise actually comprises two distinct areas of inquiry: "law as literature" and "law in literature."[77] The former branch is concerned with the interpretation and application of law using the techniques of literary criticism, dissecting a given legal text for its meaning and asking, for instance, whether the author, the reader, social and historical ethos, or the text itself should be primary in interpretation. *Law as literature* is controversial by nature, given obvious differences between the two disciplines, not to mention law's coercive force on real people.[78] Questions over methodology and suitable materials have become part of an ongoing debate about whether literary theory can inform the interpretive function of lawyers and judges.[79]

In contrast, *law in literature* deals with the representation of legal issues in novels, plays, and other literary works. Although less controversial than its cohort, this branch still raises concerns among supporters and detractors alike. "In its least impressive forms," Paul Gewirtz notes, "this sort of work can indulge in facile

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[73] *See* John H. Wigmore, *Introduction* to JOHN MARSHALL GEST, THE LAWYER IN LITERATURE (1913); John H. Wigmore, *A List of One Hundred Legal Novels*, 17 ILL. L. REV. 26 (1922); John H. Wigmore, *A List of Legal Novels*, 2 ILL. L. REV. 574 (1908); BENJAMIN N. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES (1931). *See generally* Michael Pantazakos, *Ad Humanitatem Pertinent: A Personal Reflection on the History and Purpose of the Law and Literature Movement*, 7 CARDOZO STUD. L. & LITERATURE 31 (1995).

[74] JAMES B. WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION (1973) [hereinafter WHITE, LEGAL IMAGINATION]. *See, e.g.*, RICHARD A. POSNER, LAW AND LITERATURE 4 (rev. ed. 1998) [hereinafter POSNER, LAW AND LITERATURE] ("Although the overlap between law and literature is ancient, as a field of organized study 'law and literature' hardly existed before the publication in 1973 of James Boyd White's textbook *The Legal Imagination*.").

[75] *See* WHITE, LEGAL IMAGINATION, *supra* note 74, at xx.

[76] *See, e.g.*, Elizabeth Villiers Gemmette, *Law and Literature: Joining the Class Action*, 29 VAL. U. L. REV. 665 (1995) (survey of law and literature courses); INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (Sanford Levinson & Steven Mailloux eds., 1988) (collecting essays on law and literature).

[77] Robert Weisberg, *The Law-Literature Enterprise*, 1 YALE J.L. & HUMAN. 1, 1–2 (1988).

[78] *See, e.g.*, Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

[79] *See, e.g.*, POSNER, LAW AND LITERATURE, *supra* note 74, at 209–95; Pierre N. Leval, *Judicial Opinions As Literature*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 206, 208 (Peter Brooks & Paul Gewirtz eds., 1996).

moralizing about law, using as a springboard a literary work whose focus on law is marginal and whose moral complexity is reduced to a simple humanistic message."[80] Whether his didacticism is overt or lies beneath the surface, the writer is not duty-bound to moral neutrality. Viewpoints are inherent in literary works, which may advance objectionable positions and practices just as easily as those considered normatively justifiable. Literature can also distort the reader's perception, depicting the nature of life with simplistic causal chains, or intricate layers of complexity, or an utter randomness of events. Its intoxicating effects may even stimulate a certain promiscuity of argument.

All of this provides reason for caution, not abstinence. After all, literature can grab the interest of readers in a way that law by itself cannot, placing people in poignant situations filled with conflicts of life and law and their resolutions, whether joyful or tragic. Though shaped by authorial subjectivity, a good literary work does not overtly instruct the world on the "right" answers; instead, it invites the audience members to discuss the story's meaning and implications. Unlike pure legal analysis, expertise and specialized knowledge are not prerequisites to the endeavor. An individual can draw his or her own conclusions, based not only on the text but also the individual's interactions with other readers and society as a whole.[81]

Literature can also provide insights into the lives of others and the human condition in general.[82] It allows the reader to understand what it means to be someone else, a person with an entirely different socio-economic background and set of experiences, creating a basis for empathy among individuals who might otherwise feel no connection to one another. Even for a short period of time, a white, upper-class professional suburbanite can become a poor, black youth in the inner-city, for example, or a single, unemployed mother in a rural town, able to see the world through their eyes and to appreciate the situations they face. Without explicit prodding, readers are asked to imagine themselves in the shoes of another: *How would you feel?* When the audience shares this experience, a more inclusive, interactive basis for solidarity and community may be possible. We hear other people's stories, and they become our own. This is all the more relevant when legal issues are at stake, particularly those of criminal law, which directly and often violently impact real human beings.

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[80] LAW'S STORIES, *supra* note 79, at 3.

[81] *See, e.g.*, ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 141 (2000) ("Narrative . . . differs from purely logical argument in that it takes for granted that the puzzling problems with which it deals do not have a single 'right' solution—one and only one answer that is logically permissible.").

[82] *See, e.g.*, ROBIN WEST, NARRATIVE, AUTHORITY, AND LAW 263 (1993) ("Literature helps us understand others. Literature helps us sympathize with their pain, it helps us share their sorrow, and it helps us celebrate their joy. It makes us more moral. It makes us better people.").

By broadening our consciousness of injustice, good narrative has an edifying effect on the audience and can play a part in their moral education.[83] In *Poetic Justice*, Martha Nussbaum described a pair of benefits from the bookish endeavor: Literature "provides insights that should play a role (though not as uncriticized foundations) in the construction of an adequate moral and political theory," and it "develops moral capacities without which citizens will not succeed in making reality out of the normative conclusions of any moral or political theory, however excellent."[84] Although literary works cannot replace moral theory and legal reasoning, they "can be a bridge both to a vision of justice and to the social enactment of that vision."[85] Richard Rorty reached a similar conclusion, though on different grounds than Nussbaum. In *Contingency, Irony, and Solidarity*, Rorty reiterated his skepticism that philosophical inquiry, in and of itself, can reveal the causes of or solutions to systematic injustice.[86] But a piece of literature can do what high theory cannot: stimulate an awareness of our own prejudices and the harsh practices tolerated by society. It may convey the "kinds of suffering being endured by people to whom we had previously not attended" and the "sorts of cruelty we ourselves are capable of."[87]

Most important for present purposes, literature has the power to contest current legal regimes, offering alternative visions that diverge with those held by society. A literary piece can show how things actually work or, conversely, it can inspire readers to imagine an entirely different world than their own.[88] The law by itself has no such capacity, offering only dry statutes, dense judicial opinions, and stodgy legal articles. As Guyora Binder and Robert Weisberg note in their study, *Literary Criticisms of Law*:

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[83] *See, e.g.*, MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE 8 (1995) ("[T]he novel constructs a paradigm of a style of ethical reasoning that is context-specific without being relativistic, in which we get potentially universalizable concrete prescriptions by bringing a general idea of human flourishing to bear on a concrete situation, which we are invited to enter through the imagination.").

[84] *Id.* at 12. *See also* Carrie Menkel-Meadow, *The Sense and Sensibilities of Lawyers: Lawyering in Literature, Narratives, Film and Television, and Ethical Choices Regarding Career and Craft*, 31 MCGEORGE L. REV. 1, 6 (1999) ("[Narratives] elucidate important ethical choices—at both the macro-level of choices regarding what kind of lawyer to be or career to pursue, and the micro-level of behavioral choices regarding what actions to take at specific junctures in one's career. Literature illustrates and 'teaches' us about ethics.").

[85] NUSSBAUM, *supra* note 83, at 12.

[86] RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY xiii–xiv (1989).

[87] *Id.* at xvi. *See also id.* at 141.

[88] Emerson described fiction writers as "liberating gods" with "a certain power of emancipation and exhilaration for all men," giving them "a new sense, and found within their world another world, or nest of worlds." RALPH WALDO EMERSON, *The Poet*, *in* COMPLETE WORKS: ESSAYS 33 (1899). "Whilst common sense looks at things or visible Nature as real and final facts, poetry, or the imagination which dictates it, is a second sight, looking through these, and using them as types or words for thoughts which they signify." RALPH WALDO EMERSON, *Poetry and Imagination*, *in* COMPLETE WORKS: LETTERS AND SOCIAL AIMS 23–24 (1899).

> Arguably, the literary imagination can help us not only to conceive a new and better legal regime, but also to imagine what living under alternative regimes might feel like. Literature can offer a complex, multilayered experience that transcends rigid categories, alerting us to the plurality and dynamism of the meanings we attach to social life. And a literary perspective could thereby encourage the lawgiver to eschew mechanistic regulation in favor of an open-minded pluralism, to become an empathetic, inclusive, and imaginative architect of the common good.[89]

Literature presents an external view of the law, one that allows the audience to contemplate otherwise inconceivable questions: *Does the reality of criminal justice correspond to its official rendition as rational and fair, or instead does it look more like an alternative world of the imagination?* For this reason, "good literature is disturbing in a way that history and social science writing frequently are not," Nussbaum suggests.[90] A literary work can evoke strong emotions; it may upset and confuse the audience; and it can challenge social conventions, the wielders of brute force and subtle persuasion, and even the reader's own beliefs to the point of personal catharsis.[91]

B. *Literature, the Public, and Criminal Justice Policy*

Today, scores of scholarly books and articles have been published on law and literature, complemented by academic symposia and entire journals dedicated to this interdisciplinary study. They are filled with highbrow discourse and peppered with the terms of the literary critic, where debates can amount to "family feuds"[92] over particular applications. Such cerebral stuff rarely focuses on the average citizen, and even if it did, the discussion might well be incomprehensible to the public. Some scholars have criticized the movement precisely because of its intellectual pretentiousness, insisting that the incorporation of law and literature as a tool of understanding should appeal to a broader audience rather than just furthering elite dialogue.[93]

Lawyers are no better, using a language foreign to the average individual—"legalese," as it is sometimes called. In particular, the idiom of criminal justice

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[89] GUYORA BINDER & ROBERT WEISBERG, LITERARY CRITICISMS OF LAW 3–4 (2000). *See also* JEROME BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE 9–10 (2002).

[90] NUSSBAUM, *supra* note 83, at 5.

[91] *See id.*

[92] *See* Richard H. Weisberg, *Family Feud: A Response to Robert Weisberg on Law and Literature*, 1 YALE J.L. & HUMAN. 69 (1988).

[93] *See, e.g.*, Getman, *supra* note 13; WARD, *supra* note 43, at x.

can be baffling to an ordinary person.[94] At times, complex ideas and institutional functions may necessitate terms of art, a specialized vocabulary that facilitates the practice of law. But these situations may not be as widespread as some assume. Occasionally, legal language and concepts may only serve to segregate the trained from the untrained, thereby clouding or diminishing law's import for society at large.[95] Fostering a discourse in a "human voice"[96] seems especially important for issues of crime and punishment, in light of the unparalleled authority of the state to deprive individual liberty. Moreover, the overlap of literary interests between scholar and average citizen is perhaps at its greatest when the criminal justice system is at issue.[97]

So what types of material might offer the public a better understanding of law in general and criminal justice in particular? The traditional canon of law and literature includes the so-called "Great Books" of the Western world,[98] with reams of legal scholarship generated about these works and their authors. But there is no authoritative criterion for determining whether a given text is proper material for the law-literature enterprise, and no obvious reason to draw upon a work that may have little appeal to the general population. In fact, some scholars of cultural studies have extended their analysis beyond the classics to include popular fiction, movies, television, and the like. One collection on law and literature contained essays exploring newspaper articles, children's stories, folklore, and John Grisham's books and associated movies.[99] This broader body of work may be particularly useful when examining criminal justice, given that issues of crime and punishment are typically received by the public through published and broadcast narratives, which, in turn, provide an understanding of society and human nature that cannot be conveyed by legal doctrine and statistics.[100]

This more inclusive approach corresponds to modern life, where the traditional novel constitutes only a portion of the compositions that impact society.

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[94] *See, e.g.*, Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25, 35–41 (2005) (discussing unintelligibility of federal sentencing guidelines). *Cf.* JAMES BOYD WHITE, *Making Sense of What We Do: The Criminal Law as a System of Meaning*, *in* HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 192 (1985).

[95] *See* Getman, *supra* note 13, at 588. *See also* AMSTERDAM & BRUNER, *supra* note 81, at 4–5.

[96] Getman, *supra* note 13, at 582–88.

[97] "Of all of law's narrative arenas," Gewirtz argues, "the criminal prosecution most fully engages the public's narrative desires and the scholar's narrative speculations." Paul Gewirtz, *Narrative and the Rhetoric of Law*, *in* LAW'S STORIES *supra* note 79, at 2–3.

[98] *See, e.g.*, Gemmette, *supra* note 76, at 682–92 (discussing the "great books" and the law and literature canon); RICHARD WEISBERG, POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE 117–23 (1992).

[99] *See* TALL STORIES?: READING LAW AND LITERATURE (John Morison & Christine Bell eds., 1996).

[100] *See* Kieran McEvoy, *Newspapers and Crime: Narrative and the Construction of Identity*, *in* TALL STORIES?, *supra* note 99, at 192.

As Rorty suggests, "the novel, the movie, and the TV program have, gradually but steadily, replaced the sermon and the treatise as the principal vehicles of moral change and progress."[101] Collectively, these works might fall under the heading "culture," one of the most contested terms in academe.[102] For present purposes, the word will be used in a fairly loose sense: those patterns or symbols of human activity that communicate information within and about a society, as well as its shared values and norms, transmitted by any number of institutions, giving meaning to both material and non-material aspects of that society. So defined, culture embraces language, traditional artwork, religion, education, science, and all sorts of mass media, including books, magazines, newspapers, television, movies, music, and materials on the internet. This broader understanding is consistent with technological advance in society, given that we may be engaged in "a second Gutenberg shift," from "literacy to visuality."[103]

Most of these cultural forms can be seen as a means of storytelling. In contrast to the analytical approach that often dominates legal and social science argument, ordinary human beings tend to communicate and gain understanding of life through stories, which either comport with or violate their notions of justice.[104]

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[101] RORTY, *supra* note 86, at xvi. *See also* NUSSBAUM, *supra* note 83, at 6.

[102] *See, e.g.*, REDEFINING CULTURE: PERSPECTIVES ACROSS THE DISCIPLINES (John R. Baldwin et al. eds., 2006).

[103] Kevin Kelly, *Becoming Screen Literate*, N.Y. TIMES, Nov. 23, 2008, at MM48.

> Once, long ago, culture revolved around the spoken word. . . . Then, about 500 years ago, orality was overthrown by technology. Gutenberg's invention of metallic movable type elevated writing into a central position in the culture. By the means of cheap and perfect copies, text became the engine of change and the foundation of stability . . . . In the West, we became people of the book. Now invention is again overthrowing the dominant media. . . . [T]echnology is nudging the book aside and catapulting images, and especially moving images, to the center of the culture. We are becoming people of the screen. The fluid and fleeting symbols on a screen pull us away from the classical notions of monumental authors and authority.

Id. See, e.g., MICHAEL ASIMOW & SHANNON MADER, LAW AND POPULAR CULTURE (2004); DAVID A. BLACK, LAW IN FILM: RESONANCE AND REPRESENTATION (1999); RICHARD K. SHERWIN, WHEN LAW GOES POP: THE VANISHING LINE BETWEEN LAW AND POPULAR CULTURE (2000); FILM AND THE LAW (Steve Greenfield et al. eds., 2001); LAW AND FILM (Stefan Machura & Peter Robson eds., 2001); LAW AND POPULAR CULTURE (Michael Freeman ed., 2005); LAW ON THE SCREEN (Austin Sarat et al. eds., 2005); LAW'S MOVING IMAGE (Leslie J. Moran et al. eds., 2004).

[104] Of course, storytelling pervades the entire legal process. Factual determinations begin with clients and witnesses relating stories to lawyers, who retell these narratives to other lawyers, opposing counsel and judges, as well as lay citizens sitting as jurors. But "attorneys and judges do not like being complimented as great storytellers. They work hard to make their law stories as unstorylike as possible, even *anti*-storylike: factual, logically self-evident, hostile to the fanciful, respectful to the ordinary, seemingly 'untailored.'" BRUNER, *supra* note 89, at 48. Indeed, "[t]he traditional supposition of the law has been that questions . . . can be answered by examining free-standing factual data selected on grounds of their logical pertinency." AMSTERDAM & BRUNER, *supra* note 81, at 111. Some would argue that this is the way it should be, given that "[l]ife is not a purposive narrative," "[e]vents are often simply meaningless, irrelevant to what comes next," and a

Such narrative often provides meaning and structure to real-world objects and events, even marking their existence within reality. As psychologist Jerome Bruner notes,

> it is the sense of things often derived from narrative that makes later real-life reference possible. Indeed, we refer to events and things and people by expressions that situate them not just in an indifferent world but in a narrative one: "heroes" to whom we give medals for "valor," "broken contracts" where one party has failed to show "good-faith effort," and the like. Heroes and broken contracts can be referred to only by virtue of their prior existence in a narrative world.[105]

Literary and cultural works may also kindle the imagination, allowing the audience to see what cannot be seen in the real world.[106] Fiction can convey that which is otherwise too complex, fragmented, or obscure, using words and pictures to depict the issues at stake and the human interests implicated by the criminal process. Millions of Americans are caught up in the criminal justice system in one way or another.[107] Every day, an enormous number of individuals are implicated in police investigations; many will be forced into a bewildering criminal process of hearings, motions, briefs, oral arguments, and so on; and a significant proportion end up in government custody in jails and prisons. It can be a nightmarish experience for a defendant (or victim), dragged through a long, virtually incomprehensible, sometimes hidden process controlled by massive bureaucracies and their innumerable agents, culminating in the imposition of sometimes exemplary punishment, extinguishing liberty and even life itself. The context is still modern America, the background providing an air of familiarity. But this is not the idealized image of criminal justice; instead, it is a surreal process of seemingly arbitrary judgments that are hard to capture with doctrine and data.

A literary representation of the criminal process may allow the reader to appreciate the confusion felt by suspects, defendants, victims, and family members, as well as the apparently capricious nature of life-altering decisions.

"desperate attempt to derive purpose from purposelessness will often distort reality." Alan M. Dershowitz, *Life Is Not a Dramatic Narrative*, *in* LAW'S STORIES, *supra* note 79, at 100.

[105] BRUNER, *supra* note 89, at 8.

[106] Literature "creates the world to which we turn incessantly and without knowing it," Wallace Stevens once wrote, giving "to life the supreme fictions without which we are unable to conceive of it." Wallace Stevens, *The Noble Rider and the Sound of Words*, *in* MODERNISM: AN ANTHOLOGY 644 (Lawrence Rainey ed., 2005).

[107] *See, e.g.*, MATTHEW R. DUROSE ET AL., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2005, at 1 (2007), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cpp05.pdf (noting that 43.5 million persons or 19% of U.S. residents age sixteen or older had face-to-face contact with law enforcement in 2005); SOURCEBOOK, *supra* note 50, at tbl. 4.1.2006, *available at* http://www.albany.edu/sourcebook/pdf/t412006.pdf (providing data on the more than fourteen million arrests in the U.S. in 2006); *supra* note 50 and accompanying text.

Along these lines, Kafka's writings often provide evocative metaphors for the nature of criminal justice, where legal outsiders remain ignorant to the law's substance and procedure. In *The Trial*, Kafka tells the story of Josef K., who, "without having done anything truly wrong, was arrested."[108] The protagonist is subjected to a perplexing process, administered by a string of petty officials and culminating in Josef K.'s execution—all without his ever understanding the law or the charges against him. Although scholars have proposed far deeper, more esoteric interpretations of the text,[109] *The Trial* provides the average reader a striking analogy to the arbitrary, cumbersome, unfeeling character of criminal justice today, where preexisting images of a logical and fair process conflict with the otherworldly experiences of those whose actual interests are at stake. In fact, judicial opinions have referenced Kafka to describe those cases and doctrines that seem utterly absurd or render the law incomprehensible to lay participants.[110] "*The Trial* is actually closer to reality than fantasy as far as the client's perception of the system," Justice Anthony Kennedy once noted. "It's supposed to be fantastic allegory, but it's reality."[111]

There is, in fact, a vast body of literary and cultural works that may convey difficult legal concepts or multifaceted phenomenon in a fashion understandable to the average citizen. Shirley Jackson's unsettling short story, *The Lottery*, presents a powerful metaphor for the arbitrary nature of punishment and, in particular, the death penalty in America, bringing home what Justice Potter Stewart described as the lightning-strike quality of capital punishment.[112] In the cinematic realm, Steven Soderbergh's Academy Award-winning film, *Traffic*, examined drug distribution, use, and abuse from a systemic perspective, offering a broader understanding of the issues while also presenting a more fully rounded and vivid portrayal of the characters, costs, and consequences of drug prohibition. These works and many others provide opposing images to the prevailing ideology of criminal justice as fair and rational, perhaps shaking the audience of its complacency. "Counterstories," as Richard Delgado has called them,

> enrich imagination and teach that by combining elements from the story and current reality, we may construct a new world richer than either

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[108] FRANZ KAFKA, THE TRIAL 3 (Breon Mitchell trans., 1998) (1925).

[109] For a spirited debate on the interpretation of Kafka, see Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985); Richard A. Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431 (1986); Robin West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986).

[110] *See* Parker B. Potter, Jr., *Ordeal by Trial: Judicial References to the Nightmare World of Franz Kafka*, 3 PIERCE L. REV. 195 (2005).

[111] Terry Carter, *A Justice Who Makes Time to Read, and Thinks All Lawyers Should, Too*, CHI. DAILY L. BULL., Jan. 26, 1993, at 2.

[112] Furman v. Georgia, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring).

> alone. Counterstories can quicken and engage conscience. Their graphic quality can stir imagination in ways in which more conventional discourse cannot. . . . [But] counterstories can serve an equally important destructive function. They can show that what we believe is ridiculous, self-serving, or cruel. They can show us the way out of the trap of unjustified exclusion. They can help us understand when it is time to reallocate power. . . . [Counterstories] invite the reader to suspend judgment, listen for their point or message, and then decide what measure of truth they contain.[113]

Still, one might wonder whether works of fiction can actually change criminal justice policy today. For example, *Traffic* seemed to resonate with government officials and the general public[114]—receiving rave reviews and numerous awards, including four Oscars—yet the movie had no apparent impact on the so-called war on drugs, which remains in effect to this day. Throughout American history, however, there have been literary and cultural pieces that influenced public policy by stimulating debate and priming the mechanisms of change. Perhaps the leading critic of the law and literature movement, Richard Posner, readily conceded that fictional works can have substantial political consequences. "Upton Sinclair's novel *The Jungle* led to federal regulation of food processing," Posner notes, "and who doubts the effect of *Uncle Tom's Cabin* (1852) on the abolitionist cause?"[115] The same might be said of John Steinbeck's *The Grapes of Wrath*, which provoked argument about the consequences of the Dust Bowl and the plight of migrant workers.[116]

Another poignant example stems from America's figurative witch-hunts for purported communists. During the early to mid-twentieth century, the courts largely refused to inquire into the factual basis of the alleged threat posed by communism—the probability and immediacy of any real danger to the U.S. socio-political order[117]—with now-infamous repercussions: abusive investigations, dubious prosecutions, and, most notorious of all, the demagoguery of Sen. Joseph McCarthy and his congressional colleagues. Those who failed to fully cooperate or invoked their constitutional rights were labeled "Fifth Amendment communists,"[118] with some people suffering devastating consequences to their

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[113] Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2414–15 (1989).

[114] *See, e.g.*, Anthony Breznican, *Hollywood Explores Drug Culture*, ASSOCIATED PRESS, Jan. 18, 2001.

[115] POSNER, LAW AND LITERATURE, *supra* note 74, at 305–06. *See also* BRUNER, *supra* note 89, at 10, 53–60.

[116] BRUNER, *supra* note 89, at 94.

[117] *See, e.g.*, Dennis v. United States, 341 U.S. 494, 509–11 (1951).

[118] *See, e.g.*, COLD WAR RHETORIC: STRATEGY, METAPHOR, AND IDEOLOGY 92 (Martin J. Medhurst et al. eds., 1997).

professional and personal lives.[119] As fear and finger-pointing overtook the nation, playwright Arthur Miller was reminded of a topic he had studied as a student, America's first (and quite literal) witch hunt: "McCarthy [was] actually saying certain lines that I recall the witch-hunters saying in Salem. So I started to go back, not with the idea of writing a play, but to refresh my own mind because it was getting eerie."[120]

In *The Crucible*, Miller explored the seventeenth-century moral panic that overtook a small colonial town, resulting in scores of arrests, bogus trials for witchcraft, and some twenty executions. The theatrical production served as a powerful metaphor for the public dread of communist infiltration and associated government abuses occurring in mid-twentieth century America. "In both [eras], to keep social unity intact, the authority of leaders had to be hardened and words of skepticism toward them constricted," Miller noted. "A new cautionary diction, an uncustomary prudence inflected our way of talking to one another."[121] Although the play initially fell flat, it eventually received critical acclaim, including a Tony Award in 1953, as well as appreciation for providing a rival narrative to the anti-communist anxieties and government fear-mongering then raging in the United States.[122]

Through his play, Miller sought "to make life real again, palpable and structured," in the belief that "a work of art might illuminate the tragic absurdities of an anterior work of art that was called reality, but was not."[123] Some might question the play's immediate impact on the public's imagination and its response to political demagoguery, particularly given that Miller was subsequently hauled before the House Committee on Un-American Activities and held in contempt of Congress for refusing to name names.[124] Nonetheless, *The Crucible* was the most significant literary challenge to McCarthyism and is probably the best known cultural artifact of the era. It has become a stage classic performed around the globe, providing an influential narrative on the repressive consequences of unchecked fear and irrationality.[125] "I can almost tell what the political situation in a country is when the play is suddenly a hit there," Miller wrote in his 1987 memoir, "it is either a warning of tyranny on the way or a reminder of tyranny just past."[126]

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[119] *Cf.* VICTOR S. NAVASKY, NAMING NAMES (rev. ed. 2003).

[120] *The Art of Theater: Arthur Miller*, 38 PARIS REV. 1, 36–37 (Sum. 1966) (interview of Arthur Miller), *available at* http://www.theparisreview.org/media/4369_MILLER_A.pdf.

[121] Arthur Miller, *Are You Now Or Were You Ever. . .?*, THE GUARDIAN, June 17, 2000, *available at* http://www.guardian.co.uk/books/2000/jun/17/history.politics.

[122] *See, e.g.*, Lee Baxandall, *Arthur Miller: Still the Innocent*, ENCORE XI, May-June 1964, at 16–19.

[123] Miller, *supra* note 121.

[124] *See, e.g.*, Joseph A. Loftus, *Miller Convicted in Contempt Case*, N.Y. TIMES, June 1, 1957.

[125] *See, e.g.*, A.P. FOULKES, LITERATURE AND PROPAGANDA 83–104 (1983).

[126] ARTHUR MILLER, TIMEBENDS: A LIFE 348 (1987).

C. *Dystopia, Real and Fictional*

As suggested, fictional works may gain force through their connection to historical fact. But the public imagination can also be stirred by depictions of altered or future worlds. For centuries, authors have constructed fictional societies not only to entertain readers but to provide a foil by which to evaluate the social order in which they live. Sixteenth-century writer and English statesman Thomas More crafted the term "utopia" in a book by the same name, where his lead character travels to an imaginary island-nation that has achieved the ideal polity.[127] A negative image exists as well, that of "dystopia." Apparently coined by nineteenth-century philosopher John Stuart Mill in a parliamentary speech, dystopia has been used to describe an imaginary society that is the antithesis of utopia.[128] Such places are marked by fear and oppression, with individuals leading a miserable, dehumanized existence.

Ironically, fictional dystopias sometimes develop from the pursuit of a utopian society and its underlying ideological goals—the elimination of poverty and disease, the achievement of socio-economic equality, the promise of technological advancement, and so on. Dystopias may also emerge from periods of war, revolution, or some other form of mass chaos or perceived exigency, where the people become willing to relinquish much, including basic liberty, in exchange for security. Under either scenario and regardless of any egalitarian claims to the contrary, the ensuing social arrangements tend to be hierarchical with strict class divisions akin to a caste system. The type of government that rules this new order is the defining feature of modern dystopian fiction: a totalitarian dictatorship that sustains its power through widespread fear of a state police force and justice system, usually coupled with propaganda reiterating the righteousness of the regime's judgment and inspiring hatred of dissenters, non-conformists, the presumably lawless lower classes, and all other "outsiders."

In contemporary dystopian works, the government obtains conformity and fear of state agents by, among other things, stripping the populace of its privacy. Individuals are under constant surveillance, at times through technology that penetrates personal spaces to reveal otherwise secret thoughts and actions. As such, everything becomes public in a dystopian world. The state's enforcement apparatus is rationalized by fear-mongering propaganda, with nightmarish trials

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[127] THOMAS MORE, UTOPIA (2002) (1516). In subsequent centuries, various fictional works would explore and expand upon the idea of a perfect social order. *See, e.g.*, JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS (2008) (1658); B.F. SKINNER, WALDEN TWO (2005) (1948). The modern representation of utopia is not limited to novels, however, but also can be seen in, *inter alia*, philosophical tracts and political rhetoric. *See, e.g.*, AMOS KIEWE & DAVIS W. HOUCK, A SHINING CITY ON A HILL: RONALD REAGAN'S ECONOMIC RHETORIC, 1951–1989 (1991); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

[128] *See, e.g.*, RICHARD C.S. TRAHAIR, UTOPIAS AND UTOPIANS: AN HISTORICAL DICTIONARY 110 (1999). Analogous terms include "anti-utopia" and "negative utopia."

and cruel punishment inflicted upon those who defy the regime. In dystopian fiction, society is marked not by sporadic miscarriages of justice but instead continuous, systematic injustice.[129]

George Orwell's *Nineteen Eighty-Four* offers the classic portrayal of totalitarianism in the fictional state of Oceania. The inhabitants are bombarded by propaganda encouraging them to fear and hate enemy-outsiders and to give their unconditional loyalty to the regime, epitomized by Big Brother, the Party's ever-present leader.[130] Objective truth has ceased to exist in Oceania, where facts are revised to serve the Party's goals and the populace is indoctrinated to accept even the patently false. To ensure their submission, common citizens are subjected to relentless surveillance, with hidden microphones planted around the city and two-way televisions monitoring individuals in their own homes. Recognizing the regime's perpetual lies, protagonist Winston Smith engages in petty rebellions—maintaining subversive thoughts, keeping a diary, and having a covert affair with a younger woman. Eventually, he is led to believe that a party insider, O'Brien, is a member of the Brotherhood, a shadowy group seeking to overthrow the Party. It is all a ruse, however, leading to the protagonist's arrest and imprisonment by the regime's Thought Police, his brutal torture and brainwashing at the hands of O'Brien, and ultimately, Winston's betrayal of the woman he loved and his own conscience.

The book is thematically rich, exploring state control of information, language, and even history to redefine the "truth"; the use of human and technological surveillance to extinguish personal privacy; and the psychological and physical manipulation of a population to maintain subservience.[131] All of these connect to an overarching theme, the danger of totalitarianism, which had dominated Orwell's writing since his involvement in the Spanish Civil War.[132] As

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[129] *See* ERIKA GOTTLIEB, DYSTOPIAN FICTION EAST AND WEST: UNIVERSE OF TERROR AND TRIAL 30 (2001).

[130] GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949).

[131] Another major theme is sex. *See Part V: Sex and Politics*, *in* ON NINETEEN EIGHTY-FOUR: ORWELL AND OUR FUTURE, *supra* note 6, at 231–75.

[132] *See* GEORGE ORWELL, *Why I Write*, *in* 1 COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL: AN AGE LIKE THIS, 1920-1940, at 5 (Sonia Orwell & Ian Angus eds., 2000) [hereinafter ORWELL, *Why I Write*] ("The Spanish war and other events in 1936-37 turned the scale and thereafter I knew where I stood. Every line of serious work that I have written since 1936 has been written, directly or indirectly, against totalitarianism and for democratic socialism, as I understand it.") It should be noted that Orwell was extremely critical of capitalism, at least in its non-advanced forms. *See, e.g.*, GEORGE ORWELL, *The Lion and the Unicorn: Socialism and the English Genius*, *in* 2 COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL: MY COUNTRY RIGHT OR LEFT, 1940-1943, at 56 (Sonia Orwell & Ian Angus eds., 2000); GEORGE ORWELL, *Review*, *in* 3 COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL: AS I PLEASE, 1943-1945, at 117 (Sonia Orwell & Ian Angus eds., 2000). Some have argued, however, that Orwell would support capitalism if he had been alive to see its development. *See* Norman Podhoretz, *If Orwell Were Alive Today*, *in* THE NORMAN PODHORETZ READER 215 (Thomas L. Jeffers ed., 2004).

a political matter, *Nineteen Eighty-Four* offers a chilling portrait of totalitarianism taken to its logical extremes.[133] Even skeptics of the law-literature enterprise, such as Richard Epstein, acknowledge that works like *Nineteen Eighty-Four* have "a certain working advantage over a quantitative social science" in the perspective it offers on how a totalitarian regime is able to acquire so much authority to begin with.[134] Dystopian literature provides insights into the rise and persistence of such states—how average individuals can be subdued by an erroneous perception of safety, how tyrants are able to elicit obedience from entire populations of previously autonomous, free-thinking citizens, and how a regime's machinery of fear and control can be maintained over long periods of time.[135]

Although *Nineteen Eighty-Four* has had a singular impact on the American psyche,[136] other works within the genre have explored similar themes of totalitarianism.[137] No one is ever acquitted in a fictional dystopia, its criminal process lacking the characteristics of a just system, and yet the regimes are not necessarily "lawless." Rather than being subject to summary execution, the lead characters are often tried and sentenced before an adjudicative body with the trappings of legality.[138] The criminal process becomes a means to demonstrate the rationality and legitimacy of the regime's justice machinery, while simultaneously vilifying the defendant (and all other enemies of the state) and terrorizing the masses into docile obedience out of fear that they will be next.[139]

But compelling dystopian fiction does more than depict a dreadful society and the horror generated by totalitarian government. It creates an eerie sense of familiarity for the reader, who is able to perceive social patterns in real life extrapolated to terrifying ends in a dystopian world. The work may resonate with the events of contemporary society and the reader's own experience, and echo of other places well known to the audience. Accounts of life in Nazi Germany often

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[133] *See, e.g.*, Richard A. Posner, *Orwell Versus Huxley: Economics, Technology, Privacy, and Satire*, 24 PHIL. & LIT. 1, 18 (2000) [hereinafter Posner, *Orwell Versus Huxley*].

[134] Richard A. Epstein, *Does Literature Work as Social Science?: The Case of George Orwell*, 73 U. COLO. L. REV. 987, 1004 (2002).

[135] *See id.* at 1004–05.

[136] *See, e.g.*, *Introduction*, *in* ON NINETEEN EIGHTY-FOUR: ORWELL AND OUR FUTURE, *supra* note 6, at 3; David Brin, *The Self-Preventing Prophecy; or, How a Dose of Nightmare Can Help Tame Tomorrow's Perils*, *in* ON NINETEEN EIGHTY-FOUR: ORWELL AND OUR FUTURE, *supra* note 6, at 224.

[137] *See, e.g.*, ALDOUS HUXLEY, BRAVE NEW WORLD (1932); YEVGENY ZAMYATIN, WE (Gregory Zilbourg trans., 1921). *See also* MARGARET ATWOOD, THE HANDMAID'S TALE (1986); RAY BRADBURY, FAHRENHEIT 451 (1953); ANTHONY BURGESS, A CLOCKWORK ORANGE (1962); ARTHUR KOESTLER, DARKNESS AT NOON (Daphne Hardy ed., 1941); AYN RAND, ANTHEM (1938); KURT VONNEGUT, PLAYER PIANO (1952).

[138] *See, e.g.*, GOTTLIEB, *supra* note 129, at 35.

[139] *See id.* ("societies can be characterized as dystopic when the prime function of the law is to define lawlessness and to segregate those inside the magic circle, who are to be placed under the law, from those who are thrust outside as enemies, demons, scapegoats").

describe a dystopian world as awful as any fictional society. Likewise, one cannot read Orwell without imagining the post-World War II environment, especially the rise of police states around the globe. In fact, the stark contrast between the discourse of totalitarian rulers and the narratives of those they ruled illuminates the relative nature of utopia and dystopia. While the party leadership might well have described Soviet life as a communist utopia, the existence of the dissident was surely dystopian.

For political theorists like Hannah Arendt, the totalitarianism of Hitler's Germany and Stalin's Russia represented a new, radical form of dictatorial authority that sought "the permanent domination of each single individual in each and every sphere of life."[140] As in fiction, real-world totalitarian regimes have arisen in times of political strife and socio-economic crisis, drawing strength from a negative solidarity among the populace and professing a comprehensive perfectionist ideology. They often acquire and consolidate power through an oppressive police force that seeks out and destroys the alleged enemies of the state via a network of informants, unrestricted searches and seizures, heavy-handed interrogation techniques, and prolonged detention in brutal conditions. When necessary, official propaganda can describe such action as essential to counter the allegedly devious nature and evil plans of the regime's enemies, thereby justifying a relentless war against them.

Carl Friedrich and Zbigniew Brzezinski described totalitarianism as a "syndrome" of interrelated characteristics, such as control of the media and maintenance of a secret police force.[141] Others scholars have been even more explicit about the psychological aspect of totalitarianism, an "authoritarian personality" of sorts, which includes:

> exaggerated concern with power; obedience and respect for authorities; disregard for and a proclivity to exploit and manipulate others . . . ; a high level of conventionality, and, at the same time, a lack of individuality; an inclination to self-righteousness and moral indignation; bigotry; a tendency to condemn minorities and other marginal groups; magnified moral concern with sex; intolerance; thinking in rigid categories of "black and white"; a tendency to use stereotypes; persistent superstitiousness, and hostility towards "others" (as opposite to "us").[142]

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[140] HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 326 (1973) (1951). *See also* LEONARD SCHAPIRO, TOTALITARIANISM (1972); CARL J. FRIEDRICH & ZBIGNIEW K. BRZEZINSKI, TOTALITARIAN DICTATORSHIP AND AUTOCRACY (1956); FRANZ NEUMANN, THE DEMOCRATIC AND THE AUTHORITARIAN STATE (1957). *See generally* PAUL BROOKER, NON-DEMOCRATIC REGIMES: THEORY, GOVERNMENT AND POLITICS (2000).

[141] FRIEDRICH & BRZEZINSKI, *supra* note 140, at 22.

[142] Adam Podgorecki, *Totalitarian Law: Basic Concepts and Issues*, *in* TOTALITARIAN AND POST-TOTALITARIAN LAW 3 (Adam Podgorecki & Vittorio Olgiati eds., 1996).

This mentality co-opts the legal system for its own purposes. For a dictator, law has instrumental value by pronouncing norms of coherence and integrity that coexist with, but never trump, a shadow system serving the caprice of authority. This secret law is ubiquitous and peremptory in totalitarian governance, confronting the people at all times and reminding them that law is merely a coercive tool of the regime.[143]

Nowhere is this more evident than in the criminal process of a totalitarian state. In 1991, Professor Radzinowicz—a former Polish refugee who had witnessed the rise of oppressive penal policies a half-century earlier[144]—described the aspects of an authoritarian model of criminal justice typified by the worst dictatorships in modern times. In such systems, crimes are ill-defined and consistently added to the penal code; police ignore legal constraints, lack meaningful accountability, and exercise de facto adjudicative powers on the streets; suspects are subjected to physical and mental coercion to extract information, and offenders are viewed as malevolent outsiders to be subjugated or extinguished; the criminal process is opaque, and the rules of evidence and procedure are ignored or paid lip-service; punishment is harsh, and prisoner rights are non-existent; and appellate review is cursory at best.[145] Radzinowicz pointed to Nazi Germany and Soviet Russia as practicing "the most perfect (and cruel) examples" of this model.[146] Whether it was the elimination of citizen individuality, the application of grotesque stereotypes, or the destruction of the rule of law, both regimes used criminal justice as a means to achieve hegemonic control over the populace.

But Radzinowicz went further, suggesting that many of the above indicators apply to contemporary nations, including the United States. Although it would be "grossly misguided and unfair" to describe the U.S. approach as an archetype of authoritarianism, he did "not hesitate to affirm that the American system belongs to the lowest category among the democratic countries of the world."[147] The point may be well taken, given that several of the above elements can be identified within the U.S. criminal justice system, including:

- an exponential growth in criminal liability and punishment through, *inter alia*, the creation of broadly defined offenses, the use of liability-expanding doctrines, and the enactment of determinate

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[143] *See id.* at 14.

[144] *See* LEON RADZINOWICZ, ADVENTURES IN CRIMINOLOGY (1999).

[145] Leon Radzinowicz, *Penal Regressions*, 50 CAMBRIDGE L.J. 422, 425–27 (1991).

[146] Intensive studies corroborate the dystopic characteristics of these two dictatorships. *See, e.g.*, INGA MÜLLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH (1991); PETER H. SOLOMON JR., SOVIET CRIMINAL JUSTICE UNDER STALIN (1996).

[147] Radzinowicz, *supra* note 145, at 439.

sentencing schemes and harsh mandatory minimum terms of imprisonment;[148]

- deficient police accountability and the existence of a secret law on the streets, evidenced by high-profile cases and reports of mental and physical coercion of suspects, acts of police violence and even torture, racial discrimination in the investigation of crime, and various other forms of officer misconduct;[149]
- the exemption of certain categories of crime from normal legal rules and a fervent hostility to any arguments challenging the underlying rationale for special treatment, epitomized by the de facto "drug exception" to constitutional criminal procedure and the rejection of evidence that, for instance, supports the availability of medical marijuana;[150] and
- the demonization of offenders—as well as judges who dare to rule in their favor—leading to attacks on judicial independence, the effective transfer of power from courts to prosecutors, the limitation on appellate and collateral review for defendants, and the tolerance (if not desire) for brutal prison conditions.[151]

Moreover, specific subsets of U.S. society may experience a microcosmic version of despotic rule, a sort of mini-dystopia, exemplified by the repressive policing of lower socio-economic classes in urban America.[152]

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[148] *See, e.g.*, Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005). *See also* Luna, *Gridland*, *supra*, note 94.

[149] *See, e.g.*, Erik Luna, *Race, Crime, and Institutional Design*, 65 LAW & CONTEMP. PROBS. 183 (2003); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107 (2000).

[150] *See, e.g.*, Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753 (2002).

[151] *See, e.g.*, Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139 (2006); James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C. L. REV. 433 (2003); J.C. Oleson, *The Punitive Coma*, 90 CAL. L. REV. 829, 849–61 (2002); Charles Fried, *Reflections on Crime and Punishment*, 30 SUFFOLK U. L. REV. 681, 683–92 (1997).

[152] For example, a community project in Los Angeles entitled "Utopia/Dystopia" sought to examine the disparate experiences in the city's downtown area:

> One person's utopia is another's dystopia. In the past 40 years civic policy in Los Angeles has generated the twin towers of utopia and dystopia: Bunker Hill, the redeveloped high rise financial center, and below it Skid Row. The real estate boom has generated new social policy, including the desired displacement of the majority population of poor people living in the area. [The Los Angeles Police Department] has engaged in a policy of constant harassment and daily arrests of people living on the streets. All to make the area safe for development.

Los Angeles Poverty Department, *UTOPIA/dystopia*, *available at* http://lapovertydept.org/index.php?option=com_content&task=blogcategory&id=31&Itemid=45 (last visited Sept. 7, 2009).

As mentioned earlier, doctrinal analysis and criminological research may have difficulties expressing the full consequences of state action. Standard approaches to legal reasoning often fail to convey the human interests at stake, while the fastidious, point-by-point approach of many lawyerly arguments and judicial opinions may lose the bigger picture. Given the foregoing, one obvious concern is the diminution of individual freedom and procedural protections through the steady expansion of the criminal justice system and the authority of law enforcement. Dystopian fiction can communicate this danger through political satire, illustrating the potential repercussions should current trends continue without critical examination and response.[153] By prompting identification of the possibilities, a dystopian work may inspire the audience to take steps to prevent a truly dreadful outcome.

Recognizing this literary potential, legal scholars and even a few jurists have referenced leading dystopian works to express the hazards of a given criminal justice ruling or doctrine. In his dissent from the Court's decision upholding warrantless aerial surveillance, Justice William Brennan penned the following conclusion:

> I hope it will be a matter of concern to my colleagues that the police surveillance methods they would sanction were among those described . . . in George Orwell's dread vision of life in the 1980's: "The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said . . . . In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows." Who can read this passage without a shudder, and without the instinctive reaction that it depicts life in some country other than ours?[154]

Although brief, this reference has power because America's cultural framework has fully incorporated *Nineteen Eighty-Four*, with the work carrying a widely understood symbolic meaning when applied to government action. The mental picture of the police conduct in question becomes more lucid and intense, allowing the audience to imagine the potential consequences and contemplate whether the law should, in fact, prohibit such intrusions on privacy.[155]

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[153] Posner, *Orwell Versus Huxley*, *supra* note 133, at 8 ("Extrapolation is the key. The satirist criticizes repulsive tendencies in his or her society by providing an imaginative picture of the logical outcome of those tendencies.").

[154] Florida v. Riley, 488 U.S. 445, 466–67 (1989) (Brennan, J., dissenting) (quoting GEORGE ORWELL, NINETEEN EIGHTY-FOUR 4 (1949)).

[155] *See* M. Todd Henderson, *Citing Fiction*, 11 GREEN BAG 2D 171 (2008). In his article, Henderson concluded that meaningful literary references are not a common occurrence. Such

Many will doubt that a truly dystopian society could ever emerge in the United States, given the relatively fleeting nature of modern totalitarian dictatorships, the American aversion to governmental abuses and even petty tyrannies, and the existence of thousands upon thousands of government officials—law enforcement agents, prosecutors, judges, and many others—who work tirelessly for the public welfare. With that said, there are good reasons for circumspection. "History is a long and dreary litany of ruinous decisions made by rulers in all centuries and on all continents," notes scientist and author David Brin in his discussion of dystopian fiction's real-world benefits. "A common thread weaves through most of these disasters; a flaw in human character—*self-deception*—eventually enticed even great leaders into taking fatal missteps, ignoring the warnings of others."[156] Comparisons to dystopias of literature and history can offer warnings about disturbing trends in criminal justice and the systemic structures that generate such problems, which may impact the public imagination.

In this important sense, literary dystopias contain prognostications for the future, drawing the audience's attention to past incidents and present day experience. The year before his death, Chief Justice William Rehnquist penned a short review of *Nineteen Eighty-Four*, noting that "[p]erhaps Orwell's widely read book itself helped to discourage any possible effort by a government to curb [basic] freedoms."[157] He acknowledged that the danger of totalitarianism in the Western world is far less likely today than when the dystopian work was released in 1949. Elsewhere, however, the threat remains quite real, confronting individuals on a regular basis. "The book stands as a warning against letting liberal democracy slip away or be extinguished where it already exists and as a testament to the meager lives of those who presently live under such a regime," Rehnquist concluded.[158]

Dystopian fiction may be especially apt today, given America's recent experiences and the social and legal changes that have ensued. Like the state of war depicted in *Nineteen Eighty-Four*, the current "war on terror" is continuous and has no foreseeable end, with the enemy changing over time, from terrorist organizations to entire nations. Nonetheless, with a dichotomous worldview of us-versus-them, the American government effectively adopted the Orwellian position that the "enemy of the moment always represent[s] absolute evil."[159] Officials

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citations occurred in about 1 out of every 10,000 federal appellate decisions; they are often found in separate opinions and employed by the same group of jurists; and they are primarily referenced for concepts in the judge's own world, "not the world of the criminal, the marginalized, or the less fortunate." *Id.* at 177.

[156] Brin, *supra* note 136, at 224.

[157] William H. Rehnquist, *Orwell: 1984*, 102 MICH. L. REV. 981, 986 (2004). *See also* Brin, *supra* note 136, at 222–23, 230.

[158] Rehnquist, *Orwell*, *supra* note 157, at 987. *But cf. infra* note 320 and accompanying text.

[159] ORWELL, *supra* note 130, at 32.

sometimes speak in a type of *Newspeak*,[160] where civilian deaths are referred to as "collateral" and a privacy-reducing law is labeled a "Patriot Act."[161] The U.S. military even opened an "Office of Strategic Influence" designed to sway public opinion and policymakers, possibly through the dissemination of false information.[162] The operation is reminiscent of Oceania's Ministry of Truth and the Party slogan, "Who controls the past controls the future: who controls the present controls the past."[163] Of special concern here and discussed below is the adoption of long-abandoned practices—such as imprisonment without judicial recourse and the use of torture to extract confessions and other information—often with the support of self-styled progressives and in a social environment that stirs only fear and rage.[164]

IV. CRIMINAL JUSTICE AND THE WAR ON TERROR

The events of September 11, 2001 scarcely need repeating: A small band of Al Qaeda operatives used hijacked airplanes as ballistic weapons against American targets, killing nearly three thousand people and shocking the entire world. In response, the U.S. military invaded Afghanistan and Iraq with, to date, mixed results. Most relevant for present purposes, the federal government engaged in activities that seem to fit within the authoritarian model of criminal justice, including the following:

- In the immediate wake of 9/11, law enforcement interviewed thousands of Middle-Eastern men now residing in the United States, some of whom were detained on the pretext of immigration violations, in a type of mass roundup that smacked of racial profiling. Although subsequent guidelines issued by the U.S. Department of Justice generally prohibit this type of profiling, the rules specifically stated that agents "protecting national security or

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[160] *See id.* at 53 ("Don't you see that the whole aim of Newspeak is to narrow the range of thought?"); *id.* at 303 ("The purpose of Newspeak was not only to provide a medium of expression for the world-view and mental habits proper to the devotees of Ingsoc, but to make all other modes of thought impossible.").

[161] *See infra* note 174 and accompanying text.

[162] *See, e.g.*, David E. Kaplan, *How Rocket Scientists Got Into the Hearts-and-Minds Game*, U.S. NEWS & WORLD REPORT, Apr. 17, 2005, at 30, 31; James Dao & Eric Schmitt, *Pentagon Readies Efforts to Sway Sentiment Abroad*, N.Y. TIMES, Feb. 19, 2002, at A1.

[163] ORWELL, *supra* note 130, at 37. *See also id.* at 215 ("the essential act of the Party is to use conscious deception while retaining the firmness of purpose that goes with complete honesty"); *id.* at 217 ("The Ministry of Peace concerns itself with war, the Ministry of Truth with lies, the Ministry of Love with torture, and the Ministry of Plenty with starvation.").

[164] *See id.* at 220.

preventing catastrophic events (as well as airport security screeners) may consider race, ethnicity, and other relevant factors."[165]

- Those accused of immigration violations (as well as a few held on so-called "material witness" warrants) were detained for months on end, without trial or even access to legal counsel and their families. Some claimed to have been placed in unusual conditions (e.g., extended solitary confinement) and abused physically and verbally (e.g., guards beating a detainee and calling him a "Muslim killer").[166] Other detainees have been subject to "extraordinary rendition" and similar schemes, where they were either handed over or taken by American officials to foreign jurisdictions that allow cruel conditions of confinement, systematic prisoner abuses, and even torture.[167]
- Alleged terrorists were placed in military detention at the U.S. Naval Base in Guantánamo Bay, Cuba, as well as a few other military facilities and a network of secret prisons maintained by the Central Intelligence Agency.[168] The extended, incommunicado internment in a modern-day penal colony was rationalized by exploiting imprecise but critical legal terms, such as the concept of "unlawful combatants." Most detainees went uncharged in any sort of legal tribunal, while a few faced trial before a military commission in a process entirely controlled by the executive branch and utilizing looser rules of evidence and procedure than employed in regular criminal courts. Worse yet, it appears that innocent individuals may have been detained at Guantánamo based on unsubstantiated allegations.[169]

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[165] U.S. Dept. of Justice, *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies*, June 2003, *available at* http://www.usdoj.gov/crt/split/documents/guidance_on_race.php. *See generally* David A. Harris, *New Risks, New Tactics: An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001*, 2004 UTAH L. REV. 913. *Cf.* Liz Robbins, *9 Muslims Are Pulled From Plane and Denied Re-Entry; Airline Apologizes Next Day*, N.Y. TIMES, Jan. 3, 2009, at A9.

[166] *See, e.g.*, Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007). *See also* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003) *available at* http://www.usdoj.gov/oig/special/0306/index.htm.

[167] *See, e.g.*, Arar v. Ashcroft, 532 F.3d 157 (2d Cir. 2008); El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007); Jane Perlez et al., *Ex-Detainee of the U.S. Describes a 6-Year Ordeal*, N.Y. TIMES, Jan. 6, 2009, at A1; Ian Fisher, *Testimony Is Said to Implicate C.I.A. in Seizure of Suspect in Italy*, N.Y. TIMES, Feb. 16, 2007, at A5.

[168] *See* WAYNE MCCORMACK, UNDERSTANDING THE LAW OF TERRORISM 43–54 (2007) (providing relevant legislation and executive orders, including the Detainee Treatment Act of 2005 and the Military Commission Act of 2006).

[169] *See, e.g.*, William Glaberson, *Rulings of Improper Detentions in Cuba as the Bush Era Closes*, N.Y. TIMES, Jan. 19, 2009, at A1.

- The Bush Administration approved "enhanced interrogation techniques"—extremely harsh, if not torturous, methods to extract information from terrorism suspects—relying upon legal memos that opined such actions would not violate domestic and international law or could at least be justified under exigent circumstances.[170] Some methods sound banal—for instance, employing temperature extremes, sleep deprivation, and stress positions—but can result in severe physical and psychological trauma.[171] One much-discussed technique, known as "water-boarding," involves pouring water over the face of an immobilized detainee, instigating a gag reflex and making the individual believe that he is drowning and on the verge of death. A recently released report documented other troubling practices, such as applying pressure to a detainee's carotid artery until he passed out, threatening to use a handgun and power drill, staging mock executions, and suggesting that a detainee's family members were about to be sexually assaulted.[172] All told, scores of individuals have died in C.I.A. or military detention abroad.[173]
- The federal government implemented new or enhanced surveillance programs that implicate personal privacy and basic legal constraints, such as the Fourth Amendment. For instance, agents may obtain information from electronic communications providers about their subscribers without meeting the traditional standard of probable

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[170] *See, e.g.*, *A Guide to the Memos on Torture*, N.Y. TIMES, *available at* http://www.nytimes.com/ref/international/24MEMO-GUIDE.html. In the words of journalist Anthony Lewis, "the memos read like the advice of a mob lawyer to a mafia don on how to skirt the law and stay out of prison." Anthony Lewis, *Making Torture Legal*, N.Y. REV. BOOKS, July 15, 2004 at 4.

[171] *See, e.g.*, Mark Danner, *US Torture: Voices from the Black Sites*, N.Y. REV. BOOKS, Apr. 9, 2009, *available at* http://www.nybooks.com/articles/22530 (reviewing International Committee of the Red Cross report on treatment of C.I.A. detainees). *See also* Andrew Sullivan, *Dear President Bush*, THE ATLANTIC, Oct. 2009, at 78–88, *available at* http://www.theatlantic.com/doc/200910/bush-torture.

[172] *See, e.g.*, OFFICE OF THE INSPECTOR GEN., CENTRAL INTELLIGENCE AGENCY, COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES, (SEPTEMBER 2001-OCTOBER 2003) 49, 75–76 (2004) (released Aug. 24, 2009), *available at* http://graphics8.nytimes.com/packages/pdf/politics/20090825-DETAIN/2004CIAIG.pdf; Mark Mazzetti & Scott Shane, *C.I.A. Abuse Cases Detailed in Report on Detainees*, N.Y. TIMES, Aug. 24, 2009, at A1.

[173] *See, e.g.*, *From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules (Part II): Hearing on Interrogation Techniques Before H. Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights, and Civil Liberties*, 110TH CONG. 24 (2008) (statement of Colonel Lawrence Wilkerson, chief of staff to former Secretary of State Colin Powell).

cause.[174] In addition, a scheme known as the "Terrorist Surveillance Program" empowered the National Security Agency (N.S.A.) to intercept phone calls where one party is outside of the United States and it is believed that one of the parties is somehow connected to Al Qaeda.[175] In 2008, questions were raised as to whether the N.S.A. illegally wiretapped a Muslim scholar residing in the U.S. and failed to reveal this information at his trial, which culminated in a life sentence.[176] The newest allegations are far broader, however, concerning the N.S.A.'s unauthorized surveillance of private phone calls and e-mail, including the "overcollection" of possibly millions of individual communications.[177]

- Nearly every aspect of America's anti-terrorism efforts has been shrouded in secrecy and only partially revealed by civil rights suits, for instance, or requests under the Freedom of Information Act, with the Justice Department often asserting the so-called "state secrets privilege" to defeat such actions.[178] Most recently, there have been revelations of undisclosed counterterrorism and surveillance programs, claims that the head of the Central Intelligence Agency's clandestine service ordered the destruction of videotapes of enhanced interrogations, and allegations that government officials impeded investigations into mass P.O.W. killings by America's Afghani allies.[179] Other problematic ideas never came to fruition (e.g., using military forces to conduct domestic searches and

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[174] *See* Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, §215, 115 Stat. 272, 287–88.

[175] Dan Eggen, *Bush Authorized Domestic Spying Post-9/11 Order Bypassed Special Court*, WASH. POST, Dec. 16, 2005, at A1.

[176] *See, e.g.*, Eric Lichtblau & James Risen, *Panel to Call for N.S.A. Investigation Into Wiretapping of Muslim Scholar*, N.Y. TIMES, Dec. 8, 2008, at A22.

[177] *See, e.g.*, James Risen & Eric Lichtblau, *Extent of E-Mail Surveillance Renews Concerns in Congress*, N.Y. TIMES, June 17, 2009, at A4; Eric Lichtblau & James Risen, *Officials Say U.S. Wiretaps Exceeded Law*, N.Y. TIMES, Apr. 16, 2009, at A1.

[178] *See, e.g.*, El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007) (denying discovery on extraordinary rendition program based on state secrets privilege); Am. Civil Liberties Union v. Nat'l Sec. Agency, 493 F.3d 644, 648 (6th Cir. 2007) (noting that the "specifics remain undisclosed" about the Terrorist Surveillance Program); Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918 (D.C. Cir. 2003) (denying request for information about detainees). *See generally* United States v. Reynolds, 345 U.S. 1 (1953) (seminal Supreme Court decision on privilege).

[179] *See, e.g.*, Mark Mazzetti, *U.S. Says C.I.A. Destroyed 92 Tapes of Interrogations*, N.Y. TIMES, Mar. 3, 2009, at A16; James Risen, *U.S. Inaction Seen After Taliban P.O.W.'s Died*, N.Y. TIMES, July 11, 2009, at A1; Scott Shane, *Cheney Is Linked to Concealment of C.I.A. Project*, N.Y. TIMES, July 12, 2009, at A1. *See also* Scott Shane, *A New Push to Look Back: Bush-Era Issues May Force Obama's Hand*, N.Y. TIMES, July 13, 2009, at A1.

seizures) or were unsuccessful (e.g., C.I.A. outsourcing of assassinations to private contractors).[180]

- Government officials sometimes employed sweeping definitions of "terrorism" in classifying cases.[181] If prosecutors decide to bring charges, they have at their disposal a number of substantive offenses—such as conspiracy and "material support" of terrorism—that raise concern of due process, freedom of speech, associational rights, and the like, due to their open-ended, inchoate nature.[182] Civil liberties groups have decried the broad sweep of these crimes and their application in particular cases, with some defense attorneys claiming their clients have entered into plea bargains under threat of being labeled an "enemy combatant," which would render them *persona non grata* in the ordinary criminal process.[183]

Through such actions, officials have sought and, to a degree, achieved a type of terror exception to established procedures and constitutional standards.[184] The policies and practices have been rationalized by claims of government necessity and often accepted at face value by a fearful citizenry. For example, not only was the public ignorant as to the specifics and consequences of the Patriot Act, but there was little congressional debate before its passage.[185] "Despite my misgivings, I acquiesced in some of the administration's proposals," Senator Patrick Leahy conceded, "because it is important to preserve national unity in this time of national crisis and to move the legislative process forward."[186] In general, the American public accepted much of the expansion in government powers through its subsequent submission to a "fortress mentality."[187] Few would have

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[180] *See, e.g.*, Mark Mazzetti & David Johnston, *Bush Weighed Using Military in U.S. Arrests*, N.Y. TIMES, July 25, 2009, at A1; Mark Mazzetti, *Outsiders Hired As C.I.A. Planned to Kill Jihadists*, N.Y. TIMES, Aug. 20, 2009, at A1.

[181] *See, e.g.*, Transactional Records Access Clearinghouse, *Alternative Federal Definitions of Terrorism Criminal Cases*, *available at* http://trac.syr.edu/tracreports/terrorism/215/include/definitions.html#critical_infrastructure.

[182] *See, e.g.*, Wayne McCormack, *Inchoate Terrorism: Liberalism Clashes with Fundamentalism*, 37 GEO. J. INT'L L. 1 (2005). *See generally* MCCORMACK, *supra* note 168.

[183] *See, e.g.*, MCCORMACK, *supra* note 168, at 139.

[184] The alleged legal basis and potential breadth of post-9/11 presidential power is outlined in a series of memoranda issued by the Justice Department's Office of Legal Counsel. *See, e.g.*, Neil A. Lewis, *Memos Reveal Scope of Power Bush Sought in Fighting Terror*, N.Y. TIMES, Mar. 3, 2009, at A1. The documents are now available at http://documents.nytimes.com/bush-administration-terrorism-memos#p=1.

[185] *See, e.g.*, Sharon H. Rackow, *How the USA PATRIOT Act Will Permit Governmental Infringement Upon the Privacy of Americans in the Name of "Intelligence" Investigations*, 150 U. PA. L. REV. 1651, 1694–96 (2002).

[186] 147 Cong. Rec. 19, 493 (2001) (statement by Sen. Leahy).

[187] JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED

thought this possible before 9/11, and today levelheaded analysis raises doubts as to the basis for the government's extraordinary actions. The calculations should be checked, with a fresh assessment of costs and benefits.[188]

A. *Rethinking the War on Terror*

Let's reconsider some of the foundational aspects of the war on terror, beginning with the definition of *terrorist*. This infamous designation gets thrown around quite a bit, but exactly what makes an individual a "terrorist" rather than, say, a perfectly respectable "revolutionary" or "freedom fighter"? Is it the severity of his acts, such as the infliction of massive, indiscriminate harm on people and property? Or is it the targeting of innocent civilians in their homes and public spaces to achieve some political end? One federal statute defines terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents."[189] Osama bin Laden easily qualifies as a terrorist under this formulation, but Timothy McVeigh might not. After all, McVeigh was neither a clandestine agent nor a member of a subnational group.

Another approach might focus on a trio of common criteria: "the terrorist appears in civilian clothing, attacks civilian targets, and blends back into civilian populations."[190] Oddly, this could make a serial killer like Ted Bundy or John Allen Muhammad a terrorist, but might exclude a fatigue-clad member of FARC[191] or a Klansman draped in a white sheet. Still another basic feature of terrorism is the ongoing nature of violence against civilians.[192] But if some individual (or group) commits only a single act of politically motivated violence against civilians, no matter how horrific, is he not a terrorist? For better or worse, an affirmative response would seem to convert terrorism into a recidivist concept.[193]

In addition, what is one to make of mass violence against civilians that would be deemed terrorism if committed by private actors but instead is the work of government agents or others who act under color of law? Consider, for instance,

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AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 277 (2007). *But cf.* N.R. Kleinfield, *A Fortress City That Didn't Come to Be: Fears of 9/12 Revisited*, N.Y. TIMES, Sept. 11, 2009, at A1.

[188] David Johnston & Charlie Savage, *Obama Signals His Reluctance to Investigate Bush Programs*, N.Y. TIMES, Jan. 12, 2009, at A1 (quoting Elisa Massimino, executive director of Human Rights First).

[189] 22 U.S.C. § 2656(f)(d)(2).

[190] MCCORMACK, *supra* note 168, at 8.

[191] FARC is the Spanish-language acronym for the Revolutionary Armed Forces of Columbia, which has been designated by the U.S. State Department as a foreign terrorist organization.

[192] MCCORMACK, *supra* note 168, at 29.

[193] There are also various psychological or cultural frameworks for understanding terrorists, but these seem more like diagnostic criteria than workable elements of a legal definition. *See, e.g.*, *id.* at 29–32.

the historical exploits of various American officials, from Andrew Jackson's virtually genocidal relocation of Native Americans on the "trail of tears" and William Tecumseh Sherman's scorched-earth practices during his "march to the sea," to the fire-bombing of Dresden and Tokyo and the nuclear destruction of Hiroshima and Nagasaki.[194] A truly brutish approach might look to who prevailed in the underlying conflict or ask whether a given action had the pretense of legality. This is only acceptable if someone adopts a might-makes-right approach or some sort of Nixonian understanding of executive power.[195] History records horrifying acts against civilians that were "lawful" in some sense, backed by a given population and grounded in a legal text (e.g., anti-Semitic violence based on the Nuremberg Laws). But the cloak of authority does not seem to diminish the moral culpability of an otherwise terroristic act; if anything, the abuse of power makes it worse, not better.

When the issue is terrorism, maybe the actors and their actions can be differentiated through the doctrine of "double effect," a line of reasoning that lays out circumstances where harm to another may be justified by the greater good it produces.[196] But the analysis can be tricky, requiring a normative judgment about the relevant action and the values that it seeks to vindicate, an assessment of the actor's actual intentions in light of the delicate line between purposeful ends and foreseen consequences, and a weighing of harms and benefits, some of which may be speculative or incommensurable. For example, historians seem to agree that Sherman's march facilitated the end of the Civil War, "destroy[ing] much of the South's potential and psychology to wage war,"[197] and as a result, his tactics were critical to maintaining the union and ensuring the ultimate demise of slavery in America while also minimizing further bloodshed.[198]

But Sherman himself acknowledged that vengeance played a part,[199] with "many acts of pillage, robbery, and violence"[200] committed by his troops and most

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[194] *Cf.* DAVID E. STANNARD, AMERICAN HOLOCAUST: THE CONQUEST OF THE NEW WORLD 84 (1993) (describing violence committed against non-belligerent Native Americans).

[195] "[W]hen the president does it," President Nixon told journalist David Frost, "that means that it is not illegal." *Richard Nixon: Interview on Watergate*, *reprinted in* THE POWER OF THE PRESIDENCY: CONCEPTS AND CONTROVERSY 179 (Robert S. Hirschfield ed., 1982). *See, e.g.*, ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 421 (2004).

[196] The concept, which originated from Thomas Aquinas's discussion of lethal self-defense in his *Summa Theologiae*, has been the topic of much philosophical debate. *See, e.g.*, Suzanne Uniacke, *Double Effect*, *in* 3 ENCYCLOPEDIA OF PHILOSOPHY 120 (Edward Craig ed., 1998).

[197] DAVID J. EICHER, THE LONGEST NIGHT: A MILITARY HISTORY OF THE CIVIL WAR 768 (2001). *See also* HERMAN HATTAWAY & ARCHER JONES, HOW THE NORTH WON: A MILITARY HISTORY OF THE CIVIL WAR (1983).

[198] *See* JAMES M. MCPHERSON, THIS MIGHTY SCOURGE: PERSPECTIVES ON THE CIVIL WAR 116–121 (2007).

[199] *See, e.g.*, EICHER, *supra* note 197, at 768 (quoting Sherman as saying that "the whole army is burning with an insatiable desire to wreak vengeance upon South Carolina . . . I almost tremble at her fate, but feel that she deserves all that seems in store for her.").

of the harm inflicted upon the populace being "simple waste and destruction."[201] In fact, the campaign helped set a precedent for the concept of *total war*:

> The Civil War, as practiced by the belligerents and characterized by Sherman, implemented two propositions which later wars took much further: that the nation and the nation's professed ideals admit no necessary limit in their fight to prevail; that the methods of waging war do not differ categorically if at all between the belligerent whose cause is labeled just and the belligerent whose cause is labeled unjust. Neither of these propositions commands universal assent, yet modern belligerents have acted as if they were true.[202]

In the end, Sherman's tactics might still be justified by the objectives it achieved, just as one might stomach the civilian deaths in Hiroshima and Nagasaki given Japan's imperialist ambitions, the aggression and cruelty of that nation's military, and the estimated casualties from an American land invasion. To be meaningful, however, such analysis demands an open mind free of hypocrisy, one willing to hear all arguments and then judge them on the merits. If the topic of terrorism were approached in this manner, the evaluation would seem to invite claims by the purported terrorists themselves—or, more likely, by someone willing to play the devil's advocate—regarding the normative underpinnings of their acts and the goals that were served, as well as the supposed injustices perpetuated and damage inflicted by the United States. For some, this will be a most unpleasant discussion, but it is one that a liberal constitutional democracy must have to ensure that it remains precisely that: a state governed by the people and concerned for the common good, yet always mindful of individual substantive rights, like the

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[200] WILLIAM T. SHERMAN, MEMOIRS OF GENERAL WILLIAM T. SHERMAN 182 (William S. McFeely ed., 1984) (1875).

[201] PHILLIP KNIGHTLEY, THE FIRST CASUALTY: THE WAR CORRESPONDENT AS HERO AND MYTH-MAKER FROM THE CRIMEA TO IRAQ 29 (The Johns Hopkins Univ. Press 2004) (1975). *See also* MICHAEL FELLMAN, CITIZEN SHERMAN: A LIFE OF WILLIAM TECUMSEH SHERMAN (1995). Southerners were also terrified by the threat of sexual assault at the hands of Union soldiers, due in no small part to U.S. General Benjamin Butler's infamous military order that any female citizen of New Orleans who showed contempt towards his troops "shall be regarded and held liable to be treated as a woman of the town plying her avocation" (i.e., a prostitute). *General Orders No. 28*, *in* 1 PRIVATE AND OFFICIAL CORRESPONDENCE OF GEN. BENJAMIN F. BUTLER DURING THE PERIOD OF THE CIVIL WAR 490 (1917), *quoted in* Crystal N. Feimster, *General Benjamin Butler and the Threat of Sexual Violence During the American Civil War*, 138 DÆDALUS 126, 128–29 (2009). Butler maintained that the order did not authorize rape, but according to one historian, "he clearly believed that threatening sexual violence was a justifiable means of subduing southern women." Feimster, *supra*, at 129. Moreover, some U.S. military and political officials supported Butler's actions, and President Lincoln never repudiated the order. *Id.* at 129–30.

[202] CHARLES ROYSTER, THE DESTRUCTIVE WAR: WILLIAM TECUMSEH SHERMAN, STONEWALL JACKSON, AND THE AMERICANS 358–59 (1991). *See also* STANNARD, *supra* note 194.

freedom to be a dissenter or non-conformist, and solicitous of basic procedural protections against invasions of privacy and deprivations of freedom.

I will leave it to others to present the grievances of alleged terrorists[203] and instead focus on the government responses to 9/11—the profiling and mass round-ups, the harsh conditions of confinement and extraordinary renditions, the use of coercive interrogation techniques and the internment of foreign suspects, the various forms of enhanced surveillance, and so on. At a minimum, the exceptional nature of these programs and the power they provide law enforcement call for heavy scrutiny of their application. The definition of terrorist and terrorism proves central to the inquiry. Terrorism scholar Wayne McCormack has articulated a series of rationales that support conceptual clarity in this area, including: the preclusion of arbitrary power via explicit standards; the delineation by case type of an appropriate legal forum (domestic civilian, military, or international); the prevention of irrational, vigilante justice in the wake of violence; and the assurance of constitutionally authorized, commensurate responses by government.[204] By defining the terms terrorist and terrorism, at least society will have an idea of the acts and actors subject to the state's enhanced authority.

But as suggested above, hard definitions have been hard to come by, and quite frankly, a universally agreed-upon formulation may be impossible. For many decades, the world community has struggled to delineate what counts as terrorism and who should be deemed a terrorist, with nations sometimes clashing among themselves over particular applications, exemplified by a 2002 case where the U.S. and Israel disagreed upon the classification of a homicidal rampage.[205] Just as troubling, however, is law enforcement's own labeling of acts and actors and the deployment of its new, exceptional powers. A recently released report found that federal entities classifying cases agreed less than ten percent of the time that

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[203] For instance, one frequently repeated grievance is that "the United States has favored Israel in the Arab-Israeli conflict," creating "a widespread sense in the Islamic world that its policies are unfair and lacking in evenhandedness." Karima Alavi, *At Risk of Prejudice: Teaching Tolerance About Muslim Americans*, 65 SOC. EDUC. 344, 346 (2001), *available at* http://downloads.ncss.org/lessons/650603.pdf.

[204] MCCORMACK, *supra* note 168, at 8–9.

[205] *See id.* at 291.

> The man officials say opened fire at a crowded El Al airlines ticket counter on Thursday was an Egyptian-born owner of a limousine service who apparently went to the airport heavily armed and determined to kill, managing to take two lives before Israeli security guards shot him to death during a fierce, bloody struggle. . . . American and Israeli officials initially appeared to disagree on Thursday about whether [the] rampage should be called a terrorist attack. But it became clear today that the difference was really over what constitutes terrorism. Yuval Rotem, Israel's consul general in Los Angeles, said that even a lone individual attacking an Israeli target like the El Al ticket counter should be considered a terrorist. But F.B.I. officials said that only if [the assailant] was linked to a terrorist organization would American investigators call it that, rather than a hate crime.

Rick Lyman & Nick Madigan, *Officials Puzzled About Motive of Airport Gunman Who Killed 2*, N.Y. TIMES, July 6, 2002, at A1.

terrorism was involved in a given prosecution.[206] An earlier government audit found that all sorts of cases were being counted as terrorism prosecutions—drug trafficking, immigration violations, even marriage fraud—irrespective of whether the investigation was able to link the suspect or defendant to terrorist activity.[207] As it turns out, federal prosecutors are spending far less time on bona fide terrorism cases than the public has been led to believe,[208] and they decline to prosecute two-thirds of terrorism referrals brought to them by investigating agencies, often for lack of evidence, criminal intent, or a viable federal offense.[209] Nonetheless, law enforcement has been exercising its war-on-terror powers at an increasing rate,[210] with agents across the country using terrorism provisions against seemingly common criminals.[211]

Such information should elicit skepticism as to whether the resources and investigative tools provided to law enforcement were as necessary as claimed or instead a power grab during a time of national hysteria. But even assuming we had a clear idea of what constitutes terrorism and trusted law enforcement to abide by this definition, another basic question remains: Does the threat justify the exceptional powers and responses of government? Many assume that the terrorist phenomenon is unique, but history is replete with acts that would qualify as

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[206] Transactional Records Access Clearinghouse, *Who Is a Terrorist?: Government Failure to Define Terrorism Undermines Enforcement, Puts Civil Liberties at Risk, available at* http://trac.syr.edu/tracreports/terrorism/215/. The Justice Department disagrees with the report's analysis and conclusions. *See* Lolita C. Baldor, *Study: Fewer Terrorism Suspects Going to Trial*, ASSOCIATED PRESS, Sept. 28, 2009.

[207] OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AUDIT REPORT 07-20, THE DEPARTMENT OF JUSTICE'S INTERNAL CONTROLS OVER TERRORISM REPORTING 43 (2007), *available at* http://www.usdoj.gov/oig/reports/plus/a0720/final.pdf. *See also* Nora V. Demleitner, *How Many Terrorists Are There?: The Escalation in So-Called Terrorism Prosecutions*, 16 FED. SENT'G REP. 38 (2003); Mark Fazlollah & Peter Nicholas, *U.S. Overstates Arrests in Terrorism: For Years, Officials Said, Cases that Should Not Have Been in that Category were Included to Support Budget Requests*, PHILA. INQ., Dec. 16, 2001, at A1. *Cf.* Robert M. Chesney, *Federal Prosecution of Terrorism-Related Offenses: Conviction and Sentencing Data in Light of the "Soft-Sentence" and "Data-Reliability" Critiques*, 11 LEWIS & CLARK L. REV. 851 (2007); Nina Bernstein, *Effort on U.S. Immigrant Raids Cast Wider Net*, N.Y. TIMES, Feb. 4, 2009, at A1.

[208] *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AUDIT REPORT 09-03, RESOURCE MANAGEMENT OF UNITED STATES ATTORNEYS' OFFICES 43 (2008), *available at* http://www.usdoj.gov/oig/reports/EOUSA/a0903/final.pdf. *See also* Lara Jakes Jordan, *Audit: Public Shorted on Terror Prosecutions*, ASSOCIATED PRESS, Nov. 10, 2008.

[209] *See* Transactional Records Access Clearinghouse, *supra* note 206.

[210] *See, e.g.*, Richard B. Schmitt, *Spying Up, But Terror Cases Drop*, L.A. TIMES, May 12, 2008, at A1.

[211] *See, e.g.*, Eric Lichtblau, *U.S. Uses Terror Law to Pursue Crimes from Drugs to Swindling*, N.Y. TIMES, Sept. 28, 2003, at A1 ("The government is using its expanded authority under the far-reaching law to investigate suspected drug traffickers, white-collar criminals, blackmailers, child pornographers, money launderers, spies and even corrupt foreign leaders, federal officials said."); David Caruso, *Patriot Act Targeting Common Criminals*, NAT'L REP., Sept. 15, 2003, at A2. *See also* MCCORMACK, *supra* note 168, at 341.

terrorism under any of the foregoing standards or criteria.[212] Nor should it be dispositive that the current state of affairs has been denominated a "war." Similar declarations have been made against other problems—drugs, poverty, crime, gangs, et cetera—and in each case, the object hardly fits the classic definition of *war*.[213] Instead, the war on terror, like the war on drugs, is a type of political trope that expresses the earnestness of government actors and the significance they attach to their efforts.

So what is the threat posed by terrorism, however defined? It has been estimated that about fifteen thousand people have been killed in terrorist attacks around the world over the past four decades, an average of about 380 deaths per year. For perspective, this rate is less than the annual number of Americans who suffocate in bed, drown in swimming pools, or are electrocuted.[214] Indeed, the number of people killed by terrorists worldwide over the past forty years is roughly equivalent to those murdered by "ordinary" criminals *in the U.S. each year*. Over a lifetime, an American is more likely to be killed by lightning or a venomous animal, for instance, than to die in a terrorist attack.[215] Around the globe, the amount of terrorist incidents decreased after the collapse of the Soviet Union in 1991, and contrary to conventional wisdom, the Western world has experienced a significant decline in terrorism-related attacks and deaths in recent years.[216] Today, there appears to be a consensus among analysts that another incident akin to 9/11 is unlikely to occur in the United States.[217] Moreover, experts and agency heads agree that 9/11 could have *and should have* been detected and averted by law enforcement.[218] It is also safe to assume that the conventional wisdom about hijackings (e.g., calmly cooperate) will not be heeded.[219]

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[212] *See, e.g.*, THE HISTORY OF TERRORISM: FROM ANTIQUITY TO AL QAEDA (Gérard Chaliand & Arnaud Blin eds., 2007). *See also* MCCORMACK, *supra* note 168, at 57; CALEB CARR, THE LESSONS OF TERROR 31 (2002). As Chinese military expert Wu Ch'i said in the fourth century B.C., "[O]ne man willing to throw away his life is enough to terrorize a thousand." *Wu Ch'i's Art of War, Appendix I*, *in* SUN TZU, THE ART OF WAR 168 (Samuel B. Griffith trans., 1971).

[213] For instance, the war on terror lacks a geographically defined state opponent. *See, e.g.*, WEBSTER'S UNABRIDGED DICTIONARY (1913), *available at* http://machaut.uchicago.edu/cgi-bin/WEBSTER.sh?WORD=war (defining *war* as a "contest between nations or states, carried on by force . . . . As war is the contest of nations or states, it always implies that such contest is authorized by the monarch or the sovereign power of the nation."). On the lighter side, one has to wonder what type of a "war" can be fought using Viagra. *See* Joby Warrick, *Little Blue Pills Among the Ways CIA Wins Friends in Afghanistan*, WASH. POST, Dec. 26, 2008, at A1.

[214] *See* DAVID GARDNER, THE SCIENCE OF FEAR 249 (2008). *See generally* NATIONAL SAFETY COUNCIL, ODDS OF DEATH DUE TO INJURY, UNITED STATES, 2005, *available at* http://www.nsc.org/research/odds.aspx [hereinafter ODDS OF DEATH].

[215] *See* GARDNER, *supra* note 214, at 249–51.

[216] *See id.* at 251; *Dying to Lose: Explaining the Decline in Global Terrorism*, *in* HUMAN SECURITY BRIEF 2007, at 8–21 (2008), *available at* http://www.humansecuritybrief.info/hsb07_chapter1.pdf.

[217] BRIAN MICHAEL JENKINS, UNCONQUERABLE NATION 32 (2006).

[218] In 2007, National Intelligence Director Michael McConnell told Congress "9/11 should

Still, what are the odds that an individual will die in a hijacking? One scholar put it in perspective by making the threat implausibly worse and then crunching the numbers:

> [L]et us assume that each week one commercial aircraft were hijacked and crashed. What are the odds that a person who goes on one trip per month would be in that plane? There are currently about 18,000 commercial flights a day, and if that person's trip has four flights associated with it, the odds against that person's being on a crashed plane are about 135,000 to 1. If there were only one hijacked plane per month, the odds would be about 540,000 to 1.[220]

By comparison, the odds of dying in a car crash each year is 6,500 to 1.[221] What makes the public's lack of perspective on comparative risk particularly perverse is that some 1,500 Americans died in the year following 9/11 precisely because the nation temporarily shifted from the safest form of travel (flying) to the most dangerous (driving).[222]

But what about an apocalyptic scenario, for instance, a nuclear attack leveling an American city? Although an exact statistic is impossible,[223] the risks can be assessed in light of history and available information in an attempt to make a rational judgment. One might begin with the fact that the country Islamic jihadists hate the most, Israel, has never suffered this type of attack.[224] In a very real sense, the Cold War concept of "mutually assured destruction" may still apply, given that any nation that either uses or provides terrorists such weaponry would be courting utter annihilation by a nuclear power such as Israel[225] or the United States. The

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have and could have been prevented. It was an issue of connecting information that was available." *Rep. John Conyers Jr. Holds a Hearing on Warrantless Surveillance and the FISA Act, Part 6*, Jan. 10, 2006, FDCH CAPITAL TRANSCRIPTS, *available on Westlaw at* 2007 WLNR 18350297 (statement of Michael McConnell, Director of National Intelligence).

[219] GARDNER, *supra* note 214, at 252 ("We all know that the old rule of hijackings—stay calm and cooperate—is out.").

[220] Michael L. Rothschild, *Terrorism and You—The Real Odds*, WASH. POST, Nov. 25, 2001, at B7. *See also* SUNSTEIN, LAWS, *supra* note 47, at 97 ("if it is estimated that the United States will suffer at least one terrorist attack each year with the same number of deaths as on September 11, the risk of death from terrorism is about .001 percent").

[221] ODDS OF DEATH, *supra* note 214.

[222] Gerd Gigerenzer, *Out of the Frying Pan into the Fire: Behavioral Reactions to Terrorist Attacks*, 26 RISK ANALYSIS 347 (2006) (estimating number of Americans who died on the road in the attempt to avoid the fate of the passengers on 9/11). *See also* GARDNER, *supra* note 214, at 3.

[223] *See* GARDNER, *supra* note 214, at 257–58.

[224] Of course, it can be argued that Israel's no-holds-barred approach to terrorism has prevented a WMD attack.

[225] *Cf.* Greg Myre, *In a Slip, Israel's Leader Seems to Confirm Its Nuclear Arsenal*, N.Y. TIMES, Dec. 12, 2006, at A5.

one group that was able to obtain a weapon of mass destruction on its own—Aum Shinrikyo, a Japanese cult with greater resources, technological capacity, and freedom of movement than Al Qaeda—spent years trying to acquire nuclear, biological, and chemical devices. But it was only able to kill nineteen people using the nerve agent sarin, casting doubt on the idea that such weaponry can be easily acquired and deployed.[226]

Before 9/11, the so-called Gilmore Commission concluded that existing terrorist organizations (and, for that matter, most nations) lacked the ability and resources to kill masses of people by biological, chemical, or nuclear/radiological attack,[227] an assessment that has been reaffirmed in the ensuing decade.[228] For instance, a recent report by the U.S. National Intelligence Council acknowledged that the risk of nuclear weapon use remains very low. The report did provide a litany of grave threats and important caveats, and its overall tenor was somber. But it also made the rather unexpected prediction that Al Qaeda may "decay sooner than many people think" and "support for terrorist networks in the Muslim world appears to be declining."[229] All in all, terrorism does not appear to be the type of threat to the nation's very existence that might justify truly extraordinary powers or aconstitutional decision-making.[230]

B. *Fear and Politics*

On rare occasions, some American politicians have put the danger of terrorism in perspective. "Calculate the odds of being harmed by a terrorist," Senator John McCain wrote in 2004. "It's about as likely as being swept out to sea by a tidal wave."[231] New York City Mayor Michael Bloomberg echoed this sentiment in 2007: "You have a much greater danger of being hit by lightning than

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[226] *See, e.g.*, GARDNER, *supra* note 214, at 254–56; FIRST ANNUAL REPORT OF THE ADVISORY PANEL TO ASSESS DOMESTIC RESPONSE CAPABILITIES FOR TERRORISM INVOLVING WEAPONS OF MASS DESTRUCTION 46–51 (1999), *available at* http://www.rand.org/nsrd/terrpanel/terror.pdf.

[227] FIRST ANNUAL REPORT, *supra* note 226, at 21.

[228] *See, e.g.*, Eileen Sullivan, *Homeland Security Forecasts 5-year Terrorism Threat Picture*, PESERET NEWS, Dec. 26, 2008, at A7 (WMD attacks are deemed "the most unlikely because it is so difficult for Al Qaeda and similar groups to acquire the materials needed to carry out such plots, according to the internal Homeland Security Threat Assessment for the years 2008-2013."); FOURTH ANNUAL REPORT OF THE ADVISORY PANEL TO ASSESS DOMESTIC RESPONSE CAPABILITIES FOR TERRORISM INVOLVING WEAPONS OF MASS DESTRUCTION 21 (2002), *available at* http://www.rand.org/nsrd/terrpanel/terror4.pdf.

[229] NATIONAL INTELLIGENCE COUNCIL, GLOBAL TRENDS 2025: A TRANSFORMED WORLD 67–70 (2008), *available at* http://www.dni.gov/nic/NIC_2025_project.html. *See also* Scott Shane, *Rethinking What to Fear*, N.Y. Times, Sept. 27, 2009, at WK1 (noting that terrorism experts believe Al Qaeda and its jihadist agenda are in decline in the Muslim world).

[230] *See infra* notes 298–321 and accompanying text.

[231] JOHN MCCAIN, WHY COURAGE MATTERS: THE WAY TO A BRAVER LIFE 35 (2004).

being struck by a terrorist."[232] Unfortunately, Bloomberg was excoriated for his honesty, and McCain's statement proved to be an exception to the prevailing terrorism rhetoric.[233] Fear-mongering has become a powerful campaigning tool, at times sinking to scurrilous claims about an opponent being soft on terrorism. Fueled by government propaganda and political opportunism, a collective anxiety of terrorism overwhelmed the critical thinking skills of the American people.[234]

Understandably, the initial public response to 9/11 was highly emotional—anger, grief, and most of all, fear. The coordinated attacks carried profound signal value for the average citizen, portending grave danger to the national security and to one's own personal safety. In the aftermath, nearly nine out of every ten Americans believed that it was likely that additional attacks would occur in the coming weeks, and most were at least somewhat worried that they or their families would be victims of terrorism. This nervous reaction was to be expected given the horror witnessed by the public, much of it in real-time. What seems surprising, however, is that the level of fear remained high in the absence of subsequent attacks. Although the statistics fluctuated between 2002 and 2006, the trendline was unambiguous—fear of terrorism gradually increased over time.[235]

For the most part, the abiding nature of this fear stemmed not from subsequent actions of Al Qaeda or any other cabal. Instead, it was generated by the U.S. government itself, with Americans repeatedly reminded that 9/11 stood for more than mass murder. These were not merely "acts of terror" but "acts of war,"[236] representing an existential threat to America and the entire civilized world. "Freedom and democracy are under attack"[237] the public was told, terrorism being the modern successor to "Hitlerism, militarism, and communism."[238] Likewise,

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[232] *Bloomberg on JFK Plot: 'Stop Worrying, Get a Life,'* June 4, 2007, http://wcbstv.com/national/Michael.Bloomberg.JFK.2.284516.html.

[233] Zbigniew Brzezinski, *Terrorized by "War on Terror": How a Three-Word Mantra Has Undermined America*, WASH. POST, Mar. 25, 2007, at B1.

[234] As this article approached the end of the editing process, former Homeland Security Secretary Tom Ridge claimed that he had felt pressured to raise the color-coded terrorism threat level in 2004 and had wondered whether the action was actually about politics rather than security. *See* TOM RIDGE, THE TEST OF OUR TIMES: AMERICA UNDER SIEGE ... AND HOW WE CAN BE SAFE AGAIN (2009). *See also* Peter Baker, *Bush Official, in Book, Tells of Pressure on '04 Vote*, N.Y. TIMES, Aug. 21, 2000, at A19; Ron Fournier, *Democrats Knocked Off Balance by Terror Alerts*, ASSOCIATED PRESS, Aug. 4, 2004. Other former Bush Administration officials have adamantly denied Ridge's allegations. *See* Baker, *supra*; *Rumsfeld, Townsend Rebuff Ridge*, THE ATLANTIC, Aug. 20, 2009, *available at* http://politics.theatlantic.com/2009/08/bush_security_adviser_rebuffs_ridge.php.

[235] *See* GARDNER, *supra* note 214, at 249 ("Worry about terrorism did not decline as time passed and the threatened onslaught failed to materialize; instead, it slowly rose.").

[236] George W. Bush, *Remarks Following a Meeting with the National Security Team*, Sept. 12, 2001, WKLY. COMPILATION PRESIDENTIAL DOCUMENTS, *available on Westlaw at* 2001 WLNR 4496205.

[237] *Id.*

[238] George W. Bush, *Address before a joint session of the Congress on the State of the Union*, Feb. 3, 2003, WKLY. COMPILATION PRESIDENTIAL DOCUMENTS, *available on Westlaw at* 2003 WLNR

the individuals detained in Guantánamo Bay were described as "killers" who "don't share the same values we share" and "would like nothing more than to come after America"; "the worst of a very bad lot," "devoted to killing millions of . . . innocent Americans"; and "the most dangerous, best trained, vicious killers on the face of the earth."[239] The government thus had a "solemn obligation to protect the people," to "stay on the offensive," and to "win the war on terror."[240]

According to the government's newly formed homeland security agency, "[t]oday's terrorists can strike at any place, at any time, and with virtually any weapon."[241] Most frightening of all were prophecies of terrorists detonating weapons of mass destruction. As President Bush warned in 2002, "we cannot wait for the final proof—the smoking gun—that could come in the form of a mushroom cloud."[242] Aided by rogue regimes, groups like Al Qaeda would employ biological, chemical, and even nuclear devices to wreak death and destruction in the United States. "Imagine those nineteen hijackers with other weapons and other plans," Bush suggested in his 2003 state of the union address. "It would take one vial, one canister, one crate slipped into this country to bring a day of horror like none we have ever known."[243] The government would "do everything in [its] power to make sure that day never comes,"[244] which, as it turns out, required law enforcement to dispense with standard constraints and procedures.[245] As was the case with drug enforcement, the metaphor of war proved to be a potent rhetorical device to facilitate anti-terrorism efforts and concomitant increases in official power.[246]

In the ensuing years, politicians and bureaucrats continued to present doomsday scenarios involving weapons of mass destruction. In 2005, then-CIA Director Porter Goss declared that "it may only be a matter of time before al Qaeda or another group attempts to use chemical, biological, radiological and nuclear

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6640846 [hereinafter Bush, *Address*].

[239] David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981, 2015 (2008) (quoting President Bush, Vice President Cheney, and Defense Secretary Rumsfeld).

[240] George W. Bush, *Remarks in a Discussion at Owens Community College in Perrysburg Township, Ohio*, Jan. 21, 2004, WKLY. COMPILATION PRESIDENTIAL DOCUMENTS, *available on Westlaw at* 2004 WLNR 11424399.

[241] OFFICE OF HOMELAND SECURITY, NATIONAL STRATEGY FOR HOMELAND SECURITY 1 (2002).

[242] David E. Sanger, *Bush Sees 'Urgent Duty' to Pre-empt Attack by Iraq: He Cites Threat Posed to U.S. and Allies*, N.Y. TIMES. Oct. 8, 2002, at A1.

[243] Bush, *Address*, *supra* note 238.

[244] *Id.*

[245] *See, e.g.*, SIMON, *supra* note 187, at 272 ("[T]he major legislative and administrative responses to 9/11 have been to heighten the power of law enforcement and prosecutors to do much of what they were doing before with even fewer avenues for legal challenge.").

[246] As Jonathan Simon notes, the term *war* changes the issue "from a question of policy to a model of how to govern," indicating "a transformation of the means and rationalities by which elites justify and set the desired dimensions of their own governance." SIMON, *supra* note 187, at 259.

weapons,"[247] while Vice President Cheney warned of terrorist ambitions "to arm themselves with weapons of mass destruction . . . and to cause mass death in the United States."[248] More recently, a congressional commission predicted that "a weapon of mass destruction will be used in a terrorist attack somewhere in the world by the end of 2013," with one former senator testifying that "the risk of a nuclear weapon being used today is growing, not receding."[249] Along the way, those who disagreed with government actions or challenged their constitutionality were branded as pro-terrorist. For instance, House Speaker Dennis Hastert said that Democrats who opposed the Military Commissions Act had "voted in favor of new rights for terrorists" and would prefer to "gingerly pamper the terrorists who plan to destroy innocent Americans' lives."[250]

The public anguish was only heightened by media coverage and its repetition of government claims, often with little journalistic scrutiny. Sometimes news outlets even exacerbated fears by reporting the merely imaginable as if it were a looming threat. The result was a type of feedback loop among government officials, the news media, and the American public that spiraled perceptions of danger.[251] The entertainment industry played a major part as well. The threat of terrorism provides the perfect plotline for movie thrillers and television dramas, where overworked and outmanned government agents fight through legal niceties and bureaucratic redtape to uncover terrorist schemes and diffuse ticking time-bombs before cities are eviscerated in a nuclear cloud.[252] Eventually, fact may be conflated with fiction, news with entertainment, the probable with the merely hypothetical. As a nation, imaginary horrors can transform a free-minded citizenry into a trembling mass, willing to give up liberty for the sake of safety at the urging of alarmists and opportunists.[253]

By all appearances, that is precisely what happened. The government's constant reference to terrorists, terrorism, the war on terror, and so on—reverberating in the echo chamber of modern media—tended to provoke public anxieties to the point of paranoia. This, in turn, engendered a level of tolerance for

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[247] Dana Priest & Josh White, *War Helps Recruit Terrorists, Hill Told: Intelligence Officials Talk of Growing Insurgency*, WASH. POST, Feb. 17, 2005, at A1.

[248] *Vice President's Remarks on the War on Terror*, Nov. 21, 2006, WHITE HOUSE PRESS RELEASES & DOCUMENTS, *available on Westlaw at* 2005 WLNR 18802582 (speech by Vice President Dick Cheney).

[249] BOB GRAHAM ET AL., COMM'N ON THE PREVENTION OF WEAPONS OF MASS DESTRUCTION PROLIFERATION AND TERRORISM, WORLD AT RISK xv (2008).

[250] *See, e.g.*, Richard B. Schmitt & Julian E. Barnes, *Bush Signs Tough Rules on Detainees: As the Controversial Law on Terror Trials and Interrogations Takes Effect, Justice Dept. Asks That Prisoners' Hearing Requests Be Dismissed*, L.A. TIMES, Oct. 18, 2006, at A1.

[251] *See, e.g.*, GARDNER, *supra* note 214, at 272–78; JENKINS, *supra* note 217, at 151–53.

[252] *See* GARDNER, *supra* note 214, at 278. Probably the best-known fictional counterterrorism agent is Jack Bauer of the television show "24."

[253] *See* JENKINS, *supra* note 217, at 153.

the aforementioned government activities despite their similarity to the authoritarian model of criminal justice. It didn't seem to matter that the exceptional post-9/11 powers of government were granted even though critical terms like terrorism were ill-defined and subsequently applied in a troubling fashion. It was of no moment when government officials employed specious logic, like FBI Director Robert Mueller testifying that he was "very concerned about what we are not seeing,"[254] thereby converting the lack of evidence into the very basis for a threat's existence.[255] Nor did the public seem to notice when officials and commentators used the language of possibility—it *may* be a matter of time before a weapon of mass destruction is used, terrorists *might* try another 9/11-type plot, one *could* envision a Mumbai-like attack in an American city, and so on[256]—without mentioning the probability of such an incident.[257] As a whole, the American people did not engage in the type of clear-headed analysis, particularly with regard to the actual risk posed by terrorism, either before or during the implementation of anti-liberal policies and practices.

The state of fear in America helped make this possible, heightening emotions and suppressing rational thought, making it simpler for demagogues to muster popular support for their favored programs.[258] Some of the consequences have been merely nonsensical or irritating,[259] the result of politics and bureaucracy as

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[254] Priest & White, *supra* note 247.

[255] *See, e.g.*, JOHN E. MUELLER, OVERBLOWN 38 (2006). Officials also cite to their "gut feelings." Sheldon Alberts, *'Gut feeling' Lands Czar in Trouble: U.S. Security Chief Ridiculed over Terror Comments*, OTTAWA CITIZEN, July 12, 2007 ("'All of these things have given me a gut feeling that we are in a period of vulnerability,' Mr. Chertoff said. 'Not that I have a specific threat that I have right now but . . . I want to be somewhat more vigilant.'"); GEORGE TENET, AT THE CENTER OF THE STORM: MY YEARS AT THE CIA 375 (2007) (former CIA chief writing that although he doesn't know why further attacks didn't occur, "I do know one thing in my gut: al-Qa'ida is here and waiting.").

[256] *See, e.g.*, Arun Kumar, *Mumbai Attacks Call for New Counter Terrorism Strategy*, INDO-ASIAN NEWS SERVICE, Jan. 12, 2009 (quoting U.S. Homeland Security Advisor Ken Wainstein as saying about the Mumbai attack, "You could envision it happening in any American city. It's chilling when you think about it.").

[257] *See, e.g.*, MUELLER, *supra* note 255, at 38; GARDNER, *supra* note 214, at 269.

[258] *See, e.g.*, Brzezinski, *supra* note 233.

[259] One ridiculous example is the ever-growing list of potential terror targets. "It reads like a tally . . . that a child might have written: Old MacDonald's Petting Zoo, the Amish Country Popcorn factory, the Mule Day Parade, the Sweetwater Flea Market and an unspecified 'Beach at End of a Street.'" Eric Lipton, *Come One, Come All, Join the Terror Target List*, N.Y. TIMES, July 12, 2006, at A1. Far more serious is the F.B.I.'s mismanagement of a terrorist watch list, resulting in the mistaken inclusion of thousands of innocent individuals and the failure to identify people who might be suspected of terrorist ties. *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, AUDIT REPORT 09-25, THE FEDERAL BUREAU OF INVESTIGATION'S TERRORIST WATCHLIST NOMINATION PRACTICES (2009), *available at* http://www.usdoj.gov/oig/reports/FBI/a0925/final.pdf. *See also* NATIONAL EMPLOYMENT LAW PROJECT, A SCORECARD ON THE POST-9/11 PORT WORKER BACKGROUND CHECKS: MODEL WORKER PROTECTIONS PROVIDE A LIFELINE FOR PEOPLE OF COLOR, WHILE MAJOR TSA DELAYS LEAVE THOUSANDS JOBLESS DURING THE RECESSION (2009), *available at*

usual. But others bear a resemblance to disturbing practices of the past,[260] including America's most infamous modern example of individual liberty trumped by alleged state necessity in an environment of heightened public anxiety: the internment of Japanese-Americans during World War II. In 1944, the Supreme Court placed its imprimatur on the removal of more than 110,000 Japanese-Americans from their homes and their confinement in far-off detention camps.[261] Over time, the historical record would show that military officials had exaggerated the risk of espionage and sabotage, withheld reports concluding that Japanese-Americans did not present an unusual threat, and generally relied upon grotesque racial stereotypes and mass hysteria.[262] In ensuing decades, the internment order would be rescinded and convictions vacated, apologies would be given and relatively token remuneration offered, and the entire episode would be seen as disgraceful. But the damage to the detainees' lives could not be undone.

In fact, the Supreme Court's decision has never been overturned. Dissenting Justice Frank Murphy denounced the internment policy as depriving individuals of "their constitutional rights on a plea of military necessity that has neither substance nor support,"[263] pointing to the absence of reliable evidence and reasoned analysis. Instead, the action was founded upon the type of raw fear and prejudice that supported "the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy."[264] Justice Robert Jackson also dissented from the decision, arguing that the Court had "validated the principle of racial discrimination in criminal procedure and of

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http://nelp.3cdn.net/0714d0826f3ecf7a15_70m6i6fwb.pdf (report describing how background-check law intended to prevent terrorists from becoming port workers has denied employment to people without any connection to terrorism).

[260] *See, e.g.*, Brzezinski, *supra* note 233:

> The culture of fear has bred intolerance, suspicion of foreigners and the adoption of legal procedures that undermine fundamental notions of justice. Innocent until proven guilty has been diluted if not undone, with some—even U.S. citizens—incarcerated for lengthy periods of time without effective and prompt access to due process. There is no known, hard evidence that such excess has prevented significant acts of terrorism, and convictions for would-be terrorists of any kind have been few and far between. Someday Americans will be as ashamed of this record as they now have become of the earlier instances in U.S. history of panic by the many prompting intolerance against the few.

[261] Korematsu v. United States, 323 U.S. 214 (1944).

[262] *See* Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984); PETER IRONS, JUSTICE AT WAR (1983); A. John Radsan, *Second-Guessing the Spymasters with a Judicial Role in Espionage Deals*, 91 IOWA L. REV. 1259, 1299–1303 (2006); Joanne Hirase, *The Internment of Japanese Americans: The Constitutional Threat Fifty Years Later*, 19 J. CONTEMP. L. 143 (1993); Mark Tushnet, *Defending* Korematsu*?: Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273; Eric K. Yamamoto, Korematsu *Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1 (1986).

[263] *Korematsu*, 323 U.S. at 234 (Murphy, J., dissenting).

[264] *Id.* at 240.

transplanting American citizens," which "then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[265] But these admonitions went unheeded, as have other warnings against irrational fear and overreaction, with the public succumbing to several "Red Scares" from World War I through the Cold War-era, vacillating moral panics about illegal drugs during the twentieth century, and now the war on terror in the new millennium.

When government actors speak in belligerent terms and individual rights are beset by claims of necessity, the courts sometimes seem to lack the wherewithal or confidence to intercede.[266] In these circumstances, the only chance may lie with the people themselves through public pressure and democratic mechanisms, demanding change and the restoration of rights. One would hope that such movement comes from a moment of collective sobriety, the populace regaining its senses, challenging official claims, and engaging in thoughtful deliberation. But such constitutional crises often stem from a common angst that clouds reality and disempowers rational decision-making. The writings of individual jurists, criminologists, and criminal procedure experts may be inaccessible or too obscure for common citizens and thus politically ineffective. What may be needed is an alternative narrative that captures the imagination of the public, countering the impetuous fears about communists, drug offenders, terrorists, and so on. Not unlike *The Crucible* and its attempt to stimulate awareness of the McCarthy-era abuses, a 2006 movie offered a rival vision of the war on terror and a cautionary tale for the American public.

V. D FOR DYSTOPIA

Remember, remember the fifth of November,
The gunpowder treason and plot.
I know of no reason why the gunpowder treason
Should ever be forgot.

So begins the cinematic version of *V for Vendetta*,[267] with actress Natalie Portman's voice reading this first verse of an old British tune, traditionally sung in memory of a foiled scheme to blow up the seat of power in 1605. The conspiracy had set its sight on the opening day of Parliament, when lawmakers and other politicians, the newly enthroned King James I and his family, and much of the

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[265] *Id.* at 246 (Jackson, J., dissenting).

[266] *But see, e.g.*, *infra* note 340.

[267] V FOR VENDETTA (Warner Bros. 2006) [hereinafter VENDETTA]. *See also* ANDY WACHOWSKI ET AL., V FOR VENDETTA: FROM SCRIPT TO FILM (Spencer Lamm & Sharon Bray eds., 2006); STEVE MOORE ET AL., V FOR VENDETTA: A NOVELIZATION (2006); *Movie Transcription of V for Vendetta*, *available at* http://www.movietranscriptions.com/236741_V_For_Vendetta.html (last visited Sept. 2, 2009).

aristocracy would be gathered in the House of Lords to formally commence a new session of government. "The genesis of the plot is unclear," one modern report notes.[268] Many historians describe it as a poorly executed attempt by Papal loyalists to reestablish Catholic reign in England. But some have suggested the involvement of agents-provocateurs, who hoped to goad a few dupes into an ill-fated scheme that would only increase popular support for British Protestantism. "Whatever the truth of the origins of the plot, it must be accepted that most, if not all, of the conspirators felt that theirs was an honest attempt to root out heresy and re-establish the true religion."[269]

The plot was uncovered before its execution and the conspirators arrested, including Guy Fawkes, who had been tasked with lighting the slow fuses before fleeing the country but instead was caught "with a dark lantern and burning match," or so the lyrics claim. Fawkes was only a minor player in the larger conspiracy, yet he would be remembered as a principal and the focus of public attention, duly enshrined in the second refrain of the British tune:

Guy Fawkes, Guy Fawkes, 'twas his intent
To blow up the King and Parliament.
Three score barrels of powder below,
Poor old England to overthrow.

Through "God's providence he was catch'd," the song continues, alluding to Fawkes' trial, conviction, and execution (but not before medieval-style torture). He would live in infamy for centuries as the lead character in a national holiday held each November 5th—"Guy Fawkes Night" (also called "Bonfire Night")—celebrated in England with fireworks and bonfires burning Fawkes in effigy, all to commemorate the thwarting of a treasonous bombing. Even Fawkes' first name has taken on popular significance: After the event, the word "Guy" was used colloquially to describe someone with an odd or grotesque appearance (like the Fawkes effigies), and in contemporary America it has morphed into slang for just about any man or group of people. In *V for Vendetta*, however, Guy Fawkes is cast in a heroic light, providing the inspiration for the story's protagonist and his own strike against tyranny in the form of a modern totalitarian regime.

A. *V for Vendetta*

The dystopian narrative originally appeared as a "graphic novel," essentially a comic book on literary steroids.[270] Rather than the conventional soft-bound, serial

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[268] HOUSE OF COMMONS INFORMATION OFFICE, THE GUNPOWDER PLOT, FACTSHEET G8, 2 (2006), *available at* http://www.parliament.uk/documents/upload/g08.pdf.

[269] *Id.*

[270] ALAN MOORE & DAVID LLOYD, V FOR VENDETTA (K.C. Carlson ed., DC Comics 1988).

format associated with superhero tales, graphic novels are longer, often with hard covers and serious-sounding titles, published by major book presses—and most importantly, these works typically deal with weighty topics of real-world significance. As described in a *New York Times* article, a graphic novel constitutes "an integrated whole, of words and images both, where the pictures don't just depict the story; they're part of the telling."[271] It affects the reader "almost subconsciously," offering "a place of longing, loss, sexual frustration, loneliness and alienation—a landscape very similar, in other words, to that of so much prose fiction."[272] The graphic novel is an especially powerful means to convey fear, distrust, social instability, and alienation.

Alan Moore, the textual author of *V for Vendetta*, emphasized the importance of works that rouse the imagination:

> We spend a lot of time in these imaginary worlds, and we get to know them better than the real locations we pass on the street every day . . . . [T]hey play a more important part in our shaping of the world than we realize. Hitler, for example, read [the works by nineteenth-century British science fiction author Edward] Bulwer-Lytton. Osama bin Laden used to read quite a lot of Western science fiction. That's why comics feel important to me. They're immense fun as a game, but there's also something more serious going on.[273]

Graphic novels aspire to become what the traditional novel once was—a widely comprehendible, even colloquial medium for the general public.[274] They are now part of popular culture, which, as mentioned, is affected by non-traditional literary forms, from pictures and paintings, to songs and speeches, to movies and television. Not unlike the canonical texts of law and literature, these works of contemporary culture reflect the intuitions and anxieties of modern life, employing an extended canvas of words and images that can make the shocking disturbingly familiar.

V for Vendetta fits within this mold. Both the graphic novel and the movie take place in a futuristic but recognizable setting for Anglo-Americans: England sometime in the near future.[275] The protagonist—known only by the letter "V"—is an escapee of a post-apocalyptic concentration camp. Although his background is

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[271] Charles McGrath, *Not Funnies*, N.Y. TIMES MAGAZINE, July 11, 2004, at 24, 30.

[272] *Id.*at 56. A noteworthy example is *Maus*, the Pulitzer Prize-wining, two-volume narrative about the relationship between a Jewish father and son, and the former's experiences at Auschwitz. By using the "familiar imagery of cats and mice"—felines as fascist oppressors, mice as victims—the work "made the Holocaust bearable and approachable, strange and yet familiar." *Id.* at 33.

[273] *Id.*

[274] *See id.*

[275] Published in 1988, the graphic novel takes place in 1997. The movie, which was released in 2006, is set in the year 2020.

never fully revealed, the audience is led to believe that V was rounded up with other undesirables (e.g., minorities, gays, and dissidents) as part of a totalitarian power grab. In the concentration camp, the inmates are subjected to medical experiments that kill almost all of the detainees, their dead bodies buried in mass graves (in the movie) or burnt in furnaces (in the graphic novel). The exception is V, whose mind and body are transformed by the experiments, which actually increase his mental and physical acuity. Eventually, he blows up the concentration camp and escapes to London, where he plots his revenge on those involved in the inmates' deaths as well as officials who have browbeaten the British citizenry into compliance.

Led by a tyrannical dictator,[276] the current government rose to power in the wake of national and international turmoil.[277] This justified totalitarian rule, the regime's leader argues to his deputies, and the populace must be constantly reminded of the potential for disaster.

> What we need right now is a clear message to the people of this country. This message must be read in every newspaper, heard on every radio, seen on every television. This message must resound throughout the entire Interlink. I want this country to realize that we stand on the edge of oblivion. I want every man, woman and child to understand how close we are to chaos. I want everyone to remember why they *need* us![278]

The masses are cowed by memories of mayhem reiterated by state-run media, as well as by the regime's utter disregard for individual liberty, exemplified by the roundup of undesirables. Particularly important is the regime's secret police force, known as "Fingermen," who exercise free reign in their investigations—including the power to search, seize, interrogate, detain, torture, and even kill at the agents' discretion—terrorizing the populace into submission. It is during one of these police abuses that the audience is introduced to both V and the story's heroine, Evey Hammond, a young girl caught after curfew by Fingermen who intend to rape and possibly kill her. Dressed in a Guy Fawkes mask, V saves Evey that night and then blows up an important, emblematic government building—Parliament in the book, the Old Bailey in the movie—all of which occurs on, appropriately enough, November 5th. In the ensuing weeks and months, V kills off those responsible for the concentration camp, including the regime's

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[276] "Adam Susan" in the novel; "Adam Sutler" in the movie.

[277] A nuclear war in the novel; in the movie, a biological attack blamed on terrorists but actually perpetrated by the government to obtain dictatorial authority.

[278] VENDETTA, *supra* note 267; WACHOWSKI ET AL., *supra* note 267, at 130; MOORE ET AL., *supra* note 267, at 291; *Movie Transcription*, *supra* note 267. *See also* MOORE & LLOYD, *supra* note 270, at 37.

leadership, blowing up other government buildings along the way and inspiring the people to rise up against their oppressors.

The protagonist's words and deeds are meant to incite a population that has been lulled into submission and even co-opted in the fulfillment of inhumane policies. In the movie, V commandeers the state-run television station and speaks directly to the public about the totalitarian state they live in and the fear that made it all possible:

> Good evening, London. Allow me first to apologize for this interruption. I do, like many of you, appreciate the comforts of every day routine—the security of the familiar, the tranquility of repetition. I enjoy them as much as any bloke. But in the spirit of commemoration, thereby those important events of the past usually associated with someone's death or the end of some awful bloody struggle, a celebration of a nice holiday, I thought we could mark this November the 5th, a day that is sadly no longer remembered, by taking some time out of our daily lives to sit down and have a little chat.
>
> There are, of course, those who do not want us to speak. I suspect even now, orders are being shouted into telephones, and men with guns will soon be on their way. Why? Because while the truncheon may be used in lieu of conversation, words will always retain their power. Words offer the means to meaning, and for those who will listen, the enunciation of truth. And the truth is, there is something terribly wrong with this country, isn't there? Cruelty and injustice, intolerance and oppression. And where once you had the freedom to object, to think and speak as you saw fit, you now have censors and systems of surveillance coercing your conformity and soliciting your submission.
>
> How did this happen? Who's to blame? Well certainly there are those more responsible than others, and they will be held accountable, but again truth be told, if you're looking for the guilty, you need only look into a mirror. I know why you did it. I know you were afraid. Who wouldn't be? War, terror, disease. There were a myriad of problems which conspired to corrupt your reason and rob you of your common sense. Fear got the best of you, and in your panic you turned to the now high chancellor . . . . He promised you order, he promised you peace, and all he demanded in return was your silent, obedient consent.
>
> Last night I sought to end that silence. Last night I destroyed the Old Bailey to remind this country of what it has forgotten. More than four hundred years ago a great citizen wished to embed the fifth of November forever in our memory. His hope was to remind the world

> that fairness, justice, and freedom are more than words, they are perspectives.[279]

Both the graphic novel and the movie reference the perils of public anxiety, which allows tyrants to deny personal liberty in exchange for safety, or the illusion thereof. Like other dystopian narratives, they defy the Pollyannaish notion that people will always oppose totalitarianism and its commands. For instance, the novel alludes to the infamous Milgram experiments at Yale University,[280] where participants showed an alarming willingness to impose severe pain on others. The works highlight the ways in which dictatorships come to power and remain as such through a coordinated, comprehensive system of control over the masses. They also emphasize that tyranny comes in various forms, from large-scale policies of repression to the abusive actions of individual agents, who rule their precincts as petty tyrants. *V for Vendetta* reminds the audience of its own heritage, where repressive regimes were overthrown only after revolutionaries were willing to die to (re)gain freedom from despots. "Beneath this mask there is more than flesh," V proclaims after being shot by government agents. "Beneath this mask there is an idea, and ideas are bulletproof."[281]

B. *P for Provocative*

Both versions of *V for Vendetta* maintain a sense of familiarity in the midst of tyranny, a defining feature of dystopic literature. The realistic, almost tangible feel of these works is not accidental: The graphic novel was written in response to the conservative policies of the Margaret Thatcher-led British government of the 1980s, while the movie was released at a time when American civil liberties were being curtailed as part of the world-wide war on terror. As for the latter, it could have been expected that a major Hollywood production, with parallels to actual practices (e.g., heightened state surveillance and brutal interrogations), would provoke citizens on both sides of the Atlantic and be seen as a jab at policymakers, depicting the potential consequences of governing through fear.[282] Some predicted that the movie would "drive political conservatives crazy"[283] and lead right-wing

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[279] VENDETTA, *supra* note 267; WACHOWSKI ET AL., *supra* note 267, at 35; *Movie Transcription*, *supra* note 267.

[280] *See* MOORE & LLOYD, *supra* note 270, at 73.

[281] VENDETTA, *supra* note 267; MOORE ET AL., *supra* note 267, at 337. *See also* MOORE & LLOYD, *supra* note 270, at 236.

[282] *See, e.g.*, Ruthe Stein, *In 'Vendetta,' disastrous U.S. and British policymaking gives rise to terrorism—what a shocker*, S.F. CHRON., Mar. 16, 2006, at E1; Carina Chocano, *It's all a Little Murky Under the Mask*, L.A. TIMES, Mar. 17, 2006, at E12.

[283] David Edelstein, *So You Want A Revolution?*, CBS News, Mar. 12, 2006, http://www.cbsnews.com/stories/2006/03/12/sunday/main1391704.shtml?tag=contentMain;contentBody.

commentators "to condemn it as a pro-terrorism piece of garbage."[284] Others, however, saw it as a "powerful anti-state film" that "digs beneath the surface of events to reveal the psychological factors—particularly our own fears—and institutional interests that combine to make tyranny possible." [285] In this latter sense, it corresponds with an Anglo-American literary tradition,[286] grounded in a cultural sensitivity to tyrannical rule, deprivations of individual liberty, and the abuses of law enforcement.[287] *V for Vendetta* also fits within a cinematic genre, where works of science fiction serve as social metaphors and teaching tools.[288]

Needless to say, there are limits to applying any form of fictional literature to the real world, and *V for Vendetta* is no different. The notion of Guy Fawkes as hero is quite a change from the traditional British image, which was far closer to the American depiction of Benedict Arnold (revolutionary turncoat) than, say, John Brown (failed instigator of slave rebellion). Whether history should treat Fawkes as valiant or villainous is a matter of interpretation, as well as one of personal values and social norms. For many, he was a terrorist whose destructive means were intolerable, despite the violent time-period and regardless of the ends sought. Today, the bombing of buildings is presumptively contemptible in liberal society. But others view the incident with a less jaundiced eye and even offer occasional homage; recently, Fawkes was included on a list of the hundred "greatest Britons," for instance, and one popular jibe suggests he was "the only man to ever enter Parliament with honorable intentions."[289] In both print and celluloid forms, *V for Vendetta* conveys some of this tension, which modern culture has captured in the much-contested saying, "one man's terrorist is another man's freedom fighter."

Several commentators lambasted the movie on precisely this point, arguing it had turned terrorism into heroism:

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[284] Richard Roeper, *Don't fall for false mask being put on 'Vendetta,'* CHI. SUN-TIMES, Mar. 14, 2006, at 11.

[285] Butler Shaffer, "V for Vendetta," Mar. 20, 2006, http://www.lewrockwell.com/shaffer/shaffer132.html.

[286] Some of the leading dystopic novels were penned by American and British authors (e.g., Aldous Huxley and George Orwell of the U.K., Ray Bradbury and Kurt Vonnegut of the U.S.).

[287] *See, e.g.*, DECLARATION OF INDEPENDENCE (U.S. 1776) (declaring that the British Crown, through "a long train of abuses and usurpations," had "evince[d] a design to reduce [the people] under absolute despotism," with the "direct object the establishment of an absolute tyranny").

[288] *See, e.g.*, Richard Corliss, *Can A Popcorn Movie Also Be Political? This One Can*, TIME, Mar. 13, 2006.

> If a cheapo '50s fantasy called *Invasion of the Body Snatchers* could also be a rich parable of conformist paranoia, and if *The Matrix* could clue kids into mathematics and philosophy, then a film as bold and thoughtful as *V for Vendetta* is allowed to stoke a multiplex debate on the use and abuse of state power. The best works of popular art get to play by their own rules.

Id.

[289] *See, e.g.*, Emilienne Ireland, *Campaigning Online*, *in* ROUTLEDGE HANDBOOK OF POLITICAL MANAGEMENT 170 (Dennis W. Johnson ed. 2008).

> *V for Vendetta* is a movie about a heroic terrorist. However unjust the regime he opposes . . . V is a guy who goes around blowing up parts of London, and he likes his work. That was repugnant enough back when Moore wrote his comic book, two decades before Sept. 11. It's become even more so since last July, when terrorists actually did bomb three subway trains and a bus in London.[290]
>
> If the h-for-hype "*V for Vendetta*" connects with a wide American audience, then something truly has shifted in the homeland-insecurity pop landscape of the early 21st Century. It means we're ready for a cultured, sophisticated, man-about-town terrorist who espouses the belief that "blowing up a building can change the world." Finally, a film to unite movie-mad members of Al Qaeda with your neighbor's kid, the one with the crush on Natalie Portman.[291]
>
> [W]hat we're dealing with is a lackluster comic-book movie that thinks *terrorist* is a synonym for *revolutionary*. . . . [T]he movie plays like a clumsy assault on post-9/11 paranoia. It references "America's war," uses imagery direct from Abu Ghraib and contains dialogue likely to offend anyone who's not, say, a suicide bomber.[292]
>
> Hollywood seems to have had a difficult time distinguishing terrorists from those trying to defeat them. But in this case, the distinction it fails to make is between free democratic nations like the U.S. and England on the one hand, and totalitarian regimes like the Soviet Union and Nazi Germany on the other. Consider this film another example of Hollywood being AWOL—or even on the other side—in the war on terror.[293]

Provocative but effective dystopian works could withstand this type of criticism, with their fundamental purpose bolstered rather than undermined by claims of neo-heresy. "I often have the feeling that even at the best of times literary criticism is fraudulent," wrote George Orwell in 1948, with its flaws only exacerbated in times of crisis, when "our whole attitude towards literature is coloured by loyalties which we at least intermittently realize to be non-literary."[294]

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[290] Lev Grossman, *The Mad Man In The Mask*, TIME, Mar. 13, 2006, at 57, 58.

[291] Michael Phillips, *'V' for Vexing*, CHI. TRIB., Mar. 16, 2006, at 1.

[292] Jeff Giles, *Anarchy in the U.K.: "V for Vendetta" Tries Talkin' About A Revolution*, NEWSWEEK, Mar. 20, 2006, at 69.

[293] Roger Aronoff, *V for Vendetta Against Bush*, ACCURACY IN MEDIA, Apr. 26, 2006, *available at* http://www.aim.org/media-monitor/v-for-vendetta-against-bush/.

[294] GEORGE ORWELL, *Writers and Leviathan*, *in* 4 THE COLLECTED ESSAYS, JOURNALISM, AND LETTERS OF GEORGE ORWELL: IN FRONT OF YOUR NOSE, 1945–1950 (Sonia Orwell & Ian Angus eds.,

Government officials are often called upon to use coercive methods out of necessity, from low-level police investigations of local crime to large-scale military action against belligerent, even genocidal regimes. Intense emotions like fear and hatred may lead people to see things in black and white, us versus them, to pigeonhole rather than analyze, and ultimately, to acquiesce to the state and its representatives.

At times, nationalism may inhibit a healthy, vigilant suspicion of those in power. "After Hitler it was difficult to maintain seriously that 'the enemy is your own country,'" Orwell once noted.[295] People sometimes cling to the idea that political decision-making involves choices between good and evil, that a democratic state and its officials can be trusted to do the right thing, and that if something is deemed necessary it is also morally correct. This belief "belongs to the nursery."[296] Politics involves choices among competing harms, and government itself often presents a type of lesser evil. The more fervently a state claims the need for action or, for instance, the stronger the political backlash against a particular cultural work, the greater the danger that something has gone awry and that individual rights and principles of liberal governance are in jeopardy. In such times, dystopian fiction, political satire, and other forms of literary resistance against the state can be a blessing to a free society.

The cinematic hero of *V for Vendetta* is portrayed as an extremely vengeful yet quite sane revolutionary seeking the end of totalitarian rule by a neo-conservative regime. In particular, the movie presents a transparent critique of a specific instance of state power: the Bush Administration and its post-9/11 policies. Apologists for the erstwhile administration will see any comparison to the fictional totalitarian regime as supremely unfair, *and they may be right*. The analogy between anti-terrorism programs and a cinematic police state is hyperbolic, of course, and the foregoing critique of the war on terror may seem polemical in style, written with the benefit of 20/20 hindsight and the sobriety that distance provides.[297] Maybe the modern phenomenon of terrorism is in fact

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2000) [hereinafter ORWELL, *Writers and Leviathan*].

[295] *Id.* at 410.

[296] *Id.* at 413.

[297] Along these lines, then-Attorney General Michael Mukasey opposed criminal investigations of those involved in developing anti-terrorism policies as detrimental second-guessing:

> [T]here is absolutely no evidence that anybody who rendered a legal opinion, either with respect to surveillance or with respect to interrogation policies, did so for any reason other than to protect the security in the country and in the belief that he or she was doing something lawful. In those circumstances, there is no occasion to consider prosecution and there is no occasion to consider pardon. If the word goes out to the contrary, then people are going to get the message, which is that if you come up with an answer that is not considered desirable in the future you might face prosecution, and that creates an incentive not to give an honest answer but to give an answer that may be acceptable in the future. It also creates some incentive in people not to ask in the first place.

Transcript of Reporters Roundtable Discussion with Attorney General Michael B. Mukasey, PR

unique, presenting an existential threat to personal safety, American society, and Western civilization.[298] The United States is not founded upon a suicide pact,[299] and there have been times of national peril when officials have disregarded the Constitution in order to save it (or so it was argued), as when President Lincoln unilaterally declared war on the South, suspended the writ of habeas corpus, restricted freedom of speech and the press, and allowed civilians to be tried before military tribunals.[300]

I do not question that Al Qaeda is a homicidal menace. The events of 9/11 are a testament to this, as are the more recent attacks in Bali, London, Madrid, and Mumbai. Al Qaeda's methods are brutal and respect no boundaries; its operatives give up their lives willingly, if not joyfully, and have no qualms about chopping off the heads of infidels or even killing fellow Muslims if need be. Today's terrorists use against liberal society some of its defining features, freedom and openness, with conservatives and liberals alike predicting another terrorist attack in the future.[301] In fact, as this article was entering the final editing stages, the federal government had just arrested several individuals and charged one defendant in a bombing plot that, by all appearances, represents one of the most serious terrorism cases in years.[302] By the time the ink dries on this special issue, some Western

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NEWSWIRE, Dec. 3, 2008, *available at* http://www.reuters.com/article/pressRelease/idUS250091+03-Dec-2008+PRN20081203. *See also* Jack Goldsmith, *No New Torture Probes*, WASH. POST, Nov. 26, 2008, at A13.

[298] *See, e.g.*, David E. Sanger, *Obama's Worst Pakistan Nightmare*, N.Y. TIMES MAGAZINE, Jan. 11, 2009, at 32, 33 (discussing concerns about the Pakistani nuclear arsenal falling into the hands of terrorists).

[299] *See* Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("There is danger that if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."). *Cf.* Jeffrey D. Hockett, *Justice Robert H. Jackson, The Supreme Court, and the Nuremberg Trial*, 1990 SUP. CT. REV. 257, 289–94 (1990) (discussing the inconsistency of Justice Jackson's jurisprudence).

[300] It might be argued, however, that Lincoln's Civil War measures—as well as the constitutionally dubious actions of President Wilson during World War I and Presidents Roosevelt and Truman during World War II—were overt and actively involved Congress in the decision-making process, showing a commitment to openness and respect for the separation of powers doctrine, and thereby distinguishing these assertions of presidential power from those in the wake of 9/11. *See, e.g.*, SCOTT M. MATHESON, J., PRESIDENTIAL CONSTITUTIONALISM IN PERILOUS TIMES (2009).

[301] *See, e.g.*, Nicholas D. Kristof, Editorial, *Time to Come Clean*, N.Y. TIMES, Apr. 26, 2009, at WK14 (noting that there will be another major terror attack); Michael Falcone, *Cheney Predicts 'Probability' of Attack*, N.Y. TIMES, Feb. 5, 2009, at A23.

[302] *See* William K. Rashbaum, *Terror Suspect Is Charged With Preparing Explosives*, N.Y. TIMES, Sept. 25, 2009, at A1. *See also Stadiums, Hotels Attract 'Terrorist Interest,' Feds Say*, CNN, Sept. 22, 2009, *available at* http://www.cnn.com/2009/US/09/22/us.security.bulletins/index.html?iref=newsearch (reporting "'terrorist interest' in attacking sports and entertainment venues as well as luxury hotels"); John Arquilla, *The Coming Swarm*, N.Y. TIMES, Feb. 15, 2009, at WK11 (suggesting that that America will be subject to "a new 'Mumbai model' of swarming, smaller-scale terrorist violence").

nation, maybe even the United States, may have suffered a major terrorist incident. If this happens, all of the constitutionally dubious post-9/11 policies—the warrantless eavesdropping, the mass internment at Guantánamo Bay, the enhanced interrogation techniques, and so on—could be vindicated in the eyes of many Americans, who might call for even more extreme approaches to prevent yet another attack.

Although remaining doubtful, I am willing to debate the government's contentions and underlying analysis about its exceptional programs and practices, and then judge the case on the merits. For instance, supporters of N.S.A. wiretapping could argue that it helped bridge the gap between domestic security and foreign intelligence, intimating that the program may be associated with (apparently classified) successes. But opponents might point to a report suggesting that the resulting surveillance had little value, with the program yet to be connected to any specific counterterrorism achievement.[303] As for Guantánamo, those who would maintain the detention facility can cite a Defense Department report that claimed dozens of former detainees have returned to terrorism, including a man who became a central figure in Al Qaeda's operations in Yemen.[304] Yet others might note that the list overstates the number of terrorism recidivists by including mere suspects, for instance, as well as non-violent former detainees wanted by the Saudi government for encouraging resistance against its monarchy.[305]

Probably the most discussed post-9/11 program, the use of enhanced interrogation techniques, could also be the most difficult. Advocates can argue the techniques allowed interrogators to extract actionable intelligence from prominent Al Qaeda operatives, suggesting that torture may be the only way to prevent terrorist attacks. Moreover, commentators might contend that few people would bar coercive interrogation in all circumstances, and some have even argued that the

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[303] *See* OFF. OF THE INSPECTORS GEN., U.S. DEP'T OF DEF. ET AL., UNCLASSIFIED REPORT OF THE PRESIDENT'S SURVEILLANCE PROGRAM (2009) *available at* http://documents.nytimes.com/federal-report-on-the-president-s-surveillance-program#p=1; Michael Hayden, Editorial, *Warrantless Criticism*, N.Y. TIMES, July 27, 2009, at A21; Eric Lichtblau & James Risen, *U.S. Wiretapping of Limited Value, Officials Report*, N.Y. TIMES, July 11, 2009, at A1.

[304] *See, e.g.*, Elisabeth Bumiller, *1 in 7 Detainees Rejoined Jihad, Pentagon Finds*, N.Y. Times, May 21, 2009, at A1 (detailing Pentagon report on released detainees' terrorist recidivism); Robert F. Worth, *Saudis Issue List of 85 Terrorism Suspects*, N.Y. TIMES, Feb. 4, 2009, at A5; Robert F. Worth, *Freed by the U.S., Saudi Becomes A Qaeda Chief*, N.Y. TIMES Jan. 23, 2009, at A1; *Detainee Went From Gitmo to al Qaeda, Official Says*, CNN, Jan. 24, 2009, *available at* http://www.cnn.com/2009/POLITICS/01/23/gitmo.detainee/index.html; David Morgan, *Pentagon: 61 Ex-Guantanamo Inmates Return to Terrorism*, REUTERS, Jan. 13, 2009, *available at* http://www.reuters.com/article/topNews/idUSTRE50C5JX20090113?feedType=RSS&feedName=topNews&rpc=22&sp=true.

[305] *See, e.g.*, Peter Bergen & Katherine Tiedemann, Editorial, *Inflating the Guantánamo Threat*, N.Y. TIMES, May 29, 2009, at A25 (analysis by terrorism experts questioning claims by the Defense Department); *Security Experts Skeptical On Gitmo Detainee Report*, CNN, Jan. 24, 2009, *available at* http://www.cnn.com/2009/POLITICS/01/24/gitmo.detainees/index.html.

state may have a *duty* to torture in the so-called "ticking time-bomb" scenario.[306] But opponents of coercive interrogation—including an F.B.I. agent involved in the questioning of high-value detainees—cast doubt on whether useful information was or could be obtained by enhanced interrogation techniques.[307] More generally, they emphasize that torture violates domestic and international law, it alienates the United States from other nations and serves as a recruiting tool for Al Qaeda, and it is inconsistent with the basic principles of a liberal society (e.g., treating each individual as worth of respect and dignity).[308]

Any comprehensive evaluation is well beyond the scope of this article. But it should be noted that a thorough analysis of these issues will require knowledge of the relevant facts and detached legal and moral inquiry, and to be worthwhile, any discussion must go beyond the superficial. No glib assertions that the government's policies are "critical" or "vital,"[309] for example, or knee-jerk condemnations of opposing views and cultural works as "pro-terrorist."[310] These offer nothing more than refrains from the propaganda that facilitated the very programs at issue. Instead, a meaningful argument would explain in detail why the government's actions were both necessary and appropriately tailored to uncover plots of mass violence. If special or emergency powers are invoked, they must be applied with prudence and constantly checked for misuse, subjected to judicial review and the scrutiny of public watchdogs.[311] Anti-terrorism efforts may deserve

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[306] *See generally* ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 131–63 (2002); Charles Krauthammer, *The Truth About Torture*, WEEKLY STANDARD, Dec. 5, 2005, at 21; Eric A. Posner & Adrian Vermeule, *Should Coercive Interrogation Be Legal?*, 104 MICH. L. REV. 671 (2006). *Cf.* Scott Shane, *Interrogations' Effectiveness May Prove Elusive*, N.Y. TIMES, Apr. 23, 2009, at A14.

[307] *See, e.g.*, Ali Soufan, Editorial, *My Tortured Decision*, N.Y. TIMES, Apr. 23, 2009, at A27; Shane O'Mara, *Torturing the Brain: On the Folk Psychology and Folk Neurobiology Motivating 'Enhanced and Coercive Interrogation Techniques,'* TRENDS IN COGNITIVE SCIENCES (forthcoming 2009), http://download.cell.com/images/edimages/trends/814.pdf. *See also* Shane, *supra* note 306.

[308] *See, e.g.*, United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/Res/39/46 (Dec. 10, 1984), *available at* http://www.un.org/documents/ga/res/39/a39r046.htm; Culombe v. Connecticut, 367 U.S. 568 (1961); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936); David Luban, *Liberalism, Torture, and the Ticking Time Bomb*, 91 VA. L. REV. 1425 (2005); Philip Zelikow, Editorial, *A Dubious C.I.A. Shortcut*, N.Y. TIMES, Apr. 24, 2009, at A27.

[309] *See, e.g.*, Falcone, *supra* note 301 (quoting Vice President Cheney); *Wartime Executive Power and the National Security Agency's Surveillance Authority, Hearings before the Sen. Committee on the Judiciary*, 109th Cong. 11 (2006) (testimony of Att'y. Gen. Alberto Gonzalez) *available at* http://www.fas.org/irp/congress/2006_hr/nsasurv.pdf .

[310] *See supra* note 250 and accompanying text. Nor should interlocutors simply decry these programs as "worthless," for example.

[311] *See, e.g.*, SUNSTEIN, LAWS, *supra* note 47, at 125 ("Government ought to treat its citizens with respect; it should not treat them as objects to be channeled in government's preferred directions."). *But see, e.g.*, Noah Feldman, *In Defense of Secrecy*, N.Y. TIMES MAGAZINE, Feb. 15, 2009, at 11 (discussing limits of government transparency).

more money and manpower, but it is entirely appropriate to ask, for instance, why terrorists (however defined) should be regarded as anything other than criminals subject to standard criminal processes.[312] Although politically or religiously motivated, oftentimes well-organized and suicidal, and occasionally vast in scale, their acts are those of "regular" bombers, kidnappers, and murderers. The wholesale circumvention of constitutional principles would seem to require more, namely, a threat to the very survival of the republic the Constitution created and binds.

In a 2004 detention case, the British House of Lords rejected the claim that any danger of serious physical damage or loss of life necessarily amounts to a threat to the nation. Taking the long view, Lord Hoffman placed the issue in historical perspective.

> Of course the government has a duty to protect the lives and property of its citizens. But that is a duty which it owes all the time and which it must discharge without destroying our constitutional freedoms. There may be some nations too fragile or fissiparous to withstand a serious act of violence. But that is not the case in the United Kingdom. When Milton urged the government of his day not to censor the press even in time of civil war, he said: "Lords and Commons of England, consider what nation it is whereof ye are, and whereof ye are the governours."
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> This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation. Their legendary pride would not allow it. Terrorist violence,

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[312] *See, e.g.*, Gwynne Dyer, *Terrorism Isn't The Global Threat That Many Believe*, SALT LAKE TRIB., Nov. 30, 2008:

> Terrorism is only as important as you let it be. The people who do it . . . are by definition few, weak and marginal. If they were many, strong and central, then they would be a major political movement . . . and they wouldn't feel the need to resort to terrorism. Since they are not, the wisest course is to treat them as common criminals. All good anti-terrorist strategies deny the terrorists the status of a legitimate enemy. . . . Don't pass any special laws, and never set up special courts and detainment camps. The terrorists are marginal; keep them that way.

Cf. MCCORMACK, *supra* note 168, at 41–44 (describing the "law enforcement approach" to terrorism). *But cf.* Jonathan Mahler, *Ahead for Obama: How to Define Terror*, N.Y. TIMES, Nov. 30, 2008, at WK3 (suggesting a hybrid approach); GLENN SULMASY, THE NATIONAL SECURITY COURT SYSTEM: A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF TERROR (2009) (proposing a court system focusing on terrorism cases).

> serious as it is, does not threaten our institutions of government or our existence as a civil community.[313]

Although its history is far shorter than that of England and Spain, the United States has also faced genuine threats of extinction, whether at the hands of foreign forces or by the political suicide of civil war. The carnage of 9/11 is unparalleled in contemporary America, for sure, but the threat it posed to the country does not compare to the shelling of Fort Sumter, which presented an existential threat to the United States. Similar dangers arose in 1814 with the British sacking of Washington, D.C., and the bombing of Pearl Harbor more than a century later. They symbolized conflicts that could drastically alter or even end the American polity. The very worst Al Qaeda can do, mass murder, will horrify us as individuals and as a people, but it cannot destroy the nation—that is, unless we allow it.

Practices like torture may sacrifice some of the values we seek to preserve, including respect for human rights. In fighting monsters, to paraphrase Nietzsche, we must not become monsters ourselves.[314] More generally, the policies and practices adopted in times of perceived crisis are indicative of a government's character. In a liberal constitutional democracy, the ends do not always (or even usually) justify the means. Instead, there are limits to what a decent regime can do to an individual in pursuit of the general welfare. The truth must be pursued, of course, but not by resorting to the modern equivalents of the rack and screw or employing high-tech writs of assistance. It may seem that America is forced to fight at a disadvantage, tied down by the Constitution, but the principles of liberty and the rule of law enshrined in that document are core elements of the security it provides us all.[315] When politicians and common citizens are prepared to surrender these principles, Milton's admonition remains relevant as a call for deliberation about who we are as a people and what we stand for as a nation. As Americans, for that matter, we might keep in mind Benjamin Franklin's adage that those who surrender basic liberty for temporary safety may be worthy of neither.[316]

Some will scoff at any alleged tension, believing that liberty and safety are

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[313] A v. Secretary of State, [2004] UKHL 56, at ¶¶ 95-96, *available at* http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&others.pdf.

[314] FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL: PRELUDE TO A PHILOSOPHY OF THE FUTURE 89 (Walter Kaufmann trans., 1989) (1886).

[315] *Cf.* HCJ 5100/94 Pub. Committee Against Torture v. Israel, (1999), *available at* http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf.

[316] BENJAMIN FRANKLIN, HISTORICAL REVIEW OF PENNSYLVANIA (1759), *quoted at* http://www.bartleby.com/100/245.1.html ("They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."). Somewhat ironically, President Bush echoed this sentiment in 2003, saying that "stability cannot be purchased at the expense of liberty." David E. Sanger, *Bush Asks Lands in Mideast to Try Democratic Ways*, N.Y. TIMES, Nov. 7, 2003, at A1.

perfectly reconcilable. It is hard to tell how this proves possible—at least if liberty has as its core value freedom from state intrusions, like police searches and seizures, and the governmental means to achieve safety involve intrusions on privacy and autonomy. Perhaps the claim is that the deprivations of liberty are only minor and will be short-lived, a difficult argument to make in light of brutal interrogation policies and the creation of a penal colony.[317] Moreover, the various domestic spying programs may yet turn out to be the greatest instance of mass government surveillance in American history. And even if such actions were somehow deemed minor, experience has shown that small infringements on freedom have a generative effect, allowing more and greater deprivations of liberty. The ever-expanding powers of drug enforcement to invade personal privacy offer a modern example of this long-recognized danger.[318]

Maybe the best argument in favor of a terrorism exception is that in times of war individual rights must give way to national security, and eventually greater liberty ensues through victorious military campaigns. A decade ago, Chief Justice Rehnquist analyzed wartime restrictions on civil liberties, concluding that "reason and history both suggest that this balance shifts to some degree in favor of order—in favor of the government's ability to deal with conditions that threaten the national well-being."[319] Likewise, Michael Klarman argued that "American wars often have advanced the cause of particular freedoms, especially by expanding the pool of beneficiaries," and that total wars, "like the Civil War and World War II, undermine traditional patterns of status and behavior."[320]

One must again ask whether the war on terror (or any other symbolic conflict, like the drug war) is comparable to the Civil War, for instance, a real "shooting war" that literally divided the United States in two and resulted in more than 600,000 deaths. A similar question arises when analogies are drawn between the threat of terrorism and that posed in World War II, given that Nazi Germany and its allies were responsible for millions of deaths on battle fields and in concentration camps. And although anti-terror programs may increase safety, it is not obvious to me that these efforts will increase liberty; to put it bluntly, there are

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[317] *See, e.g.*, Perlez et al., *supra* note 167; Scott Shane, *Remarks on Torture May Force New Administration's Hand*, N.Y. TIMES, Jan. 17, 2009, at A12.

[318] *See, e.g.*, JAMES MADISON, GENERAL DEFENSE OF THE CONSTITUTION (1788), *reprinted in* 11 THE PAPERS OF JAMES MADISON 79 (Robert A. Rutland & Charles F. Hobson eds., 1977) ("Since the general civilization of mankind, I believe there are more instances of the abridgement of the freedom of the people, by gradual and silent encroachments of those in power, than by violent and sudden usurpations."); Boyd v. United States, 116 U.S. 616, 635 (1886) ("It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.").

[319] WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 222 (1998).

[320] Michael J. Klarman, *Rethinking the History of American Freedom*, 42 WM. & MARY L. REV. 265, 274–76 (2000) (reviewing ERIC FONER, THE STORY OF AMERICAN FREEDOM (1998)).

no slaves to be freed and no concentration camps to be razed. No doubt, there are people who will give their lives to harm the United States without any concern for the innocent. But there were Soviets (and their supporters) who were equally fanatical in the name of communism, with the stakes of the Cold War being genuinely apocalyptic and far more dangerous than any threat posed by Al Qaeda. Though horrifying by definition, terrorism need not be existential. As of now, given the information currently available, a convincing case has not been made for a categorical exemption of anti-terror investigations and prosecutions from the strictures of the Constitution.[321]

Some believed that any constitutional crisis was resolved in the 2008 election, with past abuses to be remedied or at least carefully reviewed by the new administration, which supposedly would employ its 9/11-enhanced powers only as necessary to prevent terrorist violence. Certainly, President Obama's inaugural address raised the hopes of many:

> As for our common defense, we reject as false the choice between our safety and our ideals. Our founding fathers, faced with perils that we can scarcely imagine, drafted a charter to assure the rule of law and the rights of man, a charter expanded by the blood of generations. Those ideals still light the world, and we will not give them up for expediency's sake.[322]

During the presidential campaign, Obama promised to address some of the most pressing concerns of civil libertarians and human rights organizations by, among other things, disavowing extant detention policies, closing the Guantánamo internment camp and the C.I.A.'s secret prisons, and barring extreme interrogation techniques that amount to torture. Indeed, within days of his inauguration the new president issued executive orders banning torture and promising to shut down the facility in Cuba and covert prisons elsewhere.[323] Likewise, the new Attorney

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[321] *See, e.g.*, Ric Simmons, *Search for Terrorists: Why "Public Safety" is Not a Special Need*, DUKE L.J. (forthcoming 2010) (arguing against a blanket terrorism exception to Fourth Amendment). *Cf.* SIMON, *supra* note 187, at 265 ("Many of the deformations in American institutions produced by the war on crime, developments that have made our society less democratic, are being publicly rejustified as responses to the threat of terror.").

[322] Barack H. Obama, *Inaugural Address*, Jan. 20, 2009, WKLY. COMPILATION PRESIDENTIAL DOCUMENTS, *available on Westlaw at* 2009 WLNR 5793905.

[323] *See, e.g.*, Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009) ("Ensuring Lawful Interrogations"); Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009) ("Review and Disposition of Individuals Detained At the Guantánamo Bay Naval Base and Closure of Detention Facilities"); Exec. Order No. 13,493, 74 Fed. Reg. 4901 (Jan. 22, 2009) ("Review of Detention Policy Options"). *See also* Address Before a Joint Session of the Congress, WKLY. COMP. PRES. DOC., *available on Westlaw at* 2009 WLNR 5793969 (Feb. 24, 2009); Mark Mazzetti & William Glaberson, *Obama Will Shut Guantánamo Site and C.I.A. Prisons*, N.Y. TIMES, Jan. 22, 2009, at A1; Peter Finn, *Obama Seeks Halt to Legal Proceedings at Guantánamo*, WASH. POST, Jan. 21, 2009, at A2.

General, Eric Holder, stated that the previous administration's most notorious anti-terrorism practices had been changed or were under review, releasing previously confidential legal memorandum, testifying before Congress that water-boarding was torture, and ultimately appointing a veteran prosecutor to investigate claims of C.I.A. prisoner abuses and its destruction of interrogation videotapes.[324] Moreover, the Justice Department abandoned the term "enemy combatant" in classifying detainees, began filing criminal charges in federal court against alleged terrorists rather than detaining them indefinitely, and issued new guidelines limiting the use of the state secrets privilege.[325] In turn, the Pentagon closed its propaganda-producing office and agreed to expand review of detainees in Afghanistan.[326]

Not every decision has been viewed as positive by civil liberties groups, however, and in general the message from the new administration has not been entirely consistent. Since assuming office, President Obama has selected his words carefully,[327] although during the presidential campaign he adopted some of the warfare rhetoric employed by the Bush Administration, leading to speculation that some controversial policies might remain intact.[328] In fact, his inaugural address declared that "our nation is at war against a far-reaching network of violence and hatred," telling terrorists that "[w]e will defeat you."[329] Subsequent statements and actions have led some to argue that President Obama had reneged on his campaign promise "to restore our Constitution and the rule of law," with no significant break from the past on some issues and mere cosmetic changes on others.[330]

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[324] *See, e.g.*, Office of the U.S. Att'y Gen., *Policies and Procedures Governing Invocation of the State Secrets Privilege*, Sept. 23, 2009, *available at* http://www.justice.gov/opa/documents/state-secret-privilieges.pdf; William Glaberson, *U.S. Won't Label Terror Suspects as 'Combatants'*, N.Y. TIMES, Mar. 14, 2009, at A1; Josh Meyer, *Holder Calls Waterboarding Torture*, L.A. TIMES, Jan. 16, 2009, at A10; Liz Halloran, *Holder Says He'll Jettison Bush-Era Practices*, NPR, Jan. 15, 2009, *available at* http://www.npr.org/templates/story/story/php?storyId=99377871; Mazzetti & Shane, *supra* note 172.

[325] *See, e.g.*, Carrie Johnson & Julie Tate, *'Combatant' Case to Move from Tribunal to U.S. Court*, WASH. POST, Feb. 27, 2009, A1.

[326] *See, e.g.*, Eric Schmitt, *U.S. Will Expand Detainee Review in Afghan Prison*, N.Y. TIMES, Sept. 13, 2009, at A1; Thom Shanker, *Pentagon Closes Office Accused of Issuing Propaganda Under Bush*, N.Y. TIMES, Apr. 16, 2009, at A12.

[327] *See, e.g.*, Lolita C. Baldor, *Obama: U.S. Choosing Words Carefully in Terror War*, KANSAS CITY STAR, Feb. 3, 2009. *See generally* Roger Cohen, *After the War on Terror*, N.Y. TIMES, Jan. 29, 2009.

[328] *See, e.g.*, *This Week with George Stephanopolous: Exclusive Interview with President-Elect Barack Obama*, (ABC television broadcast Jan. 11, 2009), *available at* http://abcnews.go.com/Video/playerIndex?id=6624066; Adam Liptak, *Early Test of Obama View On Power Over Detainees*, N.Y. TIMES, Jan. 3, 2009, at A1.

[329] Obama, *supra* note 322.

[330] *See, e.g.*, Charlie Savage, *To Critics, Obama's Terror Policy Looks a Lot Like Bush's*, N.Y. TIMES, July 2, 2009, at A14; David E. Sanger, *Obama After Bush: Leading by Second Thought*, N.Y.

For instance, the current administration has asserted its authority to indefinitely detain suspected terrorists without trial; to continue transferring prisoners to countries that ignore legal rights or to simply rely upon such nations to capture, interrogate, and detain terrorist suspects; and to resume Guantánamo-style military commissions.[331] Also controversial were decisions to bar the release of photographs documenting prisoner abuses in Afghanistan and Iraq, and the C.I.A.'s refusal to disclose further documents regarding its detention and enhanced interrogation program.[332] Most recently, the Obama Administration conceded that it might not be able to meet its pledge to close Guantánamo by the beginning of 2010, and it has asked federal lawmakers to reauthorize three provisions of the Patriot Act.[333] The former may be understandable given practical difficulties in shuttering a detention facility and relocating detainees, as well as the recalcitrance of the president's own party on this issue.[334] But the administration's support for the Patriot Act might be especially discouraging to civil libertarians and progressives, not least of all because of past statements by then-Senator Obama that the surveillance law was "shoddy."[335]

TIMES, May 16, 2009, at A3; Josh Gerstein, *Legal Left Cools Toward Obama*, POLITICO, Apr. 13, 2009, *available at* http://www.politico.com/news/stories/0409/21207.html; Charlie Savage, *Obama's War on Terror May Resemble Bush's in Some Areas*, N.Y. TIMES, Feb. 18, 2009, at A20.

[331] *See, e.g.*, Peter Baker, *Obama Says Current Law Will Support Detentions*, N.Y. TIMES, Sept. 24, 2009, at A23; David Johnston, *Rendition to Continue, But With Better Oversight, U.S Says*, N.Y. TIMES, Aug. 25, 2009, at A8; David Johnston, *Rights Cited in U.S. Trials of Detainees*, N.Y. TIMES, June 29, 2009, at A14; Eugene R. Fidell, Editorial, *The Trouble With Tribunals*, N.Y. Times, June 14, 2009, at WK8; Erick Schmitt & Mark Mazzetti, *U.S. Relies More on Aid of Allies in Terror Cases*, N.Y. TIMES, May 24, 2009, at A1; William Glaberson, *Obama Detention Plan Poses Fundamental Test*, N.Y. TIMES, May 23, 2009, at A1; William Glaberson, *Changes Planned for Guantánamo Trials May Lead to Familiar Challenges*, N.Y. TIMES, May 19, 2009, at A14; William Glaberson, *Vowing More Rights for Accused, Obama Retains Tribunal System*, N.Y. Times, May 16, 2009, at A1; Charlie Savage, *Embracing Bush Argument, Obama Upholds a Policy on Detainees in Afghanistan*, N.Y. TIMES, Feb. 22, 2009, at N6; Eric Schmitt, *Two Prisons, Similar Issues for President*, N.Y. TIMES, Jan. 27, 2009, at A1; Mark Mazzetti & Scott Shane, *Where Will Guantánamo Detainees Go?*, N.Y. TIMES, Jan. 24, 2009, at A13.

[332] *See, e.g.*, Mark Mazzetti, *C.I.A. Resists Disclosure of Records on Detention*, N.Y. TIMES, Sept. 2, 2009; Jeff Zeleny & Thom Shanker, *Obama Reversal on Abuse Photos*, N.Y. TIMES, May 14, 2009, at A1.

[333] *See, e.g.*, Peter Baker & David Johnston, *Guantánamo Deadline May Be Missed*, N.Y. TIMES, Sept. 29, 2009, at A27; Charlie Savage, *Battle Looms Over the Patriot Act*, N.Y. TIMES, Sept. 20, 2009, at N21; Ben Conery, *Obama Seeks Patriot Act Extensions*, WASH. TIMES, Sept. 16, 2009.

[334] *See, e.g.*, David Herszenhorn, *Democrats in Senate Block Money to Close Guantánamo*, N.Y. TIMES, May 20, 2009, at A1.

[335] *See* Conery, *supra* note 333; Earl Ofari Hutchinson, *Did Obama Break His Campaign Promise to Scrap the Patriot Act?*, THE HUFFINGTON POST, Sept. 16, 2009, *available at* http://www.huffingtonpost.com/earl-ofari-hutchinson/did-obama-break-his-campa_b_288112.html. Commentators have also pointed out that Attorney General Holder once expressed support for the Bush Administration's detention policies and the Patriot Act; he even forwarded a "proto-Patriot Act" in 1996 as a deputy in the Clinton Administration's Department of Justice. *See, e.g.*, Glenn Greenwald, *Preliminary Facts and Thoughts About Eric Holder*, SALON, Nov. 19, 2008, *available at*

In the end, neither conservatives nor liberals are completely averse to the arrogation power or reluctant to use public fear to achieve their ambitions. And it is on this point that *V for Vendetta*, especially the book version, offers a valuable caveat. Fascism, not neo-conservatism, was the target of the original text,[336] which could be seen as a critique of all forms of state tyranny regardless of theoretical underpinnings. No less than modern conservatism, the progressivism or neo-liberalism of the new left carries its own threats of government overreaching. As Orwell argued, "the mere sound of words ending in -ism seems to bring with it the smell of propaganda."[337] History has shown that abuses of power are not limited to any particular political philosophy. "If we find ourselves in ten years' time cringing before [a state censor]," Orwell admonished, "it will probably be because that is what we have deserved."[338] Good dystopian fiction reminds readers to be wary of encroachments upon individual liberty, regardless of the source or its intentions, and to push back if necessary.[339]

For many Americans, cautious optimism will remain in order during the first few years of the Obama Administration. But if there is to be a vanguard defending civil liberties in times of public anxiety—especially when the issue is the protections accorded suspects, detainees, and criminal defendants—it is unlikely to be those who wield vast political power. History will confirm that the forerunners of restored rights and the rule of law were individual agents and prosecutors who turned down unlawful shortcuts and rejected unfair procedures, whistleblowers who refused to remain mum about clandestine abuses, and jurists who were unwilling to place their imprimatur on unconstitutional actions.[340] These

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http://www.salon.com/opinion/greenwald/2008/11/19/holder/; John Nichols, *The Trouble With Eric Holder*, Nov. 18, 2008, *available at* http://www.thenation.com/blog/state_of_change/384564; Declan McCullagh, *Obama's Attorney General Pick: Good on Privacy?*, CNET NEWS, Dec. 2, 2008, *available at* http://news.cnet.com/8301-13578_3-10110922-38.html. This should be a reminder that federal officials have "a permanent and constantly growing wish list of law enforcement goodies," argued Jim Harper of the Cato Institute. "It may help to educate liberals and progressives who believe that Eric Holder will magically roll back the department's aggression toward civil liberty." McCullagh, *supra* (quoting Harper).

[336] The text's author, Alan Moore, disassociated himself with the movie (although his collaborator, David Lloyd endorsed it), arguing that the film recast the central conflict "as current American neo-conservatism vs. current American liberalism," without "a mention of anarchy as far as I could see" and with "the fascism ha[ving] been completely defanged." Stephen Carson, *Alan Moore on V for Vendetta*, Mar. 20, 2006, *available at* http://www.lewrockwell.com/blog/lewrw/archives/010202/html (quoting Alan Moore).

[337] ORWELL, *Writers and Leviathan*, *supra* note 294, at 412.

[338] *Id.* at 407–08.

[339] In *V for Vendetta*'s memorable phrase, "People should not be afraid of their government. Governments should be afraid of their people." VENDETTA, *supra* note 267; WACHOWSKI ET AL., *supra* note 267, at 41; MOORE ET AL., *supra* note 267, at 73; *Movie Transcription*, *supra* note 267.

[340] *See, e.g.*, Robyn Blumner, *Honoring 2008's Watchdogs of Liberty*, THE HOUR ONLINE, Dec. 27, 2008, http://www.thehour.com/story/462191. Particularly noteworthy were the decisions rejecting an expansive interpretation of executive power and concomitant limitation on judicial

individuals may not be able to check all government excesses in periods of perceived crisis, nor will they inevitably kindle the imagination of the public, the one body that can force large-scale change in a functional democracy. Yet their deeds can reveal the truth and place a spotlight on specific policies and practices, and maybe with the help of compelling counter-narratives in literature and culture, the public will decline government promises of order and peace in return for its silent, obedient consent.[341]

Dystopian fiction—from classics like *Nineteen Eighty-Four* to modern works like *V for Vendetta*—are only meditations about possibilities, not statements of present fact or future certainty. Orwell made this precise point immediately after his masterpiece was published:

> I do not believe that the kind of society I describe necessarily *will* arrive, but I believe (allowing of course for the fact that the book is a satire) that something resembling it *could* arrive. I believe also that totalitarian ideas have taken root in the minds of intellectuals everywhere, and I have tried to draw these ideas out to their logical consequences. The scene of the book is laid in Britain in order to emphasise that the English-speaking races are not innately better than anyone else and that totalitarianism, *if not fought against*, could triumph anywhere.[342]

A dystopian world need not and probably will not come to fruition in the United States. But the same can be said about the vision of a mushroom cloud, or any other horrifying image, utilized by officials in support of their enhanced powers. With provocative mental pictures at a rough equipoise—apocalyptic terrorism versus totalitarian society—the public is challenged to evaluate critically whether claims of necessity justified a curtailment of civil liberties. Dystopian literature can remind people of past abuses of power and previous fights to defeat tyranny and prevent its regeneration, forcing them to compare their present reality against both the history of despotism and the literature's dystopian image of society. These works present the audience with provocative questions: whether people will recognize tyranny before it becomes entrenched; whether foundational documents and legal doctrines will prevent tyrannical government, embodied in far-reaching policies and discrete, street-level decisions; or whether the people

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review. *See, e.g.*, Boumediene v. Bush, 128 S. Ct. 2229 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004). *See also* al-Kidd v. Ashcroft, 2009 WL 2836448 (9th Cir. 2009) (rejecting former U.S. Attorney General's immunity claim in civil suit for unlawful detention under material witness statute); Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992 (9th Cir. 2009) (rejecting broad claim of state security privilege in civil suit regarding extraordinary rendition).

[341] *See supra* note 279 and accompanying text.

[342] GEORGE ORWELL, *Letter to Francis A. Henson*, June 16, 1949, *in* IN FRONT OF YOUR NOSE, *supra* note 294, at 502.

themselves will facilitate their own enslavement, either through their affirmative involvement or simple acquiescence to an abusive state.

VI. CONCLUSION

So did *V for Vendetta* have an impact on the public imagination, or was it "a piece of pulp claptrap"?[343] Putting aside artistic criticisms (and there were many), there are good reasons to be skeptical about the movie's significance. Any new light placed on anti-terrorism policies would have occurred irrespective of particular literary or cultural challenges to the narrative of fear.[344] If change occurs under the new administration, the initial spark will have been an aggregate dissatisfaction with the federal government, with a failing economy at home and perceived military quagmires abroad playing far greater roles than, say, a collective rejection of torture. More generally, whatever effect *V for Vendetta* had on the imagination is trivial compared to the impact of *Uncle Tom's Cabin* on the debate over slavery, or the influence of *The Jungle* on food-safety reform. It will never achieve the significance of *Nineteen Eighty-Four* in popular discourse about totalitarianism. Nor is it liable to become widely identified with a particular period of American history in the way that *The Crucible* is linked with the McCarthy era.

What *V for Vendetta* offered was a contemporary dystopian narrative to contrast with government propaganda, at a time when fear suppressed sound reasoning and rendered impotent the arguments of legal doctrine and social science. Regardless of the movie's effect, then, the context in which it was received by the audience was representative of both the limits and possibilities of interdisciplinarity. In more "ordinary" times, the incorporation of criminological theory and empiricism into criminal law and procedure is considered beneficial and, for the most part, politically feasible. When public anxieties override reason, however, and criminal justice becomes the arena for demagoguery, the best response to doctrinal distortions and rights curtailments may come not from legal theorists and social scientists, but instead from artists who can inspire the public imagination.

To be clear, disciplinary expansion and interaction is not always seen as an unmitigated good.[345] Among others, Posner warns that "too many bells and whistles will stop the analytic engine in its track," undermining those models that require studious reflection before abandoning a more straightforward approach and the conclusions that follow.[346] Law and literature receives a far greater indictment,

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[343] Stephen Hunter, *Quite The Bomb: 'V for Vendetta' Can Blow Away Parliament, But Not Its Audience*, WASH. POST, Mar. 17, 2006, at C1.

[344] *Cf.* SIMON, *supra* note 187, at 282.

[345] For instance, with the proliferation and increasing demands of communities within higher education, Kerr recognized that his concept of the multiversity had, "on occasion, become a Tower of Babel partially falling apart rather than being held loosely together." KERR, *supra* note 1, at 98.

[346] Richard A. Posner, *The Future of Law and Economics: A Comment on Ellickson*, 65 CHI.-

however: It is simply irrelevant to sound legal and moral analysis, critics argue, lacking any meaningful capacity for good or evil, and without the power to improve legal professionals through ethical lessons and insights.[347] Nor can literary and cultural pieces supply the type of information imparted by social science. Although Epstein acknowledges that such works may make someone "sensitive to the ravages of poverty," for instance, they offer no information about economic changes over time and across places, or the effect poverty has on demographic variables like average life-span.[348]

Literary and cultural works are non-falsifiable, of course, and the law-literature enterprise has no concrete standards akin to research protocols. As such, concerns might be raised that inherently subjective works of fiction are being treated as scientific studies. After all, *V for Vendetta*, or even an acclaimed piece like *Nineteen Eighty-Four*, might be described as a form of propaganda, not altogether different from that promulgated by government in support of increasing its power, with the fictional texts serving as a sort of "secret police"[349] of the mind. In fact, Orwell wrote of his own subjectivity, once warning readers to "beware of my partisanship, my mistakes and the distortion inevitably caused by having seen only one corner of events."[350] And needless to say, Orwell was well aware of the danger of propaganda and historical revisionism; as he remarked during World War II, "Hitler can say that the Jews started the war, and if he survives that will become official history."[351]

But there are some essential differences between state propaganda and fictional literature: The former claims to be the truth, promulgated by an entity

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KENT L. REV. 57, 62 (1989). Specifically, Posner was challenging the idea that psycho-social variables would improve the economic model of behavior. Others object to the sloppy tendencies of interdisciplinary research, with scholars "trawling other disciplines for useful theories, methods, and information," "picking up bits and pieces as needed," all the while remaining oblivious to the methodological flaws of their approach and sloppy results that ensue. Ken Wissoker, *Negotiating a Passage Between Disciplinary Boundaries* (2000), *reprinted as adapted in* AMERICAN HIGHER EDUCATION TRANSFORMED, *supra* note 4, at 285–86. It has even been claimed that certain areas are too serious to be left in the hands of amateurs from foreign disciplines, while specific topics, like the Holocaust, are *predisciplinary*, "too painful, too historic, too terrible," to be the subject to any type of analysis whatsoever. Marjorie Garber, *Coveting Your Neighbor's Discipline (2001)*, *reprinted as adapted in* AMERICAN HIGHER EDUCATION TRANSFORMED, *supra* note 4, at 290 (paraphrasing argument of others).

[347] *See* POSNER, LAW AND LITERATURE, *supra* note 74, at 344.

[348] Epstein, *supra* note 6, at 992.

[349] In response to the idea that poets were the world's unacknowledged legislators, W.H. Auden wrote: "Sounds more like the secret police to me." 2 THE COMPLETE WORKS OF W.H. AUDEN: PROSE, 1939–1948, at 348 (Edward Mendelson ed., 2002). *See also* Weisberg, *supra* note 77, at 1 (quoting Auden); WHITE, LEGAL IMAGINATION, *supra* note 74, at 273 (quoting Shelley). *Cf.* BRUNER, *supra* note 89, at 3–9.

[350] GEORGE ORWELL, HOMAGE TO CATALONIA 231 (1969) (1938).

[351] GEORGE ORWELL, *Letter to H.J. Willmett*, May 18, 1944, *in* AS I PLEASE, *supra* note 132, at 149 [hereinafter ORWELL, *Letter to H.J. Willmett*].

with an interest in amassing power and exerting more control over the individual. By contrast, there is no assertion of facticity in the latter, which is properly labeled a work of the imagination and generally produced by individuals hoping to inspire thought rather than suppress it, stimulating the audience to seek the truth instead of spreading deception. As discussed, some literary genres invite readers to reexamine their world as personally perceived or represented by the professed brokers of reality—government, news media, industry, et cetera—in light of the image of life portrayed in a fictional work. In particular, dystopian fiction calls on the audience to imagine a future regime that maintains totalitarian control over the individual. It does not overtly question whether the image comports with current reality; England was never the "Airstrip One" of *Nineteen Eighty-Four* or the fascist dictatorship described in *V for Vendetta*. Instead, these works admonish readers to be wary of the precursors of totalitarianism and, of special relevance here, the gradual degeneration of criminal justice into an authoritarian system.

As mentioned above, dystopian fiction merely presents the plausible, not the likely or preordained. Moreover, it may be impossible to prove that a given literary or cultural piece served as a "self-preventing prophesy,"[352] helping to avoid disaster by raising public awareness. On the other hand, however, the nightmare scenarios of terrorism are only plausibilities, too—not the inevitable consequence of America's failure to expand government powers or to forego individual rights and established procedures. Nor can it be denied that *Nineteen Eighty-Four* and similar works prompted a greater awareness of authoritarian behavior and the dangers of concentrated power.[353] These pieces encourage readers to critically examine whether fundamental values are being sacrificed or distorted, often underscoring the importance of objective truth. This idea was central to Orwell, whose writings were motivated by the danger of historical revision by those in power.[354]

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[352] *See, e.g.*, Brin, *supra* note 136, at 223.

[353] *Id. See supra* notes 157–58 and accompanying text.

[354] *See supra* note 132 and accompanying text.

Some things are factual—Orwell's axiom that "two plus two make four,"[355] or Arendt's exemplar that "[i]n August 1914 Germany invaded Belgium."[356] Although these illustrations are very different, one mathematical and the other historical, "once perceived as true and pronounced to be so, they have in common that they are beyond agreement, dispute, opinion, or consent."[357] They are not the product of government edicts; their truth is neither subject to nor undermined by official statements. To be sure, the latter fact, that Germany invaded Belgium at the beginning of World War I, "concerns events and circumstances in which many are involved" and "is established by witnesses and depends on testimony."[358] And more generally, we can debate the political and socio-economic origins of what some believed to be the war to end all wars. But a free society governed by liberal constitutional democracy cannot be built upon factual lies, like the idea that the First World War began when Belgium invaded Germany.[359]

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[355] "Freedom is the freedom to say that two plus two make four," Winston Smith wrote in his diary. "If that is granted, all else follows." ORWELL, *supra* note 130, at 81. While torturing Smith, however, O'Brien rejects this mathematical truth: "Sometimes they are five. Sometimes they are three. Sometimes they are all of them at once." *Id.* at 250–51. In *Nineteen Eighty-Four*, "the very existence of external reality was tacitly denied by [the Party's] philosophy," and "[t]he heresy of heresies was common sense." *Id.* at 80. For Orwell, this was one of the defining characteristics of modern totalitarian regimes:

> Nazi theory indeed specifically denies that such a thing as "the truth" exists . . . . The implied objective of this line of thought is a nightmare world in which the Leader, or some ruling clique, controls not only the future but the past. If the Leader says of such and such an event, "It never happened," well, it never happened. If he says that two and two are five, well, two and two are five. This prospect frightens me much more than bombs, and after our experiences of the last few years that is not a frivolous statement.

GEORGE ORWELL, *Looking Back on the Spanish War*, *in* MY COUNTRY RIGHT OR LEFT, *supra* note 132, at 258–59.

[356] HANNAH ARENDT, BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT 240 (1993) (1961). Arendt's example is based on French Prime Minister Georges Clemenceau's answer as to what future historians would say about World War I: "They will not say that Belgium invaded Germany." *But cf.* JACQUES DERRIDA, WITHOUT ALIBI 293 (Peggy Kamuf ed. & trans., 2002).

[357] ARENDT, *supra* note 356, at 240.

[358] *Id.* at 238.

[359] *See* JEFFREY C. GOLDFARB, THE POLITICS OF SMALL THINGS: THE POWER OF THE POWERLESS IN DARK TIMES 17 (2006).

> Modern liberal democracy requires a separation of politics from philosophical truth, but it must be based upon factual truths in order for those who meet in public to share a common world in which they can interact politically. Modern tyranny is based on a kind of philosophical truth, an ideology, an official interpretation of facts; factual truth is, as a matter of principle, expendable.

Id. Consider also Harry Frankfurt's comments about the nature of truth:

> No one in his right mind would rely on a builder, or submit to the care of a physician, who does not care about the truth . . . . [In] all of these contexts, there is a clear difference between getting things right and getting them wrong, and thus a clear difference between the true and the false. It is frequently claimed, to be sure, that the situation is different when it comes to historical analyses and to social commentaries, and

Which brings us back to the paradoxical power of some works of fiction—their ability to rouse an ethic of truthseeking.[360] Orwell's own subjectivity, his "feeling of partisanship" and "a sense of injustice," inspired him to write for the sake of truth: "[T]here is some lie that I want to expose, some fact to which I want to draw attention, and my initial concern is to get a hearing."[361] By illustrating the consequences of a world where facts are subject to manipulation, dystopian works forewarn society that truth may fall by wayside if "all the facts have to fit with the words and prophecies of some invincible fuhrer."[362] In this context, stimulating the popular imagination is not a means to undermine legal, theoretical, and empirical analysis. To the contrary, it may provoke otherwise passive citizens to seek the truth, to question the claims and actions of government, and to demand detailed justifications consistent with established law and scientific knowledge. This is exceptionally important for criminal justice, the knife's edge of state power.[363] Criminology can provide an empirical basis for legal decision-making; works of literature and culture can make the doctrine and science of criminal justice more salient for the average citizen; and in the end, both may be necessary to ensure that objective truth and fundamental values are not surrendered in fits of irrationality.

> especially when it comes to the evaluations of people and of policies that these analyses and commentaries generally include . . . . There are important limits, however . . . concerning the range of variation in interpreting the facts that serious historians, for instance, may be expected to display. There is a dimension of reality into which even the boldest—or the laziest—indulgence of subjectivity cannot dare to intrude.

HARRY G. FRANKFURT, ON TRUTH 24–26 (2006).

[360] Ernest Hemingway once said that "a writer should be of as great probity and honesty as a priest of God." Ernest Hemingway, *Introduction*, *in* MEN AT WAR: THE BEST WAR STORIES OF ALL TIME xv (1942).

> A writer's job is to tell the truth. His standard of fidelity to the truth should be so high that his invention, out of his experience, should produce a truer account than anything factual can be. For facts can be observed badly; but when a good writer is creating something, he has time and scope to make it of an absolute truth . . . . [I]f he ever writes something which he knows in his inner self is not true, for no matter what patriotic motives, then he is finished . . . . [H]e will never be at peace with himself because he has deserted his one complete obligation.

Id.

[361] ORWELL, *Why I Write*, *supra* note 132, at 6.

[362] ORWELL, *Letter to H.J. Willmett*, *supra* note 351, at 149.

[363] *Cf.* DAVID H. BAYLEY, PATTERNS OF POLICING: A COMPARATIVE INTERNATIONAL ANALYSIS 189 (1985).