

## **Judging Our Ancestors: Lessons from the Criminal Law**

Eric L. Muller\*

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\* George R. Ward Professor, University of North Carolina School of Law. I had helpful conversations about the ideas in this essay with Bill Marshall, Kay Levine, Deborah Weissman, Joe Kennedy, Melissa Jacoby, Maxine Eichner, Scott Baker, Andrew Chin, Richard Myers, and Leslie Branden-Muller.

## Judging Our Ancestors: Lessons from the Criminal Law

*"The past, they say, is another country."*

*--Rhys Isaac<sup>1</sup>*

### 1. Introduction

How should we judge the wrongdoing of the past?

This is an old dilemma,<sup>2</sup> but it cries out for renewed attention today. Vigorous antiterrorism measures are raising fears of a recurrence of the civil rights tragedies of earlier times.<sup>3</sup> Books justifying what are conventionally seen as old mistakes and injustices—the Japanese American internment,<sup>4</sup> McCarthyism,<sup>5</sup> southern secession and the power of states to permit slavery<sup>6</sup>—climb the national bestseller lists. Public and

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<sup>1</sup> RHYS ISAAC, *LANDON CARTER'S UNEASY KINGDOM: REVOLUTION AND REBELLION ON A VIRGINIA PLANTATION* 105 (2004).

<sup>2</sup> The issue was, for example, a central concern of Lord Macaulay's in his 1835 essay entitled "Sir James Mackintosh." See Thomas Babington Macaulay, *Sir James Mackintosh*, in THOMAS BABINGTON MACAULAY, *CRITICAL AND HISTORICAL ESSAYS* 163 (Hugh Trevor-Roper ed. 1965).

<sup>3</sup> Some, for example, worry that current assertions of executive power to investigate and detain are replays of the disastrous World War I Palmer Raids. See, e.g., Anthony Romero, *In Defense of Liberty at a Time of National Emergency*, HUMAN RIGHTS 16, 17 (2002); Betty Houchin Winfield, *"To Support and Defend the Constitution of the United States Against All Enemies, Foreign and Domestic": Four Types of Attorneys General and Wartime Stress*, 69 MO. L. REV. 1095, 1114 (2003) ("Whether Ashcroft's aggressive actions will come back to haunt him in the way that Palmer and Mitchell's deeds did is still unknown."); Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051, 1074-75 (2002).

Others worry that post-September 11 antiterrorist policy has repeated the fundamental mistake of the Japanese American internment. See my discussion of this phenomenon in Eric L. Muller, *Inference or Impact? Racial Profiling and the Internment's True Legacy*, 1 OHIO ST. J. CRIM. L. 103, 105-06 (2003).

<sup>4</sup> See MICHELLE MALKIN, *IN DEFENSE OF INTERNMENT* (2004).

<sup>5</sup> See ANN COULTER, *TREASON* (2003).

<sup>6</sup> See THOMAS E. WOODS, JR., *THE POLITICALLY INCORRECT GUIDE TO AMERICAN HISTORY* (1994).

private institutions have issued or are considering controversial apologies and reparations for past acts of oppression.<sup>7</sup> Our present is unusually suffused with our past.

Everywhere, it seems, our ancestors stand accused, and everywhere someone defends them.

Historians, of course, work to suspend judgment rather than to indulge it. "As historians," maintains Trevor Burnard in his outstanding account of the brutal eighteenth-century world of Jamaican slaveowner Thomas Thistlewood, "it is not our responsibility to attribute retrospective blame."<sup>8</sup> The historian's task, Burnard maintains, is "to explain why . . . people . . . acted as they did,"<sup>9</sup> not to judge what they did.

In this stance against judgment, historians are not alone. For some people, the reluctance to judge past actors is religious or ethical—an application of Jesus' injunction against judgment in his Sermon on the Mount,<sup>10</sup> or of the secular maxim not to judge a man before walking a mile in his shoes.<sup>11</sup> Others believe that the benefit of hindsight

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<sup>7</sup> A few examples: The State of Illinois recently (and controversially) apologized for the nineteenth-century expulsion of Mormons. See Illinois House Resolution HR0793, April 1, 2004, available at <http://www.legis.state.il.us/legislation/93/hr/09300hr07931v.htm>; "Apology in Illinois," THE SALT LAKE TRIB. AA1 (April 4, 2004) ("It is always right to admit past errors and offer a hand of reconciliation."); Lee Enokian, "Is an Apology Really Necessary?" NORTHWEST INDIANA TIMES, April 15, 2004, available at [http://www.nwitimes.com/articles/2004/04/15/news/local\\_illinois/165e51b834f1256986256e76005606b3.txt](http://www.nwitimes.com/articles/2004/04/15/news/local_illinois/165e51b834f1256986256e76005606b3.txt) (last visited May 13, 2004) ("[I]t is very dangerous to hold current people accountable for the sins of their forebears"). The faculty of the University of Alabama voted in 2003 to apologize for the university's involvement with slavery. See Sherrel Wheeler Stewart, "Univ. of Alabama Votes to Apologize for Slavery," Blackamericaweb.com, April 21, 2004, available at <http://www.blackamericaweb.com/site.aspx/bawnews/uofa> ("We must face up to our past if we are to move forward."); *but see id.* ("The idea that an apology could do any good is demeaning . . . to faculty members of the 1800s who were following a practice of their time"). And in 2000, the Governor of the State of Wyoming and the Mayor of the town of Powell, Wyoming, issued a weakly worded apology for the involvement of state and local officials in the suffering of interned Japanese Americans at the Heart Mountain Relocation Center in northwest Wyoming. See Eric L. Muller, *Apologies or Apologists? Remembering the Japanese American Internment in Wyoming*, 1 WYO. L. REV. 473 (2001).

<sup>8</sup> TREVOR BURNARD, MASTERY, TYRANNY & DESIRE: THOMAS THISTLEWOOD AND HIS SLAVES IN THE ANGLO-JAMAICAN WORLD 31 (2004)

<sup>9</sup> *Id.*

<sup>10</sup> Matthew 7:1.

<sup>11</sup> See <http://www.writersblock.ca/winter99/a-origin.htm>.

inevitably makes a *post hoc* evaluation of our predecessors unfair.<sup>12</sup> On this view, the passage of time saps historical moments of their rich context and leads current observers to anachronistic misjudgment of the past. And many also refrain from judging the acts of past generations for more self-protective reasons. Only the most short-sighted person, called upon to judge the acts of those who went before him, would not worry about how harshly he will be judged by those who follow him. Lord Macaulay put the point aptly: “As we would have our descendants judge us, so ought we to judge our fathers.”<sup>13</sup>

However, danger lurks in a world of suspended judgment. George Santayana famously warned that those who do not remember history are condemned to repeat it.<sup>14</sup> Surely this remembering means something other than a computer-like dip into the value-neutral ROM of historical fact. What is the point in “remembering” the Holocaust if that entails nothing more than maintaining lists of which Jews were deported on which trains? Santayana's injunction is to remember the horrors and injustices of history *for their horror and injustice* rather than for the mere fact that they happened. Santayana urges us to understand that episodes of extraordinary oppression and suffering arose from the seemingly ordinary flow of human events, and that—precisely because we all live in that

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<sup>12</sup> North Carolina Congressman Howard Coble presented this view forcefully in 1987 when the House of Representatives debated the apology to Japanese Americans for their wartime internment that the Congress ultimately authorized in the Civil Liberties Act of 1988. See Statement of Howard Coble, Conf. Report on H.R. 442, Civil Liberties Act of 1988, 134 Cong. Rec. H6307, H6311 (Aug. 4, 1988), available at <http://bss.sfsu.edu/internment/Congressional%20Records/19880804.html#coble> (last visited March 4, 2005). Coble contended that it was “unfair and perhaps even presumptuous for us to sit in the calm of this House, thousands of miles away from any threat of war today, with the benefit of 20-20 hindsight, and pass judgment on the decisions made by President Roosevelt, his Secretary of War, and other members of his Cabinet during the threat of war which faced them in 1942 following the attack on the front line of defense at Pearl Harbor.” See *id.* Coble recently resumed his defense of Roosevelt and the internment, controversially stating in a February 2003 radio appearance that the World War II internment of Japanese Americans was justified. See *Republican Defends WWII Internments*, <http://www.cbsnews.com/stories/2003/02/07/politics/main539755.shtml> (last visited March 4, 2005).

<sup>13</sup> Thomas Babington Macaulay, *Sir James Mackintosh*, in THOMAS BABINGTON MACAULAY, CRITICAL AND HISTORICAL ESSAYS 163 (Hugh Trevor-Roper ed. 1965).

<sup>14</sup> GEORGE SANTAYANA, REASON IN COMMON SENSE (1905), reprinted in 3 THE WORKS OF GEORGE SANTAYANA: THE LIFE OF REASON 39, 218 (1936).

lulling flow—such episodes could arise again. Santayana's call for vigilance makes sense only when memory evaluates the past rather than merely recalling it. A vigilant memory is a judging memory.

Lawyers and policymakers, moreover, have different roles from historians, and cannot afford to suspend judgment as historians do.<sup>15</sup> The central question for those who make policy is not what happened; it is what should happen next. Their focus on history is therefore instrumental. The past is the stuff not of study but of *arguments*. A policymaker crafting responses to radical Islamic terrorism cannot confine herself to understanding how and why Franklin Roosevelt endorsed the internment of Japanese Americans. She must come to a judgment about whether that policy was right or wrong, justified or blameworthy in its time. She must not merely remember; she must evaluate.

Because lawyers and policymakers are human beings, this task of judging the past is difficult. Powerful emotions pull simultaneously in opposite directions. On the one hand, people wish to affirm the timelessness of core moral principles, and to own up to the mistakes of the past so that they will not recur. On the other hand, people naturally feel loyal to their forebears and want to honor them and respect the integrity of their historical moment. Under the pressure of these rival emotions, public discourse about the acts of earlier generations often becomes a pendulum that swings from shrill denunciations<sup>16</sup> to credulous justifications.<sup>17</sup>

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<sup>15</sup> On the different roles of historians and lawyers, see LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 10 (1996); G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 487-89 (2002); and William E. Forbath, *Constitutional Change and the Politics of History*, 108 YALE L. J. 1917, 1917 (1999).

<sup>16</sup> See *Columbus Day Holiday Arrives on Stormy Historical Waters*, <http://www.cnn.com/2000/US/10/09/christopher.columbus/> (last visited March 4, 2005) (quoting allegations that Columbus was a "racist killer" who "enslaved Indians, handed them over to his men for sex and set in motion their annihilation"); Conor Cruise O'Brien, *Thomas Jefferson: Radical and Racist*, THE

This Essay offers a way to still that swinging pendulum. When we approach the problem of evaluating the past *as lawyers*, we recognize that it arises in the context of not only historical judgments, but also *legal* judgments. In several settings, the criminal law has had to respond to claims that a person accused of wrongdoing deserves vindication or leniency because of his unique circumstances and worldview.<sup>18</sup> The most salient of these is the so-called "cultural defense" to criminal liability, a defense in which an accused from a foreign culture contends that he should not be held accountable here for an act that was permissible, or at least tolerated, under his foreign culture's legal, ethical, or social norms.<sup>19</sup>

The criminal law's response to these sorts of claims has not been especially warm. No American jurisdiction has recognized a complete, free-standing defense to criminal liability based in culture.<sup>20</sup> Courts and scholars have generally seen culture-based excuses as having little to do with a person's culpability, and as carrying great risks for comparatively powerless victims. To be sure, rare cases arise in which an overpowering cultural influence prevents a defendant from forming the *mens rea* that the law requires.<sup>21</sup>

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ATLANTIC (Oct. 1996) (depicting Jefferson as a crazed radical who supported the excesses of the French Revolution and a virulent racist even by the standards of his time).

<sup>17</sup> See Gregory Buls, *Thomas Jefferson and Slavery*, <http://reformed-theology.org/html/issue07/jefferson.htm> (defending Jefferson as a courageous opponent of slavery); J. Philip Bloomer, "Fighting Back for Columbus," *The (Champaign, IL) News-Gazette* (March 19, 2001) (available at <http://www.sicilianculture.com/news/chris.htm> (last visited March 4, 2005)) (quoting an Urbana, Illinois, city councilman who maintains that Columbus was "a brave and courageous man who risked his life to make a hugely important discovery when everybody else was telling him he would fall off the face of the Earth"); *Columbus Day Holiday*, *supra* note 16 (quoting commentator Patrick Buchanan's views that Columbus is a "hero, who is also a hero of Western civilization," and that criticism of Columbus is "anti-European" and "anti-Western civilization" "cultural Marxism.")

<sup>18</sup> See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* (2002).

<sup>19</sup> For a full definition of the term "cultural defense," see Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 *HARV. WOMEN'S L. J.* 57, 57 (1994).

<sup>20</sup> See Dierdre Evans-Pritchard & Alison Dundes Renteln, *The Interpretation and Distortion of Culture: A Hmong "Marriage by Capture" Case in Fresno, California,* 4 *S. CAL. INTERDISC. L.J.* 1, 19 (1994)

<sup>21</sup> Such a case was arguably *People v. Chen*, No. 87- 7774 (N.Y. Sup. Ct. Mar. 21, 1989), described in Nancy S. Kim, *The Cultural Defense and the Problem of Preemption: A Framework for Analysis*, 27 *N.M. L. REV.* 101, 119-21 (1997). Another such case was *State v. Kargar*, 679 A.2d 81 (Me. 1996), analyzed at

More commonly, judges consider mitigating evidence of a defendant's cultural framework in deciding whether the defendant deserves a modest break at sentencing.<sup>22</sup> In the main, however, claims of cultural excuse have made little headway in the criminal law.

This Essay will argue that the criminal law's treatment of culture can help us think in a principled way about the wrongdoing of prior generations. There is an important similarity between culture and time: In much the same way that we might consider excusing a person because of *where* he is from, we might also consider excusing a person because of *when* he is from. But, as with the cultural defense, this notion of "temporal" defense will not reach far. Just as the cultural defense should not fully exculpate those whose culture does not entirely negate their *mens rea*, the temporal defense should not fully exculpate those who acted with a culpable mental state in their historical moment.

While it is admittedly odd to think of historical actors having (or not having) *mens rea*, the Essay will identify several factors relating to the *choseness* of the actor's conduct that can help us distinguish past acts that should be wholly or partly excused from those that should not. The inquiry will focus on the political and social climate and the moral norms and behavioral expectations of the actor's day. Were they truly monolithic? Did the actor's society know a rival tradition? Did the actor have access to that rival tradition? In other words, do we look back on the actor's behavior and see it as

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length in Nancy A. Wanderer and Catherine R. Connors, *Culture and Crime: Kargar and the Existing Framework for a Cultural Defense*, 47 BUFF. L. REV. 829 (1999).

<sup>22</sup> For more on this, see Damian W. Sikora, Note, *Differing Cultures, Differing Culpabilities? A Sensible Alternative: Using Cultural Circumstances as a Mitigating Factor in Sentencing*, 62 OHIO ST. L. J. 1695 (2001).

a *choice*, an act of independent moral agency, rather than as an inevitability?<sup>23</sup> Only to the extent that we see it as inevitable should we think about excusing it.

To say that an act from an earlier time should not be entirely excused is not, of course, to say that it should be entirely condemned. Here, too, the criminal law provides a useful model. At a criminal sentencing hearing, the sentencer's mission is to develop as full a picture as possible of the offender and the offense, in order to craft a punishment that takes into account not just the offense but the larger circumstances in which it occurred, some of which may be extenuating.<sup>24</sup> Even where the criminal law does not exculpate an accused on the basis of evidence of his cultural practices, the law often allows such evidence in mitigation at sentencing. Much the same should also be true of our consideration of the wrongdoing of prior generations. Although evidence of "what the world was like back then" will rarely absolve a person of all responsibility for what he chose to do and for the harm he chose to inflict, such evidence should assist us in drawing a more complete and balanced picture of past generations as full, complex human beings who were more than just the sum of certain of their actions.

We might prefer not to see our ancestors in this light. It is certainly less challenging—to our image of ourselves and to our narrative about our country—to see them as justified actors whose blemishes we can cover up with the cosmetic of context. But this is risky. In justifying the acts of our ancestors, we not only dishonor the memory

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<sup>23</sup> Historian Gordon A. Craig put this point beautifully: "To forget that the present is the result of many developments that might have taken a different course and of decisions that might not have been made, or not at the same time or in the same way, is seriously to foreshorten our historical perspective and to indulge in linear thinking of the most restricted kind. The duty of the historian . . . is to restore to the past the options it once had." Gordon A. Craig, *History as a Humanistic Discipline*, in Paul Gagnon, ed., *HISTORICAL LITERACY* 134 (1989).

<sup>24</sup> See *United States v. Lynch*, 934 F.2d 1226, 1235 (11th Cir. 1991).

of those they oppressed. We also create the circumstances for renewed oppression of the powerless of today and tomorrow.

## 2. The Cultural Defense and the "Temporal Defense"

The central insight of this Essay is that the criminal law's rules for assessing the wrongdoing of people from foreign cultures can help us think more clearly about how to assess the wrongdoing of prior generations. Everything hinges on the analogy between these two seemingly different judgments. It is therefore sensible to begin by drawing the analogy clearly, and carefully considering the objections to it.

Consider the following story: John and his lover Sara are from a different culture from our own. John learns that Sara has had sex with another man. In John and Sara's culture, a woman's sexual infidelity is a grave insult to a man's honor. Their culture also tolerates corporal punishment for such betrayals. John therefore gives Sara ten lashes across the back with a whip. The trouble for John, however, is that he and Sara no longer live in their culture of origin; they live in the United States. Under twenty-first century American law, what John has done is the felony of aggravated battery.<sup>25</sup>

John's case starkly presents the problem of the "cultural defense" in the criminal law. Everyone called upon to assess John's culpability—from the police officer who arrests and charges him, to the prosecutor who negotiates with his lawyer for a possible guilty plea, to the jurors who determine his guilt or innocence, to the judge who ultimately sentences him—will have to decide whether and to what extent the norms of John's society of origin should extinguish or diminish John's culpability for whipping

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<sup>25</sup> See, e.g., *State v. Bell*, 647 So.2d 498 (La. App. 1994) (beating with a stick constitutes aggravated battery).

Sara. Do we treat John fairly if we assess his conduct by reference to our cultural standards rather than his? If, in fairness to John, we use his cultural standards rather than ours, do we compromise our efforts to deter crime and thereby place potential victims at greater risk?

Now let us change one fact in John's case: John's native society is not a foreign country, but eighteenth-century America; he is a planter and Sara is not just his lover but also his slave. Their culture is the culture of that day. What brought John and Sara to us was not a ship or an airplane, but the passage of time. We are historians, looking back on John and Sara from our early-twenty-first century vantage point and trying to determine whether John did wrong in whipping Sara for her sexual infidelity two hundred years ago.

Questions very similar to those raised by the criminal law's cultural defense now arise. As we assess the conduct and practices of an earlier generation, to what extent should we be bound by that earlier society's norms? To be fair to John, must we credit what we might call his "temporal defense"—that is, must we assess his behavior by reference to the standards of his day? Can we avoid judging John's acts according to our own moral standards without undermining our efforts to deter the sorts of misdeeds that John committed? In sparing John from judgment, do we make current and future generations of potential victims more vulnerable to a reinfliction of the sort of harm that John caused long ago?

Some might reject this analogy between the cultural defense and the temporal defense. Admittedly, the cultural defense tendered by our Immigrant John and the temporal defense hypothetically "tendered" by our Historical John are not identical. For

one thing, Immigrant John has presumably chosen to come to our shores and our culture and might therefore be more fairly saddled with judgment by our culture's norms; Historical John made no such choice. For another, Immigrant John, by virtue of his actual physical presence among us, has access to the behavioral and moral norms of our society, can learn and follow them if he chooses, and is fairly condemned if he does not do so; Historical John is stuck in his moment in the past and cannot know or follow the norms of today's society. Finally, a message of forgiveness to Immigrant John (and his cultural community in the United States) will pose clear and direct risks to actual people living today—most immediately Sara, who will be left at John's mercy if his conduct is excused. But to speak of "sending a message" to Historical John and members of his generation is incoherent; they are dead and gone. Any risk that excusing their misconduct poses to current or future generations is therefore remote.

On reflection, each of these seemingly stark distinctions between the cultural and temporal defenses is overstated. First, immigration to the United States is not invariably a matter of unfettered choice: some immigrants come here because danger effectively forces them to quit their native lands.<sup>26</sup> Many others, particularly dependent spouses, children, and elderly parents come here because a more powerful family decision-maker has decided to do so. On the other hand, while people from earlier times do not really choose to "appear" at this (or any) particular moment in history, they also really have no choice *but* to do so. Time marches on, and everyone knows it. People understand that later generations will scrutinize the choices they make and the actions they take. Thus,

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<sup>26</sup> The Hmong, who are the source of many cultural defense cases, are a good example of this: by virtue of their support for the United States and South Vietnam during the conflict with North Vietnam, it was dangerous for them to stay in Vietnam after the South fell. See TIM PFAFF, *HONG IN AMERICA: JOURNEY FROM A SECRET WAR 49-63* (1995).

especially if Immigrant John has fled to the United States to save his life, or if he has been brought here by someone else, his position with respect to the norms of today's dominant culture is more like Historical John's than first appears.

Second, for many immigrants from cultures with practices that diverge significantly from American behavioral norms, the majority's culture is often not especially accessible or intelligible. Many first-generation immigrants (and in some communities, even later-generation immigrants) live culturally insular lives.<sup>27</sup> Economic, religious, linguistic, and social barriers and preferences keep them well apart from the mainstream culture. By contrast, historical figures of a generation or two ago whose actions are later challenged typically stand well within the cultural mainstream, a mainstream that admittedly changes over time but usually does so slowly and in conformity with at least faintly visible trends. As between, say, a Vietnamese immigrant who has lived entirely within San Francisco's Chinatown since arriving three months ago, and an American political figure from the World War II era, it is not at all clear that the Chinese immigrant is able to develop a clearer sense of current American cultural norms than the World War II leader might have been able to extrapolate.

Finally, the risk of excusing conduct that is approved in a different culture is similar to the risk of excusing conduct that was approved at an earlier time. In both cases, the excuse endangers those who might again be victimized by the sort of behavior that first caused injury. In the case of the cultural defense, there are two potential groups of perpetrators and victims, one narrow and one broad. The narrow group is the accused

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<sup>27</sup> See generally RICHARD ALBA & VICTOR NEE, REMAKING THE AMERICAN MAINSTREAM: ASSIMILATION AND CONTEMPORARY IMMIGRATION 225-29 (2003); ALEJANDRO PORTES & RUBÉN RUMBAUT, LEGACIES: THE STUDY OF THE IMMIGRANT SECOND GENERATION (2001) (analyzing assimilation of second generation immigrants); Rubén G. Rumbaut, *The Crucible Within: Ethnic Identity, Self-Esteem, and Segmented Assimilation Among Children of Immigrants*, 28 INT'L MIGRATION REV. 748 (1994).

person himself and the person or people he allegedly victimized. The broader group includes other potential perpetrators, who might be encouraged if they learned that American law condoned a violent or harmful cultural practice, as well as the large class of potential victims of that cultural practice. In the temporal context, the narrow class of perpetrator and victims has of course passed away. But in a very real sense, the broader class remains—and this is the very heart of the tragedy of reliving unremembered history.<sup>28</sup> To say that some past victimization was understandable, or even perhaps justified under the circumstances, is to invite that sort of victimization to recur if and when those types of circumstances reappear. Why else were Arab American groups among the first and loudest to complain<sup>29</sup> when Congressman Howard Coble said after September 11, 2001, that he thought the incarceration of Japanese Americans in World War II was justified?<sup>30</sup> Undoubtedly the risks of the cultural defense to potential victims are more present and palpable than the risks of the temporal defense. The difference, however, is in degree, not kind.

The analogy between the cultural defense and its temporal cousin is certainly not perfect. Judgment in a court of law is not the same as judgment in the court of history. But the analogy does not need to be perfect. This Essay does not claim that the standards of the criminal law should strictly govern our reflection on history. Its claim is simply that the criminal law's cultural defense offers tools for working through a strikingly similar set of problems to those we encounter when we attempt to assess the wrongdoing

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<sup>28</sup> See *supra* note 14 and accompanying text.

<sup>29</sup> See, e.g., [http://www.proislam.com/letter\\_against\\_coble.htm](http://www.proislam.com/letter_against_coble.htm) (last visited March 4, 2005) (letter from Pro-Islam.com urging that Coble resign as Chair of House Subcommittee on Crime, Terrorism, and Homeland Security).

<sup>30</sup> See *Republican Defends WWII Internments*, *supra* note 12.

of those who went before us. Let us therefore examine the culture defense and the progress the criminal law has made toward solving those problems.

### 3. The Risks and Benefits of Cultural and Temporal Excuse

The cultural defense in the criminal law is the subject of a fairly rich literature, most of it less than twenty years old.<sup>31</sup> That literature is, perhaps not surprisingly, marked by disagreement. Something approaching agreement has emerged, however, on a couple of points. First, most scholars now agree that a new, full-blown defense to criminal liability grounded in cultural difference is a bad idea. And second, most

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<sup>31</sup> See Doriane Lambelet Coleman, *Individualizing Justice through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093 (1996); Nancy S. Kim, *The Cultural Defense and the Problem of Cultural Preemption*, *supra* note 21; Anh T. Lam, *Culture as a Defense: Preventing Judicial Bias against Asians and Pacific Islanders*, 1 ASIAN AM. PAC. IS. L.J. 49 (1993); Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36 (1995); Alison Dundes Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN'S STUD. 437 (1993); Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57 (1994); Nancy A. Wanderer and Catherine R. Connors, *Culture and Crime*, *supra* note 21; Rashmi Goel, *Can I Call Kimura Crazy? Ethical Tensions in the Cultural Defense*, 3 SEATTLE J. FOR SOC. JUST. 443 (2004); Valerie L. Sacks, *An Indefensible Defense: On the Misuse of Culture in Criminal Law*, 13 ARIZ. J. INT'L & COMP. L. 523 (1996); Daina C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053 (1994); Michael Fischer, Note, *The Human Rights Implications of a "Cultural Defense,"* 6 S. CAL. INTERDISC. L.J. 663 (1998); Taryn F. Goldstein, Comment, *Cultural Conflicts in Court: Should the American Criminal Justice System Formally Recognize a "Cultural Defense"?* 99 DICK. L. REV. 141 (1994); Neal A. Gordon, Note, *The Implications of Memetics for the Cultural Defense*, 50 DUKE L.J. 1809 (2001); Andrew M. Kanter, Note, *The Yenaldlooshi in Court and the Killing of Witch: The Case for an Indian Cultural Defense*, 4 S. CAL. INTERDISC. L.J. 411 (1995); Jisheng Li, Comment, *The Nature of the Offense: An Ignored Factor in Determining the Application of the Cultural Defense*, 18 U. HAW. L. REV. 765 (1996); Alison Matsumoto, Comment, *A Place for Consideration of Culture in the American Criminal Justice System*, 4 J. INT'L L. & PRAC. 507 (1995); Julia P. Sams, Comment, *The Availability of the "Cultural Defense" as an Excuse for Criminal Behavior*, 16 GA. J. INT'L & COMP. L. 335 (1986); Damian W. Sikora, *Differing Cultures, Differing Culpabilities?*, *supra* note 22; James J. Sing, Note, *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law*, 108 YALE L.J. 1845 (1999); Sharan K. Suri, Note, *A Matter of Principle and Consistency: Understanding the Battered Woman and Cultural Defenses*, 7 MICH. J. GENDER & L. 107 (2000); Sharon M. Tomao, Note, *The Cultural Defense: Traditional or Formal?*, 10 GEO. IMMIGR. L. J. 241 (1996); Michele Wen Chen Wu, Comment, *Culture is No Defense for Infanticide*, 11 AM. U. J. GENDER SOC. POL'Y & L. 975 (2003); Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986).

scholars now agree that evidence of cultural practices ought to be admitted, on a case-by-case basis, to support certain existing criminal law defenses.

The boundaries of the debate over the criminal law's cultural defense were marked in two law review pieces published in 1986. One, a student note published in the *Harvard Law Review*, presented an unabashed plea for the recognition of a formal "cultural defense" that would completely exonerate people who, through their cultural practices, commit criminal acts.<sup>32</sup> The note's author contended that a defense based in cultural difference is a necessary and sensible way of honoring the nation's commitments to cultural pluralism and to individualized justice.<sup>33</sup> "A new immigrant," the author explained, "has not been given the same opportunity [as a long-term resident] to absorb—through exposure to important socializing institutions—the norms underlying this nation's criminal laws."<sup>34</sup> The author conceded that a cultural defense might make it harder for the law to articulate a coherent social order and to deter crime, but countered that the effects might well be the opposite if immigrant groups came to recognize that the American legal system was sensitive to their cultural traditions.<sup>35</sup>

The other 1986 piece, a student comment by Julia P. Sams in the *Georgia Journal of International and Comparative Law*, presented a full-bore assault on the notion of a cultural defense.<sup>36</sup> Sams argued that a complete cultural defense to criminal liability would be difficult to administer, because the legal system would have to decide which immigrant groups qualify for it and which do not, as well as who among the qualifying

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<sup>32</sup> See Note, *The Cultural Defense in the Criminal Law*, *supra* note 31.

<sup>33</sup> See *id.* at 1298-1307.

<sup>34</sup> *Id.* at 1299.

<sup>35</sup> See *id.* at 1304-07.

<sup>36</sup> See Sams, *The Availability of the "Cultural Defense" as an Excuse for Criminal Behavior*, *supra* note 31.

groups deserve it and who do not.<sup>37</sup> She contended that a cultural defense would undermine the deterrent effect of the law by removing an important incentive for immigrant groups to learn American legal rules,<sup>38</sup> and would undermine the principle of legality by placing “newcomers’ . . . opinions and ideas about the laws . . . above the laws as declared by the officials.”<sup>39</sup> She also maintained that a cultural defense would be unfair to members of the cultural majority, to whom the defense would not be available.<sup>40</sup> While she recognized that “immigrant groups . . . embellish society with their diverse customs and beliefs,” she concluded that those advantages would be “nullified if United States residents are threatened by the crimes of newcomers who are excused from punishment.”<sup>41</sup>

Since 1986, much has been written about the cultural defense. While the terrain remains contested, a middle ground has opened up between the two poles fixed by those early pieces. That middle ground does not include a new, free-standing complete defense for cultural practices. Most scholars agree that an independent complete cultural defense is both unnecessary and unwise.<sup>42</sup> It is unnecessary because existing law already takes important cultural determinants of a defendant’s mental state into account. And it is unwise for a number of reasons: the defense would, for example, undermine the maxim that ignorance of the law is no excuse, and would plunge the legal system into a messy

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<sup>37</sup> *See id.* at 345-48.

<sup>38</sup> *See id.* at 348-50.

<sup>39</sup> *Id.* at 352.

<sup>40</sup> *See id.* at 350-51.

<sup>41</sup> *Id.* at 353.

<sup>42</sup> The leading exception is Alison Dundes Renteln, who argues for what appears to be a freestanding cultural defense in her 2004 book *THE CULTURAL DEFENSE* 200-201. I say that she argues for “what appears to be” a freestanding cultural defense because in actuality she believes that cultural evidence should be and sometimes is admitted in support of existing criminal law defenses. Indeed, her main reason for insisting on a freestanding cultural defense is what she views as the inappropriate reluctance of judges to accept cultural evidence in support of existing defenses. *See infra* notes 59-60 and accompanying text.

and potentially offensive set of decisions about what counts as culture and who counts as a true cultural practitioner.

But by far the most important reason scholars have advanced for rejecting a freestanding cultural defense is the realization that the defense would be perilous for crime victims, especially women and children.<sup>43</sup> A large percentage of cases involving the cultural defense are domestic abuse cases—prosecutions of adult men who batter or kill women with whom they are in relationships, and prosecutions of adult men and women who abuse or kill their children. To exonerate abusers on the basis of a claim that their own culture does not condemn their violence would make that violence harder to deter.

This poignant insight was apparent in a battered Chinese woman's reaction to *People v. Chen*,<sup>44</sup> a case in which a male Chinese immigrant successfully invoked alleged Chinese cultural practices to win a sentence of probation for killing his adulterous wife. "Even thinking about that case makes me afraid," the battered woman explained. "My husband told me: 'If this is the kind of sentence you get for killing your wife, I could do anything to you. I have the money for a good attorney.'"<sup>45</sup> This abused woman and many vulnerable women and children like her would be the ones to bear the brunt of a complete defense to criminal liability grounded in culture. Not surprisingly, most scholars agree that further disempowering those who are already vulnerable to violent

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<sup>43</sup> This position is very clearly stated in Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311 (1991).

<sup>44</sup> See *supra* note 21.

<sup>45</sup> Alexis Jetter, *Fear is Legacy of Wife Killing in Chinatown, Battered Asians Shocked By Husband's Probation*, NEWSDAY, Nov. 26, 1989, at 4.

attack is too high a price to expect them to pay for a legal doctrine that would exonerate their abusers.

But just as the weight of scholarly opinion has rejected a complete cultural defense, it has also rejected the notion that cultural influences on a defendant's behavior ought to be irrelevant to guilt or innocence. Scholars have recognized that in some situations, evidence of cultural practices and beliefs might be relevant not to a new, complete cultural defense but to old and well-established ones, especially mistake of fact, lack of intent, and duress.<sup>46</sup> Consider, as an example, the case of a Vietnamese immigrant parent charged with child abuse for engaging in *cao gio*, or “coining”—the practice of rubbing an ill child's back with an oiled and serrated coin.<sup>47</sup> If the child abuse statute requires proof of a specific intent to harm the child, then evidence that the parent engaged in *cao gio* in order to heal the child would be relevant—indeed, probably crucial—to the issue of intent. Similarly, in a rape prosecution, evidence of cultural practices surrounding sexual intercourse might tend to support a defendant's claim that he made a mistake about the fact of the victim's consent.<sup>48</sup> And a Yoruban immigrant from Nigeria who makes tribal markings with a razor blade on her son's face might be able to

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<sup>46</sup> Kay L. Levine's excellent article *Negotiating the Boundaries of Crime and Culture* is especially useful on this point. See Kay L. Levine, *Negotiating the Boundaries of Crime and Culture: A Sociolegal Perspective on Cultural Defense Strategies*, 28 L. & SOC. INQUIRY 39, 49-66 (2003). Also excellent is Maguigan, *Cultural Evidence and Male Violence*, *supra* note 31.

<sup>47</sup> See Alison D. Renteln, *Is the Cultural Defense Detrimental to the Health of Children?*, in Rene Kuppe & Richard Potz, eds., 7 LAW AND ANTHROPOLOGY: INTERNATIONAL YEARBOOK FOR LEGAL ANTHROPOLOGY 27, 39 (1994).

<sup>48</sup> This fact pattern alludes to the real California case of *People v. Moua*, No. 315972-0 (Cal. Sup. Ct. Feb. 17, 1985), discussed and analyzed at length in Deirdre Evans-Pritchard and Alison Dundes Renteln, *The Interpretation and Distortion of Culture: A Hmong 'Marriage by Capture' Case in Fresno, California*, 1 SO. CAL. INTERDISCIPLINARY L. J. 1 (1995).

offer a defense of necessity or duress if she can offer evidence that her culture predicted far greater harm to the children if they were not so marked.<sup>49</sup>

To be sure, authors have emphasized that it is important for prosecutors to make evidence available to the factfinder that counters or challenges defendants' cultural claims, in order to reduce the risk that factfinders will be tricked into mistaking willfully misogynist or child-abusive conduct for innocent cultural practice. But the weight of scholarly opinion has rejected the claim that all evidence of cultural practice should be completely barred.<sup>50</sup> It has instead settled around the idea that cultural evidence ought to be admissible in order to support established legal defenses based on the defendant's mental state.

These insights from the literature on the cultural defense offer us guidance on the problem of judging the wrongdoing of prior generations. On the one hand, we benefit from the literature's firm recognition that cultural context sometimes ought to temper blame. That recognition reassures us that our concern for the unfairness of judging with the benefit of hindsight stands on something more substantial than a taboo against speaking ill of the dead or a worry about how we will ourselves someday be judged. The criminal law's recognition of the relevance of cultural context also highlights the importance of an actor's mental state at the time he acted. What that mental state might be for historical actors (as opposed to living criminal defendants) remains to be seen. For now it is enough to note that the cultural defense offers support for the excusing instinct that is at the heart of its temporal cousin.

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<sup>49</sup> See Renteln, *supra* note 47, at 29-30.

<sup>50</sup> Perhaps the most hostile to any use of cultural evidence is Doriane Lambert Coleman, *Individualizing Justice*, *supra* note 31; *but cf. id.* at 1103-04 nn. 47, 48.

That support is, however, drastically limited by the near-universal insight in the criminal law literature that a freely available cultural defense imperils the powerless by undermining the deterrent effect of the law. A similar danger lurks in the temporal context. In every generation there are ruling and ruled classes, and the distribution of these groups across race, gender and time in the American experience has not been random. The privileged and powerful of today are, on balance, a good deal likelier to be the progeny of yesterday's elites than of yesterday's oppressed. This is, in fact, precisely what makes the task of judging the actions of earlier American generations' leaders so difficult. Even though we are not related to them by blood, they are nonetheless in some sense *our* ancestors by virtue of the leadership positions they occupied, and our judgment is compromised by the allegiance we feel we owe them. But when we too quickly excuse them for their impositions on the powerless of their day, we deprive the powerless of today, and their advocates, of the important example of their experience. We undermine the deterrent effect of history, and in so doing, create conditions that are more conducive to renewed victimization. The criminal law's cultural defense thus reminds us that suspending judgment of the wrongdoing of prior generations is not harmless generosity to the departed. It carries a cost, and that cost will likely be born by the powerless.

#### 4. The *Mens Rea* of Historical Actors

The preceding section might lead a reader to think that the literature on the criminal law's cultural defense has reached consensus on the relevance and admissibility of cultural evidence. This is not so. While the more recent literature does not swing wildly from arguments for wholesale exculpation to arguments for categorical

inadmissibility as it did twenty years ago, scholars now pursue a narrower set of disagreements about the precise role that cultural evidence might permissibly play at trial and in sentencing. Those disagreements, however, all work from the shared premise that the central legitimate reason to admit evidence of culture is to shed light on the mental state of the accused. This focus on the mental state of the actor from a different culture will help us to develop a better understanding of what we mean when we speak of the culpability of an actor from an earlier day.

In a recent article, Kay Levine presents a compelling explanation for the focus on mental state in the debate over the cultural defense.<sup>51</sup> She explains that the cultural defense raises a fundamental question about the relationship between culture and action.<sup>52</sup> At one extreme, “soft” or “external” theorists of that relationship contend that people choose their actions freely, without cultural influence, and use culture merely to explain or justify what they have done. At the other end of the continuum, “hard” or “internal” theorists maintain that culture “program[s]” actors to behave as they do, “eliminating their sense of agency or responsibility for their actions.”<sup>53</sup> An intermediate position suggests a sort of feedback loop between an actor and culture: an actor initially chooses his actions, but upon recognizing that certain actions fit within a larger cultural schema, he internalizes or appropriates that schema. The schema assumes an ever-more-powerful role in determining the actor’s conduct, and his earlier individual motivations recede. It becomes intuitive, natural, and ultimately coercive.<sup>54</sup>

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<sup>51</sup> See Levine, *supra* note 46.

<sup>52</sup> See *id.* at 42-43.

<sup>53</sup> *Id.* at 43-45.

<sup>54</sup> See *id.* at 45-46. This intermediate position, which Levine seems to favor, comes from the work of the feminist anthropologist Sherry B. Ortner. See Sherry B. Ortner, *Patterns of History: Cultural Schemas in the Founding of Sherpa Religious Institutions*, in Emiko Ohnuki-Tierney, ed., *CULTURE THROUGH TIME: ANTHROPOLOGICAL APPROACHES* 57-93 (1990).

Levine argues that the cultural defense brings a claim of cultural coercion into conflict with the baseline assumption of American criminal law that people freely choose their actions and are individually responsible for everything they do.<sup>55</sup> At the practical level, this conflict between culture and autonomy plays itself out in disputes about a criminal defendant's mental state. Inquiry into *mens rea* – the actor's allegedly culpable state of mind – is the logical place for a finder of fact to determine the extent to which larger forces outside the defendant's own will and awareness shaped or dictated his harmful act. Levine concludes that evidence of culture ought to be admissible where it undermines the defendant's criminal intent by "provid[ing] a . . . noncriminal explanation for the defendant's actions or where cultural demands place the defendant under extraordinary stress and rob him of meaningful agency."<sup>56</sup> No freestanding cultural defense to criminal liability is necessary for this purpose, Levine contends; our well-established criminal law *mens rea* defenses are adequate to the task.<sup>57</sup> On the other hand, Levine argues that cultural evidence should not be admissible where it does nothing to disprove the defendant's intent to harm his victim, but instead merely reveals that the defendant's culture tends to tolerate such harm more readily than does American culture.<sup>58</sup>

Whereas Kay Levine opposes a freestanding cultural defense to criminal liability, Alison Dundes Renteln supports it. In Renteln's view, an independent, freestanding culture-base defense is necessary to overcome the extreme reluctance of most judges to

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<sup>55</sup> See Levine, *supra* note 46, at 46.

<sup>56</sup> See *id.* at 80.

<sup>57</sup> See *id.* at 77 n.60. This is also a major thrust of Holly Maguigan's work. See Maguigan, *Cultural Evidence and Male Violence*, *supra* note 31, at 87-90.

<sup>58</sup> See *id.*

admit evidence of cultural context in support of an existing criminal law defense.<sup>59</sup> In her recent book *The Cultural Defense*, Renteln notes that a person's cultural context often supplies that person's *motive* for engaging in an act that harms another, even if it does not negate the person's *intent* to do harm. That culturally based motive, she contends, is at least partially exculpatory, even if it does not negate criminal intent and thereby supply a fully exculpatory excuse. What Renteln has in mind is thus a *partial* excuse – a sort of generic lesser-included-offense to all crimes that would be available to a defendant who acted from a culturally influenced motive.<sup>60</sup>

What is notable about the disagreement between Levine, an opponent of a freestanding cultural defense, and Renteln, a supporter, is a hidden point of agreement. Both believe that to the extent that culture mitigates or cancels criminal liability, it does so because culture can undermine the culpability of a mental state. Renteln writes clearly that “the rationale behind [a freestanding cultural defense] . . . is that an individual’s behavior is influenced to such a large extent by his culture that either (1) the individual simply did not believe that his actions contravened any laws, or (2) the individual felt compelled to act the way he did.”<sup>61</sup> Renteln wishes to be certain that the criminal law appropriately mitigates the liability of a person whose “cultural conditioning predispose[d] [him] to act in certain ways,”<sup>62</sup> and who therefore acted with a “beneficent motive.”<sup>63</sup>

Levine makes more or less the same point in her work, but with different words: the defendant entitled to mitigation is the defendant whose “cultural demands place [him]

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<sup>59</sup> See ALISON DUNDES RENTELN, *THE CULTURAL DEFENSE* 189-201 (2004).

<sup>60</sup> See *id.* at 191-92.

<sup>61</sup> *Id.* at 187.

<sup>62</sup> *Id.* at 13.

<sup>63</sup> *Id.* at 201.

under extraordinary stress and rob him of meaningful agency.”<sup>64</sup> As with Renteln, Levine’s focus is on cultural *compulsion*. She notes that a successful defense based on culture in a criminal case requires proof both that the defendant honestly acted for the claimed cultural reason at the time of the harmful act and that the defendant’s “reliance on culture (rather than on American legal standards) was reasonable.”<sup>65</sup> The inquiry into reasonableness focuses on “the actor’s (in)ability or (un)willingness to disregard cultural prescriptions—to resist cultural schemas—in response to the victim’s behavior or mainstream social pressures.”<sup>66</sup> Cultural schemas are not, after all, invariably and irreversibly coercive: “A cultural frame that has been taken into the self can be taken out again—when others fail to react in expected ways, for example, or when circumstances change, or simply when a person matures.”<sup>67</sup> Thus, Levine argues, the reasonableness of a defendant’s reliance on culture will turn on the degree of its *chosenness*. If the factfinder “believes that the defendant was able to operate outside of the schema but simply chose not to do so, it will likely find her reliance on culture unreasonable.”<sup>68</sup>

If scholars agree that harmful acts are excusable to the extent that a defendant’s cultural framework compelled him to act as he did, then perhaps something similar might be true for the cultural defense’s temporal cousin. The analogy is admittedly not easy to draw, because historians, unlike lawyers, do not have doctrines (or even really a vocabulary) of culpability. Historians are simply not accustomed to asking about the

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<sup>64</sup> Levine, *supra* note 46, at 80.

<sup>65</sup> *See id.* at 48.

<sup>66</sup> *Id.*

<sup>67</sup> *See id.* (quoting Ortner, *supra* note 54, at 89).

<sup>68</sup> Levine, *supra* note 46, at 48.

*mens rea* of historical actors.<sup>69</sup> But the literature of the cultural defense suggests fairly clearly that *compulsion and choice* are important factors in assessing the culpability of the actions of past generations. To what extent, we should ask, did the political and social climate and the moral norms and behavioral expectations of the actor's day compel him to do what he did? To what extent was it possible for him to act differently, more consistently with what would emerge as the standards of a later age? To what extent can we look back on the actor's behavior and see it as a *choice* of consequence, an act of independent moral agency?<sup>70</sup>

A number of factors will inform this inquiry into the historical figure's agency. At a basic level, we must ask whether the circumstances of his time allowed him any access at all to standards different from his own. Consider, for example, a hypothetical Virginia planter in the year 1690 who made a decision to switch his crop from wheat to tobacco. A modern anti-smoking activist, who knows that tobacco is an addictive agent of illness and death for millions of smokers, might condemn this decision. But that activist surely cannot condemn the planter's decision in its own historical moment. Tobacco's lethal properties were not known in the late seventeenth century; "the relationship of tobacco to health lay deep in the shadow of ignorance."<sup>71</sup> Attacks on smoking before the mid-nineteenth century "were couched largely in moral, xenophobic, and economic terms,"<sup>72</sup>

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<sup>69</sup> See BURNARD, *supra* note 8, and accompanying text.

<sup>70</sup> Historian Gordon A. Craig beautifully expressed this point about the choices confronting historical figures in his essay entitled "History as a Humanistic Discipline": "To forget that the present is the result of many developments that might have taken a different course and of decisions that might not have been made, or not at the same time or in the same way, is seriously to foreshorten our historical perspective and to indulge in linear thinking of the most restricted kind. The duty of the historian . . . is to restore to the past the options it once had." Gordon A. Craig, *History as a Humanistic Discipline*, in Paul Gagnon, ed., HISTORICAL LITERACY 134 (1989).

<sup>71</sup> RICHARD KLUGER, *ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS* 15 (1996).

<sup>72</sup> *Id.*

not in terms of health. Indeed, seventeenth century Englishmen saw smoking as a defense against the plague,<sup>73</sup> and even as late as the 1850s, the leading English-language medical journal opined that smoking could “be indulged in with moderation, without manifest injurious effect on the health for the time being.”<sup>74</sup> Just as the law might be willing to entertain a claim in mitigation on behalf of a rainforest tribesman suddenly plopped down in the middle of early twenty-first-century America, on the basis that the tribesman lacked any meaningful access to a tradition other than his own, so should we be open to such a claim on behalf of a temporally remote ancestor.

Now contrast this Virginia planter's farming decision with that of his hypothetical great-great-grandson to purchase slaves in 1840. A plea to suspend judgment of the nineteenth-century slaveholding planter in deference to his historical moment is surely weaker than the plea on behalf of his tobacco-harvesting forebear. Whereas the late-seventeenth century planter lived in a time of ignorant consensus on questions of tobacco and health, the nineteenth-century slaveowner lived in a time of intense debate on the propriety of owning other human beings. Change was afoot, and had been for some time.<sup>75</sup> The American and French revolutions of the late eighteenth century had upended the earlier understanding of the world as a divinely ordained hierarchy that assigned everyone—masters and slaves alike—fixed positions of social and political control.<sup>76</sup> Writing in 1782, no less a figure than Thomas Jefferson had noted that “the whole commerce between master and slave is . . . the most unremitting despotism on the one

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 16.

<sup>75</sup> See BURNARD, *supra* note 8, at 104-08.

<sup>76</sup> See ISAAC, *supra* note 1, at 46-47, 180-83.

part, and degrading submissions on the other.<sup>77</sup> By 1807, the slave trade had been abolished in England,<sup>78</sup> and a slave revolt had won independence for what would become the Republic of Haiti.<sup>79</sup> In the decades that followed, an abolition movement took root and flourished in the United States.<sup>80</sup> Slavery itself (and not merely the slave trade) was abolished throughout the British empire in 1834.<sup>81</sup> Slave acquisition and ownership in the 1840s were inevitably acts of moral choice in a way that they had not been in an earlier time. Thus, just as a factfinder would be interested in knowing whether a recent Hmong immigrant came to the United States from a place of genuinely monolithic culture (his remote home village in the Laotian mountains) or from a place of broad and mixed influences (years of interim residence in an Asian metropolis), we should be interested in knowing whether our ancestor lived in a time of stasis on the practice in question or in a time of flux.

Also relevant to what I am calling the chosenness of past wrongdoing is the position of the questioned practice in the cultural spectrum of its day. We know, for example, that eighteenth-century Jamaican slavery was a brutal institution<sup>82</sup>— more so than the contemporaneous slavery of the southeastern United States.<sup>83</sup> Yet even within that violent framework, we can identify sadistic sociopaths. Thomas Thistlewood did not confine himself to the flogging and sexual harassment that were then common methods of slave control. He devised a punishment he called "Derby's Dose," in which he

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<sup>77</sup> Thomas Jefferson, *Commerce between Master and Slave*, quoted in D.B. DAVIS, WAS THOMAS JEFFERSON AN AUTHENTIC ENEMY OF SLAVERY? 6 (1970).

<sup>78</sup> See JAMES WALVIN, BLACK IVORY: SLAVERY IN THE BRITISH EMPIRE 262 (2001).

<sup>79</sup> See GEORGE F. TYSON, TOUSSAINT L'OUVERTURE (1973).

<sup>80</sup> See MERTON L. DILLON, SLAVERY ATTACKED: SOUTHERN SLAVES AND THEIR ALLIES 1619-1865 158 (1990).

<sup>81</sup> See WALVIN, *supra* note 78, at 264.

<sup>82</sup> See BURNARD, *supra* note 8, at 32-33, 150, 177-79.

<sup>83</sup> See *id.* at 149-50.

whipped a misbehaving slave, rubbed "salt pickle, lime juice and bird pepper" in the open wounds, forced another slave to defecate in his mouth, and then gagged him for four or five hours.<sup>84</sup> Thistlewood also forced slaves to urinate into the mouths of others, and sometimes rubbed slaves with molasses and left them naked outside overnight, to be devoured by mosquitoes.<sup>85</sup> Just as the law would insist on knowing whether a particular immigrant's violent behavior was truly an artifact of his culture or a deviant choice of his own, we should ask the same question about the harms that our ancestors inflicted. "Derby's Dose" was an outrage even in its time, and we should not allow arguments about hindsight and context to dull our appreciation of that.

Just as the position of the wrongdoing in the spectrum of an era's conduct is an important facet of the "chosenness" of past wrongdoing, so is the position of the *wrongdoer*. Not every member of a generation shares equally in the maintenance of its social and cultural practices. Those who seek out or inherit positions of influence and prominence bear special responsibility for those practices because they set an example for others and are in a position to effect change. In this sense, Thomas Thistlewood contrasts usefully with a contemporary of his, Landon Carter. Both men were slaveowners—Thistlewood in Jamaica and Carter in Virginia. Thistlewood was notably more brutal with his slaves than was Carter. But Thistlewood was also a "nobody" in the society of his day—known not at all outside his small Jamaican parish and even there only for his beautiful garden.<sup>86</sup> His influence—terrorizing as it was—spread no further than the boundaries of his 160-acre farm.<sup>87</sup>

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<sup>84</sup> *See id.* at 104.

<sup>85</sup> *See id.*

<sup>86</sup> *See id.* at 9.

<sup>87</sup> *See id.* at 10.

Carter, by contrast, was an heir to one of Virginia's great families—the son of Robert "King" Carter, who owned more than three hundred thousand acres and more than seven hundred slaves and was, in the words of Rhys Isaac, "a grandee among the grandees."<sup>88</sup> Landon himself, even after sharing his father's estate with siblings, was one of Virginia's twelve richest men and the owner of more than four hundred slaves.<sup>89</sup> He was also a member of Virginia's House of Burgesses,<sup>90</sup> the presiding judge of his county court,<sup>91</sup> the chair in 1774 of his county's committee to boycott British goods,<sup>92</sup> a friend of the powerful Lee family,<sup>93</sup> and, although not a physician, a respected medical practitioner.<sup>94</sup> He was, in short, a man of influence in his county and his colony's social and political life. Some such men chose to free some or all of their slaves, either during their lifetimes (as did fellow Virginian George Wythe<sup>95</sup> and Pennsylvanian John Dickinson<sup>96</sup>) or in their wills (as did fellow Virginian George Washington<sup>97</sup>). Landon Carter—like his fellow Virginians Thomas Jefferson<sup>98</sup> and George Mason<sup>99</sup>—did neither. Indeed, unlike Jefferson and Mason, Carter never spoke publicly against slavery or even registered hesitations about the institution in his private diary. Carter had a greater

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<sup>88</sup> ISAAC, *supra* note 1, at xvii.

<sup>89</sup> *See id.* at 60.

<sup>90</sup> *See id.* at 123-61.

<sup>91</sup> *See id.* at 241.

<sup>92</sup> *See id.* at xviii-xix.

<sup>93</sup> *See id.* at 237, 350 n.40.

<sup>94</sup> *See id.* at 105-20.

<sup>95</sup> *See* Philip D. Morgan, *Interracial Sex in the Chesapeake and the British Atlantic World*, in SALLY HEMINGS & THOMAS JEFFERSON: HISTORY, MEMORY, AND CIVIC CULTURE 52, 58-59 (Jan Ellen Lewis and Peter S. Onuf, eds., 1999).

<sup>96</sup> *See* John Dickinson: *The Slave Holder*, available at <http://www.destatemuseums.org/Information/Museums/jdp/jdpslave.doc>.

<sup>97</sup> *See* George Washington and Slavery, available at [http://www.mountvernon.org/learn/meet\\_george/index.cfm/ss/101/](http://www.mountvernon.org/learn/meet_george/index.cfm/ss/101/) (last visited March 5, 2005).

<sup>98</sup> *See* JOSEPH J. ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 175, 315-16 (1996).

<sup>99</sup> *See* Mason Mystery, <http://mason.gmu.edu/~rmellen/masonmystery.htm> (last visited March 5, 2005) (Mason "was one of the first Americans and one of the very first southern plantation owners to denounce slavery, yet he owned slaves until the day he died.").

opportunity than most men of his day to exert an influence on his society's continued endorsement of the ownership of human beings. With that opportunity came responsibility. It is entirely appropriate for us to weigh his failure to shoulder that responsibility as we assess his participation in the slaveholding culture of his time.

To some it might seem viscerally unfair to condemn centuries-old acts that were not unambiguously immoral in their own time but have become so in ours. The question that this Essay explores, however, is whether this condemnation is any *more* unfair than the decision our legal system makes to condemn a recent immigrant from a foreign culture for acts that are not unambiguously immoral in his society of origin but are in ours. There is no reason to think that it is.

Indeed, judging a historical event may well be *less* unfair than judging an immigrant's conduct. A person charged with a crime risks jail time and a monetary fine if he is convicted. His cultural defense is thus grounded in due process concerns; he claims that he should not have to surrender his liberty and property for conduct that was not actually culpable. In other words, the consequences of conviction are severe enough to the defendant that he is in some sense *owed* consideration of his individuating cultural circumstances. By contrast, when we reflect on the conduct of a person from the past, nothing we say or do can have any impact on his liberty or property. He is gone. If we judge his conduct by the standards of his time rather than ours, we do so not because we actually owe him anything or because he might suffer the physical, emotional, or financial consequences of our judgment. Perhaps we feel that we owe *his memory* a certain sort of consideration. But surely living people who risk hard time in jail have a

greater claim to careful and contextually sensitive judgment than do people who have passed on.

It bears emphasis that this Essay does not contend that prior generations are not entitled to contextually sensitive judgment. Indeed, even as to actors from prior generations who can be said to have chosen to act in accordance with the wisdom of their times rather than embrace a mainstream challenge to it, the Essay does not argue against contextually sensitive judgment. The Essay maintains simply that those historical actors do not deserve to be wholly excused for the choices they made. It will usually turn out that they also do not deserve to be wholly condemned.

Again, the criminal law helpfully models the point. Where evidence of cultural influence on behavior does not substantiate a traditional defense to criminal liability such as duress or necessity, that evidence does not simply vanish from the case. Rather, it reappears at the defendant's sentencing hearing, where the defendant's lawyer offers it anew in order to place the defendant's behavior in context and show how it is less culpable than similar behavior by a person from the dominant culture.<sup>100</sup> The purpose of a sentencing hearing is to develop as complete an account as possible of the offender, his background, and the circumstances of his offense, so that the judge may tailor the offender's punishment to his culpability.<sup>101</sup> The inquiry is "broad in scope, largely unlimited either as to the kind of information [the sentencer] may consider, or the source from which it may come."<sup>102</sup> Thus, the defendant who fails in his effort at outright acquittal on grounds of culture nonetheless has the opportunity to argue for a lesser

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<sup>100</sup> See Damian W. Sikora, Note, *Differing Cultures, Differing Culpabilities?*, *supra* note 22; Maguigan, *supra* note 31, at 63-69; Kelly M. Neff, *Removing the Blinders in Federal Sentencing: Cultural Difference as a Proper Departure Ground*, 78 CHI.-KENT L. REV. 445 (2003).

<sup>101</sup> See *United States v. Lynch*, 934 F.2d 1226, 1235 (11th Cir. 1991).

<sup>102</sup> *United States v. Tucker*, 404 U.S. 443, 446 (1972).

sentence on grounds of culture. That is, moreover, an opportunity that often ought to succeed, because a person who harms another in a way common to his foreign culture is in fact less culpable than an otherwise similarly situated American who causes the same harm with no cultural support.

Something quite similar obtains when we consider the case of a historical actor who chose to embrace rather than challenge the harmful mores of his day. If we decide that a monolithic morality in his era did not completely prevent him from choosing a different way of acting, we still owe him careful consideration of the circumstances of his time. We must ask how much debate on the moral question his society actually knew, and whether he had access to it. We must ask what the costs to the historical actor of a different choice would have been, and how able he was to pay them. The answers to these questions will, and should, temper our judgment of the choice he actually made. But they should not lead us to suspend our judgment entirely.

A final example will illustrate the point. Consider a hypothetical Virginia planter who purchased slaves in 1690. We have already seen that slave acquisition in the mid-nineteenth century was an inevitably contestable choice.<sup>103</sup> This was markedly less true in 1690.<sup>104</sup> To be sure, a religious condemnation of slavery was emerging. It was, however, new: only in 1688 did an American religious movement publicly articulate a case against slavery.<sup>105</sup> And that movement was the Quakers—a movement centered in

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<sup>103</sup> See *supra* notes 75-81 and accompanying text.

<sup>104</sup> In the late seventeenth century, the practice of slavery in the American colonies was still in the process of formation. See DWIGHT LOWELL DUMOND, *ANTISLAVERY* 5-12 (1961). While Philippe Rosenberg argues powerfully that "the development of antislavery opinion in Britain was coextensive with the institutionalization of slavery itself," Philippe Rosenberg, *Thomas Tryon and the Seventeenth-Century Dimensions of Antislavery*, 61 *WM. AND MARY Q.* 609, 640 (2004), it is nonetheless clear that late-seventeenth-century antislavery argument was neither broad-based nor loud.

<sup>105</sup> In 1688, a group of Pennsylvania Quakers issued the Germantown Petition, which maintained the slavery was inconsistent with Christian principles. See THOMAS E. DRAKE, *QUAKERS AND SLAVERY IN*

the mid-Atlantic colonies, with which our hypothetical Virginia planter would have been at best barely familiar. Other anti-slavery voices, most notably that of British slavery abolitionist Thomas Tryon, were also starting to be heard late in the seventeenth century,<sup>106</sup> but they were relatively few and had not yet begun to draw significant attention in the colonies. The development of an organized abolitionist movement in the colonies was still many decades off.<sup>107</sup> Slave ownership in the Virginia of the 1690s therefore stood in a different position from the slave ownership that followed one hundred fifty years later. In assessing the wrongfulness of a planter's slave ownership in 1690s Virginia, we must temper our judgment to take account of that different position.<sup>108</sup>

## 5. Conclusion

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AMERICA 11-14 (1950); DAVID BRYON DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* 306-16 (1966).

<sup>106</sup> See Rosenberg, *supra* note 104. *But see* BURNARD, *supra* note 8, at 105-06 ("Until 1750, antislavery sentiment was close to nonexistent.")

<sup>107</sup> See DILLON, *supra* note 80, at 87-111 (1990).

<sup>108</sup> A difficult, perhaps intractable, problem remains. Must we say that slavery in a historical era in which slaveowners had *no access whatsoever* to an antislavery discourse was not wrong in its time? Or has the entire human drama been played before a "natural law" backdrop that would condemn some practices as wrong regardless of the context in which they occurred?

This question is beyond this Essay's scope. Two observations are, however, in order. First, it is probably false that there has ever been a slaveowner at any time in history who had truly no access whatsoever to an antislavery discourse. Surely there was always such a discourse among his slaves that the slaveowner insulated himself from or chose to ignore.

Second, a very careful inquiry into the true diversity of opinion and argument in a given historical period is essential before any resort to natural law. It is tempting to see an era's prevalent discourse as more monolithic than it actually was. Trevor Burnard, for example, asserts that "until 1750, antislavery sentiment was close to nonexistent." BURNARD, *supra* note 8, at 105-06. Yet Philippe Rosenberg, a scholar whose work focuses on the precise issue of pre-1750 antislavery discourse, asserts otherwise and identifies a significant number of published critiques of slavery in the British world in the late seventeenth and early eighteenth centuries. See Rosenberg, *supra* note 104, at 640, 626. If Rosenberg is correct, and there never really was a period of institutionalized slavery in the British Atlantic without antislavery argument or agitation, then it may not be necessary to resort entirely to natural law in order to assess the wrongfulness of late-seventeenth-century slaveholding in its time.

This Essay has maintained that the cultural defense and its temporal cousin are more similar to one another than might at first appear. In both instances we wrestle with the problem of judging people's actions according to our standards rather than theirs. In both we risk unfairness and contextual insensitivity by judging harshly. And in both we risk undermining deterrence and endangering the powerless by suspending judgment. One would expect, therefore, that we would approach the tasks of judging immigrants and of judging ancestors in a similar way. Indeed, one might even expect more rigorous judgment of ancestors than immigrants, because the living, who might go to prison, have a good deal more at stake in our judgment than do the dead.

Yet often the opposite seems to occur: people give a break to earlier generations that they would not give to people from other cultures. One need only examine high school history textbooks<sup>109</sup> and roadside historical markers<sup>110</sup> to see that this is so. In his book *Lies My Teacher Told Me*, James W. Loewen offers the standard textbook treatment of President Woodrow Wilson as an example of the whitewashing we offer to Americans from an earlier generation. Most textbooks present virtually nothing to counter the popular image of Wilson as a visionary, peace-minded progressive, even though evidence abounds that Wilson was a white supremacist and xenophobe who inserted or maintained American troops in half a dozen Central American countries.<sup>111</sup> Equally forgiving is, for example, the roadside marker at the site of Wyoming's Heart Mountain Relocation Center, one of the ten camps in which the government kept Japanese Americans behind barbed wire and under armed guard from 1942 to 1945. It speaks only of the Japanese

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<sup>109</sup> See JAMES W. LOEWEN, *LIES MY TEACHER TOLD ME* (1995).

<sup>110</sup> See Eric L. Muller, *All the Themes but One*, 66 U. CHI. L. REV. 1395, 1395-96 (1999); JAMES W. LOEWEN, *LIES ACROSS AMERICA* (1999).

<sup>111</sup> See Loewen, *supra* note 109, at 22-30.

Americans' "loose[ ] confine[ment]" at the site and the "modern waterworks and sewer system," "modern hospital and dental clinic," and "first-rate schooling" that they enjoyed,<sup>112</sup> and says nothing about why they were confined or what their incarceration was really like.<sup>113</sup>

Why is it so difficult for us to bring the same sort of judgment to bear on those from an earlier time as on those from a different place? To try to answer this question is, of course, to speculate. But two reasons suggest themselves.

First, as Gary B. Nash, Charlotte Crabtree, and Ross E. Dunn argue, "[h]istory . . . is about national identity."<sup>114</sup> Just as a person's individual identity is bound up in the things and people and places he remembers, so is our collective American identity bound up in the things and people and places we remember.<sup>115</sup> "A natural instinct binds us to our ancestors with a sort of sacredness, . . . giv[ing] us a feeling of continuity,"<sup>116</sup> wrote a French textbook author over a century ago, and that seems no less true today. We therefore have something quite personal at stake when we consider the actions of those who went before us. In freely excusing the wrongs of prior generations, we are not merely honoring the maxim that one should not speak ill of the dead. We are cleaning up an important component of our image of *ourselves*. As James Loewen suggests, the problem is not that we lack the information that would lead us to think badly of Woodrow

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<sup>112</sup> Historical Marker on Wyoming Highway 14A at Mile 13.

<sup>113</sup> See Muller, *All the Themes but One*, *supra* note 110, at 1396. James Loewen offers dozens of additional examples of such sanitized signs in his book *LIES ACROSS AMERICA*, *supra* note 110.

<sup>114</sup> GARY B. NASH, CHARLOTTE CRABTREE, AND ROSS E. DUNN, *HISTORY ON TRIAL* 7 (1997).

<sup>115</sup> See *id.* at ix ("The past we choose to remember defines in large measure our national character"); see also William H. McNeill, *Why Study History? Three Historians Respond*, in Paul Gagnon, ed., *HISTORICAL LITERACY: THE CASE FOR HISTORY IN AMERICAN EDUCATION* 103-04 (1989); see also *id.* at 106 ("History, our collective memory, carefully codified and critically revised, makes us social, sharing ideas and ideals with others so as to form all sorts of different human groups. Each such group acts as it does largely because of shared ideas and beliefs about the past and about what the past, as understood and interpreted by the group in question, tells about the present and probable future.").

<sup>116</sup> Ernest Lavisse, quoted in MICHAEL KAMMEN, *MYSTIC CHORDS OF MEMORY: THE TRANSFORMATION OF TRADITION IN AMERICAN CULTURE* 289 (1991).

Wilson. It is that we do not *want* to think badly of Woodrow Wilson.<sup>117</sup> To think badly of American educator, world statesman, and Nobel Peace Prize winner Woodrow Wilson is, at an important level, to think badly of ourselves as Americans.

Second, and relatedly, if we judge the acts of our ancestors as we judge the acts of immigrants, we imperil a narrative about American history to which we cling. This is the narrative of progress. In his extraordinary account of the Vietnam War, Frances FitzGerald wrote that "Americans see history as a straight line and themselves standing at the cutting edge of it as representatives for all mankind."<sup>118</sup> This archetype of perpetual progress is at least as old as Thomas Jefferson, who wrote that a hypothetical traveler from "the savages of the Rocky Mountains eastwards towards our seacoast" would find "the gradual shades of improving man until he would reach his, as yet, most improved state in our seaport towns."<sup>119</sup> This hypothetical eastward junket, Jefferson claimed, was

equivalent to a survey, in time, of the progress of man from the infancy of creation to the present day. And where the progress will stop no one can say.<sup>120</sup>

To admit to serious wrongdoing by earlier generations is to complicate this story of American history as an unbroken upward spiral toward ever greater rectitude and justice. It is to take a narrative of comforting coherence and admit to the contingency, the ambiguity, and at times the *incoherence* of the actual American experience.

Human beings, both as individuals and in groups, tend to resist contingency, incoherence, and ambiguity in the sense they have of themselves. That is to be expected.

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<sup>117</sup> See LOEWEN, LIES MY TEACHER TOLD ME, *supra* note 109, at 35.

<sup>118</sup> FRANCES FITZGERALD, FIRE IN THE LAKE 8 (1972).

<sup>119</sup> Thomas Jefferson, quoted in ROBERT NISBET, HISTORY OF THE IDEA OF PROGRESS 198 (1980).

<sup>120</sup> *Id.*

What is striking about the cultural defense and its temporal cousin is, however, this: In the cultural context, we bolster our coherence by *rejecting* the claims of immigrants that they should be judged by their own standards. In the temporal context, we bolster our coherence by *indulging* such a claim on behalf of our forebears. But what, in the end, is the difference between immigrants and ancestors that would produce such opposite responses? What, for the purposes of our judgment, is the difference between a Laotian immigrant and Franklin Roosevelt? It is quite simply this: Franklin Roosevelt was one of "us," and the Laotian is not. Franklin Roosevelt, and the other forebears of our public and private selves, have a personal claim to our compassion that the newly arrived immigrant from a foreign culture lacks. We have seen that the newly arrived immigrant and the leader of an earlier generation present themselves for our judgment in very similar ways. Surely the fact that we see ourselves more easily in one than the other does not supply a moral basis for judging them differently.

Historian Gordon Craig has written that "[t]he duty of the historian . . . is to restore to the past the options it once had,"<sup>121</sup> but it is not just our ancestors who had options. We have them too—important ones—on fronts all around us. Antiterrorism policy. Abortion. Immigration. Health care reform. Global warming and protection of the environment. Physician-assisted suicide. On these and countless other issues—some of which we probably cannot even perceive—our progeny will judge us. They will ask whether the culture of our time was truly monolithic or whether we had access to rival traditions. They will ask whether we injured people out of compulsion or choice. These might be uncomfortable questions for them; they are surely uncomfortable questions for us. But they are the right questions.

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<sup>121</sup> See Craig, *supra* note 70, at 134.