TWO WAYS OF LOOKING AT A CRIMINAL: THE EUROPEAN/AMERICAN DIVERGENCE ON CRIMINAL PUNISHMENT

Joshua Kleinfeld*

American criminal punishment in recent decades has become vastly harsher than continental European criminal punishment. The nature and chief cause of the difference, this Essay argues, is a divergence in how the two communities view criminals. Implicit in American criminal punishment are two beliefs: first, that a serious offender's criminality is immutable—that he or she is a certain kind of morally deformed person, rather than an ordinary person who commits a crime—and, second, that this deformed character devalues the offender him- or herself. Implicit in European criminal punishment is precisely the negation of these two beliefs: criminality is always mutable and, since it never goes to the roots of a person's character, never devalues the offender. Both views, this Essay argues, are benighted. What we need is a criminal system that recognizes the worst of the worst offenders for what they are, but that does not suppose more than a sliver of actual offenders to fall into that category.

* Associate Professor Law, Northwestern University Law School; Associate Professor of Philosophy (by courtesy), Northwestern University Department of Philosophy.

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INTRODUCTION: THE GREAT DIVERGENCE

For most of its history, the United States could boast that its treatment of criminals was milder and more humane—and therefore also, it was thought, more modern and democratic, more in keeping with the spirit of the Enlightenment—than continental Europe's.[1] The heritage of England was thought to be a heritage of mildness; Blackstone had remarked that "it will afford pleasure to an English reader, and do honor to the English law, to compare [English punishments] with the shocking apparatus of death and torment, to be met with in the criminal codes of almost every other nation in Europe."[2] America's founding and the decades immediately thereafter saw a wave of criminal law reform in the "republican" spirit. Major political movements aimed to abolish capital punishment, to get rid of criminal offenses that did not cause harm, to reduce punishments of maiming and humiliation, and to make prisons places of rehabilitative penance.[3] When Tocqueville and Beaumont came to America in the early 19th century, the ostensible reason was to study America's penal experiments. Reform in continental Europe was slower and more fitful in coming, but, in the late 19th century (and after the defeat of fascism), continental Europe began to reform along the lines the United States had already charted. It looked for a time as though the two would converge and proceed thereafter in the same direction. But then something changed. Starting in the 1960s and picking up speed in the 1970s,[4] America adopted more and more severe criminal penalties as Europe adopted more and more mild ones, until today an enormous and startling chasm has opened up between the two. As Michael Tonry has commented, punishment in America today is "vastly harsher than in any other country with which the United States would ordinarily be compared."[5] "[B]y the measure of our punishment practices," James Whitman writes, "we have edged into the company of troubled and violent places like Yemen and Nigeria … China and Russia … pre-2001 Afghanistan … and even Nazi Germany."[6] There is now, I submit, no respect in which the legal systems of continental Western Europe and America are more different, or more revealingly different, than with regard to criminal punishment. As a matter of European/American comparative law, nothing looms larger than this chasm, this great divergence.

There are three things to understand about the great divergence. First is that it is both massive and legally complex; it is a case of multiple streams of law and practice running together to make a very, very strong current. What attracts the most attention is the death penalty: America engages in a form of punishment that continental Western European

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[1] LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 63, 73-82 (1993) (describing the early American ideal of "republican justice"); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICAN AND EUROPE 5 (2003).

[2] WILLIAM BLACKSTONE, 4 COMMENTARIES *370-71.

[3] FRIEDMAN, *supra* note 1, at 63-82.

[4] *See* William J. Stuntz, *The Pathological Politics of American Criminal Law*, 100 MICH. L. REV. 505, 525, 536 (2001).

[5] Michael Tonry, *Preface*, *in* THE HANDBOOK OF CRIME AND PUNISHMENT, v (Michael Tonry ed., 1998).

[6] WHITMAN, *supra* note 1, at 4.

countries consider beyond the pale of civilized state conduct. But in fact, capital punishment is just the tip of a very big iceberg. As will be elaborated below, imprisonment doesn't work the same way in America and continental Europe. The maximums are different: life in prison without parole is effectively unconstitutional in Europe, and even nominal life sentences are forbidden in some countries.[7] The averages are different: American sentences are, for example, five to ten times longer for the same conduct than those of France.[8] Minimums are also different: imprisonment simply isn't used to sanction low-level crime in much of Europe, replaced by other criminal mechanisms (fines, community service, or supervision), medical treatment, or (depending on the substantive law at issue) non-criminal regulatory control. As one German scholar puts it, "Seen from the traditional viewpoint, according to which only custodial and probationary sanctions are genuinely criminal, Germany has indeed undergone a massive process of depenalization and now has a system of social control of norm violations relying almost exclusively on economic sanctions."[9] These norms for low-level crime have tended to creep upwards, such that even major offenses don't consistently lead to prison sentences: Gunter Parche, for example, the German who stabbed tennis star Monica Seles, received a sentence of probation and did no time, according to typical German practice.[10] Prison conditions are also different: American prisons are typically cages with some rehabilitative opportunities thrown in; European prisons are typically rehabilitative universities that also confine.[11]

The divergence also goes to differences in substantive criminal law and criminal procedure in ways that bear on sentencing. America criminalizes more conduct than does continental Europe, using criminal sanctions for forms of regulatory wrongdoing and drug possession that Europe does not criminalize. America also defines some core criminal concepts (mens rea terms like recklessness or criminal negligence, for example, and liability concepts like complicity or conspiracy) more broadly than does Europe, and others (like insanity or duress) more narrowly, such that a wider and more ambiguous array of people—addicts, schizophrenics, the coerced, the negligent, the tangentially criminal—are swept into America's criminal net. Meanwhile, American double jeopardy doctrine permits a single course of conduct to be charged and sentenced under multiple statutes at once (so long as each statute has an element the other lacks), so that charges and sentences can be stacked. Charges and sentences can also be stacked by counting each individual act or victim as a "count," where European jurisdictions typically treat a single criminal incident as a single violation: a defendant who puts an album illegally on a website, which

[7] *See infra* Part I.A.

[8] WHITMAN, *supra* note 1, at 71. German terms of imprisonment are not directly comparable to American ones, but there is no doubt that they are vastly shorter, as Part I.B, *infra*, shows. Generally, these direct comparisons are difficult because crimes are differently defined and data on actual sentences and time served—as opposed to statutorily defined sentences—hard to come by.

[9] Thomas Weigand, *Sentencing and Punishment in Germany*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 188, 195 (Michael Tonry, ed., Oxford University Press 2001). Weigand points out, among other things, that 82% of all adults sanctioned in German criminal court in 1996 received only a fine. *Id*.

[10] WHITMAN, *supra* note 1, at 72.

[11] *See infra* Part I.A.

is then downloaded by third parties, might be charged with ten or hundreds of counts of criminal copyright violation in America and one in most of Europe. Finally, juvenile justice is a category of difference all its own: the balance between punitivity and social work tips toward punitivity in America and social work in Europe. In particular, America's practice of trying juveniles accused of serious crimes as adults is "something that Western Europeans find little less than shocking."[12]

The chief consequence of all these differences is the American phenomenon of mass incarceration. Both America's per capita prison rate—1% or 2% of the population on any given day—and America's astonishing total of roughly 2.3 million prisoners are the world's highest.[13] By contrast, France's, Italy's, and Spain's per capita prison rates are just over one tenth of 1%, and Germany's just under one tenth of 1%.[14] In fact, dramatic though these numbers are, they actually understate the matter. With parole and probation included, about 7.3 million Americans are presently under correctional supervision, or roughly 1 in every 45 adults.[15] When quantitative differences get this big, qualitative differences emerge as well. Imprisonment is *normalized* in America—that is, imprisonment is a normal way by which the state deals with unwanted conduct—and de-normalized in Europe. Ordinary Americans commonly know people who have imprisoned; given class and race patterns, poor or black Americans almost certainly do. Europeans commonly do not. And the people one meets in American jails and prisons are a motley collection of different types and levels of offender, while in Europe, one meets there mainly terrorists, drug dealers, extreme sex offenders, and extreme violent offenders.[16]

The second thing to understand about the great divergence is that it speaks to large issues of culture, issues that go well beyond legal doctrine. Crime and punishment always has this feature to some extent. No other area of law is also a genre of literature, theater, film, and television; from Euripides's *Oresteia* to Dostoyevsky's *Crime and Punishment* to Kafka's *The Trial* to today's *Law & Order*, criminal justice has gripped the public, and part of the reason for the fascination is the sense that crime and punishment has something to tell us about ourselves—about issues of social order and disorder, violence, wrongdoing, and the power of the state. These are policy issues entwined in unusually direct ways with matters of who we socially are and want to be—with matters of culture. For certain kinds of criminal law expressivists (my own view), the field exists to defend and reinforce violated social norms, which obviously entangles criminal law closely with matters of culture. If criminal law is thus culture-bearing, the great divergence represents a fissure within Western culture, between two of the leading torchbearers of Western culture, over issues like social order and disorder, violence, wrongdoing, and the power of the state.

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[12] WHITMAN, *supra* note 1, at 3.

[13] INTERNATIONAL CENTRE FOR PRISON STUDIES, KING'S COLLEGE LONDON, WORLD PRISON BRIEF, *at* http://www.prisonstudies.org/info/worldbrief/wpb_stats.php (last visited August 15, 2014).

[14] *Id*.

[15] LAUREN E. GLAZE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES (2008).

[16] *See* WHITMAN, *supra* note 1, at 62-64, 71.

Among those, violence deserves special note. Revulsion at violence, a revulsion that is historically and culturally quite exceptional, is one of the markers of Western modernity.[17] The great divergence seems to represent a split between America and continental Europe over how we relate and think it right to relate to violence—both violence between individuals (America has a very high violent crime rate relative to Europe) and by the state against offenders (punishment). This is to say that what is at stake in the great divergence has something to do with the meaning of modernity in the modern West. It is also to say that if we are to understand the great divergence—particularly if we are to understand not just its causes but its meaning—we must be students of culture. Contemporary legal scholarship is filled with modes of understanding derived from political science and economics, but this one is for the humanists.

The third thing to understand about the great divergence is that it is a thing of our time; to understand it is cultural self-understanding. If a professor says to her class, "In ancient Athens, juries included a large portion of the male citizenry" or "In the Civil War, the allegiance of certain states was up for grabs," astute students will appreciate that something is being said that relates to the present, but no one will think the claim is directly about themselves. If on the other hand a professor says, "It was once the case that couples did not commonly live together before marriage, but with the sexual revolution, that has changed and unmarried cohabitation is common," all students will appreciate that the change is about them, their generation. The great divergence is in the same sense about us. It began in recent memory (the 1970s) and, with upticks and downticks to be sure, expands with each passing year. As is well-known, American crime has been declining from its 1990s heights, and there are some hints that American punishment will follow and become less extreme—but in historical and comparative perspective, the decline is only a small downtick from a very high peak.[18] The great divergence might be less extreme than it was in the 1990s, but it is still our reality. All Americans and Europeans alive today were either born into it or have lived through it.

Naturally scholars have been casting around for explanations of the great divergence. (More precisely, some have cast around for explanations of the *divergence*—American harshness *and* European mildness—while others have just focused on American harshness, but all that rides on the distinction is that we have more theories about the American side than the European.) As the subject is both stimulating and unavoidably speculative, a great range of explanations have been proposed. The more prominent ones focus on racism, populism and localism, political institutions and incentives, ideals of equality, anxiety about social disorder, and the historical experience of the two world wars. I'll discuss these in Part II. What bears emphasis here at the outset is that everyone to contend seriously with this phenomenon agrees that it is multicausal and that different attitudes among American and European voters toward the moral character of crime and criminals is at least one part of it. They differ over how important a piece of the puzzle those attitudes

[17] *See* FRIEDMAN, *supra* note 1, at 74-75.

[18] *See* Stuntz, *supra* note 4, at 510. *Compare* LAUREN E. GLAZE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES (2008), *with* LAUREN E. GLAZE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES (2006).

are, but no one denies the difference in moral attitudes or denies that it has some significance. That America has a "punitive culture" is all but a platitude; that "some distinctively fierce American Christian beliefs,"[19] have something to do with the great divergence is acknowledged by all. Yet few scholars contend directly with these differences in moral outlook. Perhaps the moral differences seem too amorphous and elusive. (What exactly is a "punitive culture" anyway?) There is thus a curious gap in existing scholarship: everyone knows at some level that Americans and Europeans commonly have different moral views of crime and criminals and that those different views are part of why the two societies punish differently, but upon acknowledging that factor, most (not all) scholars turn away from it in favor of other, more tractable considerations.

The object of this Essay is to illuminate the differences in moral culture that lie between American and continental European criminal punishment. The thesis is this: embedded in America's and Europe's different practices of punishment are two different moral understandings of the criminal. American criminal punishment pictures the serious offender as someone whose criminality is *immutable* and *morally devaluing*, by which I mean not that it devalues others but that it devalues the criminal him- or herself; it makes the criminal a person of low worth rather than high worth, or even not a person but a thing. These two features are related: they go toward a picture of the offender not as a person who commits a crime but as the *kind* of person who commits crimes, a person with a character that is morally deformed, twisted to the roots. European criminal punishment, by contrast, insists that criminality is *always* mutable and *never* devaluing—criminality never reaches to a person's roots. That is, European punishment does not just lack America's picture of the criminal; it actively denies it. On a certain understanding of the concept of "evil" (which I'll explain), American criminal punishment pictures the worst offenders as evil and European criminal punishment denies that there is such a thing as evil. That these two wings of Western civilization have taken up exactly opposite positions on this matter is not happenstance: the two confronted the same cultural question and took up opposing answers to it. European and American criminal law represent a conflict of moral visions. What I mean to do in this Essay is excavate the ideas and emotions at work in that conflict of visions.

This is the kind of thesis that can easily be misunderstood, and the misunderstandings can get the whole inquiry off track. So some points of clarification are in order at the outset.

First, "American" criminal law is multijurisdictional and enormously diverse, as is "European" criminal law. Generalization of the sort my thesis requires is obviously problematic in the face of these vast, internally divergent groups. But in my view, the strong form of this objection—the claim that one simply cannot speak of "American" criminal justice or "European" criminal justice at all[20]—is not plausible. America

[19] WHITMAN, *supra* note 1, at 6.

[20] I'm not aware of any comparative lawyer who goes quite this far—most generalize as I do—though David Garland may come the closest. *See, e.g.*, David Garland, *The Peculiar Forms of American Capital*

collectively (because constitutionally) permits the death penalty; Europe collectively prohibits it. Criminal law in continental Western Europe has common points of origin (such as the civil law tradition), is shaped by some common experiences (such as World War II), and is increasingly brought together by the European Union, Council of Europe, and European Court of Human Rights, among other transnational institutions. Criminal law in the United States also has common points of origin, is shaped by common experiences (such as—crucially in my view—a high crime rate), and is brought together by the federal system and U.S. Constitution. There is a very real sense in which America has a national culture, and continental Western Europe has some (smaller) measure of a shared supranational culture. Most of all, to deny that there is any such thing as "American" or European" criminal law is also to deny by implication that there is any great divergence, that there can be such a thing as harsher "American" and more mild "European" punishment (or, presumably, any other "American"/"European" contrast). There is something implausible in this denial. If it is more precise at some level to eschew the terms "America" and "Europe," that gain in precision comes at too high a cost. A better approach is to acknowledge that American and European criminal law are two complex and internally divergent sets, but also to recognize that they are sets with some common characteristics, and cross-cultural generalization is useful in this case provided one goes about it with reasonable care. Comparative analysis is well-suited to that purpose because it permits generalization in the face of exceptions: "No absolute descriptive claim about any legal system is ever true. . . . It is precisely because they deal in relative claims that comparative lawyers can walk the high road to the understanding of human legal systems, as they have been trying to do since Montesquieu."[21] Thus my points of comparison throughout this Article will be various jurisdictions within continental Western Europe (which I'll sometimes call, for convenience, simply "Europe") and within America. Germany takes pride of place on the European side, as it is the continent's largest and by far its most influential legal system. I exclude the United Kingdom, as its punishment policies are distinctive in ways that fit neither the European nor the American side.

Second, the description above of the two moral visions, the two ways of looking at a criminal, is meant to be two models or ideal-types, rather than two exceptionless generalizations. That it oversimplifies is a feature, not a bug. Max Weber developed the concept of the "ideal-type" as a tool with which to go about certain kinds of conceptual sociology; it has become one of his most celebrated and influential concepts.[22] The ideal-type is "an attempt to capture what is essential about a social phenomenon through an analytical exaggeration of some of its aspects."[23] It is formed, Weber explains, by the "one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete individual

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Punishment, 74 Social Research 435, 437 (2007) ("America is not a single place for penological purposes, any more than is 'Europe' or 'the West.'")

[21] WHITMAN, *supra* note 1, at 17.

[22] Richard Swedbger, The Max Weber Dictionary 119 (2005)

[23] *Id*.

phenomena" to fashion "a unified analytical construct."[24] The point is precisely to elide the complexities and exceptions that crowd almost any complex social phenomenon so that we can see taxonomic aspects of that phenomenon more clearly. The "market economy," for example, is an ideal-type; there are no pure market economies in the world, but the concept enables us to understand central features of actual economies. Obviously, there will be many instances of criminal punishment in both America and Europe that do not reflect the two ways of looking at a criminal I draw above. The ideal-types, if they are valid, are valid because they get at something that is important about American and European criminal punishment and because they are comparatively true, not because they are exceptionless.

Third, my claim about America's and Europe's two ways of looking at a criminal is descriptive not normative, even though it is a claim about moral ideas. Toward the end of this paper, I'll have something to say about the justice of the American and European visions, but in the main this Essay is an exercise in descriptive moral philosophy: the interest is in "studying morality as a phenomenon or as a set of concepts, rather than in preaching."[25] As Emile Durkheim (a model for the mode of thought at work throughout this Article) puts it: "Moral reality, like all reality, can be studied from two different points of view. One can set out to explore and understand it and one can set out to evaluate it. The first of these problems, which is theoretical, must necessarily precede the second . . . ."[26] The bulk of this Essay is about the anterior problem, the conclusion is about the posterior one. Another way of putting it is that the goal here is to bring to light cultural ideas implicit in legal doctrine and practice. Criminal theory can be a form of cultural study.[27]

Finally, a clarification is in order regarding the *type* of explanation I'm offering for the great divergence. The main part of my argument is a set of observations about how America and Europe punish. I try to show that the differences between American and European punishment are not as haphazard as they might look, and what differentiates them is not just that some are harsher and some are milder. Rather the differences form patterns, and the best explanation of those patterns is the one I offer above—the two ways of looking at a criminal. One might reasonably ask whether this best explanation of practice is supposed to be a *causal* explanation or an *interpretive* one. To get a grip on that distinction, consider philosophical interpretations of tort law, where a group of theorists have asked "whether, and to what extent, our current tort practices can be understood as expressing an ideal of justice," and have answered that the very structure of a tort suit, with its confrontation in the courtroom between victim and injurer, "fundamentally implicate[s]

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[24] Max Weber, Essays in the Methodology of the Social Sciences 90 (Edward Shils & Henry A. Finch, eds. & trans., Free Press 1949).

25. RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 5 (1999).

26. EMILE DURKHEIM, *The Determination of Moral Facts* (1906), *in* SOCIOLOGY AND PHILOSOPHY 35, 35 (D.F. Pocock trans., 1953).

[27] Friedman suggests a similar thought in describing the expressive function of criminal justice: "The sections of a penal code, written in crabbed legal language, harbor an unwritten subdocument, a subdocument of community morality." Friedman, *supra* note 1, at 10.

the notion of corrective justice."[28] The tort theorists' claim is not a causal one; it is about the logic of the law from an internal point of view. The parallel, causal claim—which the tort theorists don't typically make—is that those who created and sustained tort law's structure were motivated by ideals of corrective justice and fashioned the structure they did because of their beliefs. Note that these two types of claim, interpretive and causal, are independent. Whatever motivated lawyers and judges to build the tort system they built, an interpretivist could argue, the system has developed an internal logic expressive of corrective justice—even if it got that character by accident or by some evolutionary pressure over time. The opposite is also true: those who fashioned the tort system might have been motivated by ideals of justice but, due to some accident, error, or evolutionary pressure, have fashioned a system that doesn't express those ideals. There are, in short, two *kinds* of explanation available for certain complex social phenomena like the structure of tort law or the great divergence:[29] interpretive ones, which try to reconstruct the norms implicit or immanent in the phenomenon, and causal ones, which try to explain how the phenomenon came to be and what sustains it (often by reference to the motivations of the participants). I take it that each of these types of explanation is valuable on its own terms.[30] Sometimes the two are so bound together that there is no need to make the distinction, but certain kinds of large-scale social phenomena put pressure on the distinction and bring it to the foreground. The great divergence exerts that pressure.

So, again, is my "two ways of looking at a criminal" explanation of the American/European divergence causal or interpretive? Is the claim that we punish differently *because* we look at criminals differently? Or is it that, whatever caused Americans and Europeans to fashion the systems of punishment they fashioned, they wound up building systems with an internal logic expressive of certain ideas about criminals? The answer is, "Both." The main part of this Essay is interpretive: in trying to show that the two views of criminality best explain patterns of difference between American and European criminal punishment, my goal is not to explain how the divergence came to be as to see what ideas might make sense of it. This is a philosophical goal rather than an historical or sociological one: the object is to uncover the moral ideas implicit or embedded or (better) *immanent* in criminal doctrine and practice, to bring the internal logic of an area of law to light. But that done, I will also argue that Americans and Europeans really do, more or less self-consciously, look at criminals differently and that the fissure between their moral visions drove the two populations to fashion the systems of criminal punishment they fashioned. My view is not monocausal; the other factors on which scholars have focused (racism, localism, etc.) are part of the explanation. And the conflict of visions did not arise in a vacuum. Rather, what I think happened (as elaborated below) is that America experienced a massive, half-century crime wave that Europe did

[28] Jules Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349, 349, 379 (2003). One could also cite Ernest Weinrib's *The Idea of Private Law* (1995), for the approach, among many others.

[29] The two types of explanation might be at issue in all social practices and institutions, or even all human action—everything that is the product of agency at work in the world.

[30] There are skeptics of the interpretive approach—to the very suggestion that there might be Ideas (to borrow Hegel's term) standing behind or within a social practice, or that there might be a kind of philosophical knowledge of society that is not causal knowledge. But this Essay is not the place to address that deep skepticism.

not. A certain punitive moral vision was already latent in American culture, and the crime wave spurred a great many Americans to embrace that vision. Other Americans reacted to the crime wave in ways that were less morally freighted—they might, for example, have just been trying to control certain dangers, without particularly condemning the dangerous—but those pragmatists often enough agreed with the moralists as to policy, since both sides urgently wanted to get control of crime. This overlapping consensus, in which the view of criminality as immutable and morally devaluing was a significant but not the only component, led to America's side of the great divergence. Meanwhile, spared the crime wave America experienced, Europeans could indulge more utopian ideas of human moral nature latent in European culture. So it wasn't the case that the two sides simply had different moral visions and passed laws consistent with those visions. Rather, the two sides seized upon the moral visions they needed to make sense of and respond to their circumstances, provided those moral ideas were culturally available and therefore intelligible to them.

Part IA and IB, below, defend the immutability thesis, examining how American and European responses to major crime, recidivism, and parole or release exhibit the pattern of treating criminality as a permanent or changeable aspect of an offender's nature. Part IC defends the moral devaluation thesis through an analysis of the symbolic politics connected to capital punishment. Part ID demonstrates that the conflict of visions between American and European criminal law is a conflict over the existence of human evil, at least given Hannah Arendt's conception of human evil. Part II situates the interpretive thesis of Part I within the existing literature on American harshness and European mildness, and in so doing, argues that a conflict of moral visions is a better causal explanation of the great divergence than the available alternatives.

Finally, the Conclusion takes up the normative question of whether a criminal system grounded in either the American or the European view of criminality is a good one. The material in Parts I and II is resolutely descriptive, but the normative questions cannot be held back forever. Which system has criminal justice right? Should we be proud of the ways in which American criminal punishment views criminals? Should we want our criminal punishment to look more like Europe's? My view, in brief, is: "Neither, no, and no." I find both the American and European stances—and I choose this word with care—repugnant. The European view is benighted, sentimental, and naïve, the American one reckless and brutal. What we need—and this is the normative upshot of the Essay—is a system of criminal punishment that has the capacity to see the worst of the worst criminals for what they are and punish them accordingly, but that also appreciates how very few people are the worst of the worst, and does not treat all the others in the same manner. We should be Europeans with regard to the overwhelming majority of offenders, and Americans with regard to sliver remaining.

I. DIVIDED OVER THE MORAL CHARACTER OF CRIMINALS

A. Four Formulas of Modern Banishment

Crucial to the immutability inquiry is the concept, anachronistic though it might seem, of *banishment*. Banishment is a cousin of the more familiar, bloodless concept of incapacitation but not identical to it. To incapacitate assumes that the offender is liable to re-offend and aims to prevent him from doing so. But one might incapacitate by, say, taking away a drunk-driver's car; banishment removes the offender from society or removes the offender from society in some respect. Banishment is also permanent or semi-permanent. Banishment, then, implies not just that an offender is likely to re-offend, but that he is unfit to live among law-abiding people, that there is something permanently wrong or dangerous about him. What I mean to argue here is that American criminal punishment is much more incapacitative than European, but not just that: American criminal punishment banishes while European criminal punishment never or almost never does.

Whatever happened to banishment? It is one of the fundamental forms punishment can take, and one of the basic forms it has taken from earliest antiquity through modern times—from Cain's punishment after he killed Abel ("And the Lord said unto Cain . . . '[A] fugitive and a vagabond shalt thou be in the earth.'")[31] to Homer's epics ("'Just like you, I too have left my land—/I because I killed a man . . . .'")[32] to Great Britain's penal colonies in America and then Australia (where the last convicts set sail up the Swan River in 1868).[33] This is a span of perhaps some three-thousand years, which puts banishment alongside execution, fines, violence, and shame, and far above loss of liberty, in the set of basic instruments with which the law has responded to major crime. Did this ancient practice just fade away as the world filled up? No it did not. Historians often recall a rehabilitative ideal at the origin of the prison, the notion of the prison as a *penitentiary*—a place of penance.[34] But as Holmes argued, it is characteristic of legal history that "[t]he customs, beliefs, or needs of a primitive time establish a rule or a formula," which persists long after "the custom, belief, or necessity disappears," until eventually, "[t]he old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received."[35] To speak of "rules or formulas" is to speak of legal doctrine, and that is in my view too small a container for Holmes's insight: the point holds for institutions too. The prison finally is just a persistent institutional fact about society, faithful to no one function or meaning, a shell or vase into which ideas of various sorts can be poured. One idea for which it is well-fitted indeed is that of banishing within our territory those we

[31] King James, Genesis 4:9-12.

[32] HOMER, ODYSSEY, 15:302-04 (Robert Fagles trans., 1996).

[33] SEAN O'TOOLE, THE HISTORY OF AUSTRALIAN CORRECTIONS 22 (2006).

[34] *See, e.g.*, FRIEDMAN, *supra* note 197, at 77-82.

[35] OLIVER WENDELL HOLMES, JR., THE COMMON LAW, 5 (Dover Publications 1991).

never again want within our midst. A lengthy enough prison sentence is a modern banishment.[36]

How lengthy? The obvious example is life in prison without parole ("LWOP"). Even the manner of expression captures the banishment idea: "life in prison" accomplishes nothing that "one-hundred years in prison" wouldn't, but it formulates verbally the idea that the whole of a life, whatever term of years it might prove to be, is to be spent apart from ordinary people. Lawyers and juries intuitively grasp this point. As defense counsel in a recent California capital case argued to the jury:

> Mr. Bradford will die in prison. That is no longer an issue…. In chapter four of Genesis, the Lord said to Cain, 'Your brother's blood cries out to me. You shall be banished from the land on which you spilled your brother's blood. You shall become a restless wanderer in the wilderness.'… Today there is hardly a place we call a wilderness. Instead we have to build our wildernesses. We call them maximum security prisons. The mark we put on people who have committed such crimes is a sentence of life in prison without the possibility of parole. Our banishment.[37]

That an attorney can speak to a jury in this way suggests that the exchange of meanings is at some level intelligible to all. And the attorney is right: LWOP is functionally identical to Cain's punishment. It is a way of casting a person out of the city and into the wilderness—a modern banishment.[38]

Let us, then, take LWOP to be the *paradigm* manifestation of banishment in modern times. It is not the only such manifestation. Capital punishment is a sort of banishment too—an existential banishment, as it were—and not just conceptually but historically. One of the celebrated and rather unexpected findings of legal history is that capital punishment in early modern Great Britain declined as (of all things) ship-building technology improved: "In 1660, the courts had little choice between hanging convicted felons or releasing them back into the community with a branded thumb…. Transportation provided the secondary punishment that the courts had sought."[39] Executions and banishment, that is, were substantially *fungible*, which makes good sense, for the two contend with the same problem—the problem of what to do with people who simply can't be lived with—and address that problem with what is functionally the same solution: removal.[40] Indeed, the historical connection goes deeper still. When Virginia,

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[36] *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 12, 14 (2001) ("In the last few decades, the prison has been reinvented as a means of incapacitative restraint . . . . [T]he ruling assumption now is that 'prison works,'—not as a mechanism of reform or rehabilitation, but as a means of incapacitation and punishment that satisfies popular political demands for public safety and harsh retribution.")

[37] *People v. Bradford*, 14 Cal. 4th 1005 (1997).

[38] Sharon Dolovich develops this point in *Exclusion and Control in the Carceral State*, 16 *Berkeley Journal of Criminal Law* 259 (2011), and *Creating the Permanent Prisoner*, in *Life Without Parole: American's New Death Penalty* (Charles J. Ogletree, Jr., & Austin Sarat, eds., NYU Press 2012).

[39] JOHN M. BEATTIE, CRIME AND THE COURTS OF ENGLAND: 1660-1800, at 616-621 (1986).

[40] I am not the first to think so. "Of course," the legal historian Lawrence Friedman remarks, "the ultimate form of banishment was death; from this, there was no danger of return." FRIEDMAN, *supra* note

Pennsylvania, and Kentucky drastically limited capital punishment in 1795 (responding to a politically powerful anti-death penalty movement in the early United States), they almost simultaneously started building prisons, with the legislature in one case allocating additional prison funding on the very day it passed a bill to limit executions.[41] Prisons were quite literally banishment substitutes. Even today, we know that a desire for certainty that the very worst offenders will never be released is an important factor in contemporary death penalty politics. Capital jurors' thinking has proven to be riddled with concern that somehow (clemency from the governor, a snafu in the trial, a change in the law—one way or the other) a defendant convicted of a horrendous crime might, if not executed, be released. In public opinion polls, while Americans' positions on the death penalty prove to be substantially immoveable and substantially based on considerations of justice rather than pragmatic or instrumental concerns, there is a shift when those polled are given a choice between "death" and "life without the slightest possibility of parole."[42] All this is not to suggest that the meaning of capital punishment is *entirely* a matter of banishment; capital punishment has more to it than that, as discussed at length below.[43] But the belief that the offender sentenced to death is someone who should and must be permanently banished from society is *part* of capital punishment's meaning. Thus capital punishment joins life in prison without parole as a second formula of modern banishment.

There are at least two more of these banishment formulas. We ordinarily think of prison sentences as punishment along a smooth slope: to send someone to prison for three years imposes a certain degree of hardship and for twenty years simply a greater degree of hardship, as if all the differences were of degree and not of kind. But to interpret imprisonment in that way is to elide the distinction between terms of years and stages of a life. I am the same person I was three years ago, but a rather different person than I was ten years ago and a substantially different person than I was twenty years ago. Likewise, a three year prison sentence for a twenty-year-old man would be straightforwardly a punishment, but a twenty year sentence for that same man would be the remainder of his youth. It would be to say, "The young man, with his hot blood, is banished. Let the middle-aged man, with his cooler head, rejoin society." To punish someone for a stage of life is a partial banishment. Now, it's not easy to say just how long a prison sentence has to be to constitute a partial banishment, but let us say, as a working hypothesis, that it can be no less than ten years imprisonment without or before parole.

197, at 41. Whitman makes the same point: "In mandatory life sentences, and in the return of the death penalty, we see a program of permanent incapacitation . . . ." WHITMAN, *supra* note 1, at 53.

[41] STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 98 (2003).

[42] Phoebe Ellsworth & Samuel Gross, *Hardening Attitudes*, *in* THE DEATH PENALTY IN AMERICA 90-91 (Bedeau, ed.); *see also* Samuel R. Gross, *Update: American Public Opinion*, 83 CORNELL L. REV. 1448 (1998). In America's most famous murder trial—the trial of Perry Smith and Richard Hickock in Kansas, as Truman Capote reported it—the prosecutor asks the jury: "[W]hat are you going to do? . . . Send them back to the penitentiary, and take the chance of their escaping or being paroled? The next time they go slaughtering it may be *your* family." CAPOTE, *supra* note **Error! Bookmark not defined.**, 305 (emphasis in original).

[43] *See infra* Part I.D.

Finally, to deprive a felon of civil rights, particularly participatory democratic rights like the right to vote or serve on a jury is another kind of partial banishment: an eviction from the political community, the community of citizens. The same is true of permanent, state-imposed bars on certain kinds of employment, like barring sex offenders from working around children. And the same is also true, I would argue, of privately imposed deprivations based on felony status if imposed consistently enough, such as private companies refusing to employ ex-cons or banks refusing to make loans to them. These private impositions only exist because they are publicly authorized (the state has to allow invasive questions about criminal convictions on, say, employment or mortgage applications), and they amount to a community collectively, albeit informally, evicting one of its members. Employment is also among the chief sites at which individuals are assembled in the projects of common life. It was once the case that felons lost all legal personality, including even the right to hold property or enter into binding contracts—what was called "civil death." It seems obvious that civil death is banishment. But even in the more specific ways that modern American law permanently diminishes the right of felons, there is an enduring loss of equal citizenship that amounts to a partial banishment.

We now have in view what might be termed four "formulas of modern banishment": death, life in prison without parole, prison sentences of ten years or more (without or before parole), and the analogues to civil death. The list is not necessarily exhaustive,[44] but let it serve as banishment's basic forms. What I would like to demonstrate now is that America often banishes its worst offenders and Europe, depending on the country, does so very rarely or not at all.

Capital punishment is the low-hanging fruit here, of course. Europe prohibits and America permits and practices capital punishment, as is well-known. So our search turns to sentences of ten years to life.

The German Penal Code (the *Strafgesetzbuch*, abbreviated "StGB") opens its section on "Punishments" by announcing that no one may be imprisoned for less than one month or more than fifteen years, unless they are sentenced to life imprisonment.[45] Life imprisonment may only be prescribed for murder (which Germany defines to mean intentionally killing for a small set of especially bad purposes, such as "greed," "sexual desire," or "to make another crime possible or cover it up").[46] Thus every crime but murder is punished, at first glance, by a maximum of fifteen years.

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[44] *See infra* Part I.C. It would also be interesting to examine the deportation of offenders who are immigrants. I table that issue here, however, because deportation of immigrants seems to me to involve distinct normative considerations. To banish someone from the community who has been indubitably a member of the community is to say, "We think your criminality is immutable." To banish someone from the community who was never fully a member of the community may only say, "We think your criminality is someone else's problem."

[45] Strafgesetzbuch [StGB] [Penal Code (translated by the Federal Ministry of Justice)] Nov. 13 1998, § 38 [hereinafter StGB].

[46] *Id*. at § 211.

However, these announced sentences can only be understood in conjunction with the German law of parole. Provided certain conditions (including public security) are fulfilled, German courts "shall" grant parole after two thirds of a sentence between two and fifteen years has been served,[47] and "may" grant parole after half the sentence is served.[48] Again, in a majority of cases, German courts actually do grant parole. Thus most of those sentenced even to fifteen years imprisonment (including repeat offenders, as I'll discuss later) serve seven-and-a-half to ten years. And as to life imprisonment for murder, the German Federal Constitutional Court ruled in 1977 that sentences of life without parole violate the constitutional principle of human dignity, reasoning that the right to dignity implies a right to rehabilitation.[49] Following suit, the StGB requires that those imprisoned for life be released after fifteen years provided "the particular gravity of the convicted person's guilt does not require its [the punishment's] continued execution."[50] In practice, this has meant that most life sentences function as fifteen year sentences. To speak, then, of majorities and of time served rather than formal sentences, German imprisonment maxes out at seven-and-a-half to ten years for all crimes short of murder, and fifteen years for murder. There is essentially no permanent banishment and temporary banishment exists only for the worst kinds of murder.[51]

This pattern of relatively short sentences even for major crimes and, where life sentences are nominally permitted, parole rules that undercut them, holds throughout Europe. At least six European countries do not allow for life sentences at all (Spain, Portugal, Norway, Bosnia & Herzegovina, Croatia, and Montenegro).[52] Seven others that pretend to allow life sentences had, as of September 1, 2011, no prisoners serving life sentences (Iceland, Andorra, Liechtenstein, Monaco, San Merino, Serbia, and Slovenia).[53] Life sentences are putatively possible in Italy and France, but in 1987 and 1994, respectively, Italian and French courts held sentences of life without parole to be unconstitutional because of the fundamental character of the right to be considered for release and the cruelty of forcing offenders to live without hope of release.[54] France is an interesting case study here, as it has one of the continent's harsher schemes of criminal punishment. Life sentences (la réclusion criminelle à perpétuité) are available only for extraordinary crimes like leading or organizing a drug trafficking group; certain types of murder, torture, and abduction or illegal restraint; and genocide and other crimes against humanity.[55] For these serious offenses, France establishes a "safety period" (la période de sûreté) in which the offender must genuinely be imprisoned prior to consideration for

[47] StGB § 57(1).

[48] StGB § 57(2).

[49] Judgment of June 21st 1977, BVerfGE 45 187.

[50] StGB § 57.

[51] Preventive detention will be discussed below, along with recidivism.

[52] ASTOLFO DI AMATO, CRIMINAL LAW IN ITALY 102–103 tbl.8 (2011).

[53] *Id*.

[54] Catherine Appleton & Brent Grøver, *The Pros and Cons of Life without Parole*, 47 BRIT. J. CRIMINOLOGY 597, 610 & nn. 48–49 (2007).

[55] C. PÉN. 132-23, 211-1, 212-2, 221-2, 221-4, 222-34.

parole, and the safety period is eighteen years.[56] Other, slightly less serious major crimes are subject to terms of imprisonment of ten years or longer, short of (putative) life imprisonment; these include murder, torture, barbarity against a minor, gang-based drug trafficking, related gang crimes, treasonous sabotage, and crimes related to reproductive cloning and eugenics (perhaps a nod to France's Catholicism?).[57] For these crimes, the safety period is one half of the given sentence.[58] Finally, in two instances, the court may decide not to set a safety period: murder of a minor under age fifteen where accompanied by rape, torture, or an act of barbarity, and murder of a government official due to his or her employment. But even these convicted persons are eligible for parole after serving thirty years.[59] Given our four banishment formulas, France does have "stage of life" banishment (ten years or more), but only for a small set of crimes serious enough to get a sentence of at least twenty years. Italy is also one of Europe's harsher jurisdictions. But there, with narrow exceptions, defendants serving putative life sentences who behave themselves in prison become eligible for partial parole (allowing defendants to spend up to forty-five days per year at home) after eight years and full parole after twenty-one years; defendants who do not behave themselves in prison become eligible for partial parole after twenty years and full parole after twenty-six years.[60]

Meanwhile, there have been developments on the Council of Europe level as well. (The Council, it should be remembered, is a separate body from the European Union. It has been in operation since 1949, has forty-seven member states, and houses the powerful European Court of Human Rights or "ECHR".) A four-decade process, which began with a 1977 committee opinion that "it is inhuman to imprison a person for life without any hope of release" and continued with other hints and reports over the years, culminated in 2013 with the decision of the ECHR that sentences of life without parole violate Article Three of the European Convention of Human Rights, which prohibits "inhuman or degrading treatment or punishment."[61] The Court reasoned that, if a life-sentenced offender is held "without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone," no matter how "exceptional his progress towards rehabilitation."[62] No sentence that deprives prisoners of this possibility of atonement through rehabilitation can be "just" or "proportionate."[63] Why not? One reason, strange as it might sound to American ears, is the idea that Europe's constitutional order has something to do with hope in the potential for goodness

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[56] C. PÉN. 231-32.

[57] C. PÉN. 131-32, 214-1, 214-2, 221-1, 222-3, 222-8, 222-35, 222-36, 312-6, 322-8, 411-9.

[58] Id.

[59] C. PÉN. 221-3, 221-4; s*ee also* Dirk Van Zyl Smit, *Outlawing Irreducible Life Sentences: Europe on the Brink?*, 23 FEDERAL SENTENCING REPORTER 39, 41 (2010).

[60] ASTOLFO DI AMATO, CRIMINAL LAW IN ITALY 127 (2011). The exceptions are for terrorists and mafia-related offenders who do not cooperate with the government.

[61] Vinter v. The United Kingdom, 33, 48 (Eur. Ct. H.R. July 9, 2013), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122664.

[62] *Id*. at 112.

[63] *Id*.

of all human beings. The idea is invoked most directly in Judge Power-Forde's concurrence:

> [W]hat tipped the balance for me in voting with the majority was the Court's confirmation, in this judgment, that Article 3 encompasses what might be described as "the right to hope". It goes no further than that. The judgment recognises, implicitly, that hope is an important and constitutive aspect of the human person. Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading.[64]

Most important to the Court—whether understood as implying a "right to hope" or not—was the idea of human dignity. The proposition on which the decision finally rests is that imprisoning a person "without at least providing him with the chance to someday regain that freedom" violates the dignity which is the "very essence" of the European human rights system.[65]

The ECHR's rulings are not advisory; juridically, ECHR rulings are binding upon member states.[66] As of 2013, life imprisonment without parole is unconstitutional throughout virtually the whole of Europe. Indeed, given the reasoning in the ECHR's ruling and similar rulings by individual states' constitutional courts, it is not too much to say that rehabilitation is part of the constitutional law of Europe. As the Court put it: "[T]here is . . . now clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved" because striving toward rehabilitation is "constitutionally required in any community that establishe[s] human dignity as its centerpiece."[67]

The contrast with American punishment is stark and simple. Forty-eight American states and the federal government provide for sentences of life without parole.[68] A wide variety of crimes are subject to sentences of ten years or more (our baseline for a partial banishment), even on a first offense. Under federal law, for example, these are crimes that would classify as an offense level of 32 or higher under the Guidelines, which include: murder; attempted murder for money or attempted murder resulting in permanent or life-threatening bodily injury; the worst forms of sexual abuse, such as those resulting in very serious injury or involving children or abduction; kidnapping, abduction, or unlawful

[64] *Id*. (concurring opinion of Judge Power-Forde).

[65] *Id*. at 113.

[66] A distinction is in order here between rulings that cannot be enforced (because, for example, transnational police are lacking) and ruling that are juridically or formally non-binding (because they are designated by law to be advisory). Enforcement is sometimes a problem for the ECHR because it is an international court (though its record of securing compliance is surprisingly good), but its rulings are nonetheless binding as a matter of law.

[67] *Id*. at 113-14.

[68] Baze v. Rees, 533 U.S. 35, 79 (2008).

restraint; embezzling or stealing over a million dollars from a public corporation; carjacking while using a gun so as to cause injury; various crimes that in a single incident involve multiple acts or victims who can serve as the basis for multiple consecutive counts (including such things as copyright violations); and of course a raft of drug crimes.[69] Thus, in the United States, 42.4% of all federal prisoners are serving sentences that qualify as a form of banishment—sentences of at least ten years.[70] In Germany as of 2011, only 4.7% of prisoners were serving sentences of at least ten years; in Spain, 6.8%; in France, 15.2%; and in Italy, 21%.[71] In none of those countries can the banishment be permanent, as it can be and often is in the United States.

Perhaps most strikingly, the idea that life imprisonment without parole might be unconstitutional is totally off the radar screen in contemporary American law. Parole in general and LWOP in particular turn out, when seen in comparative perspective, to be chock-full of symbolic meaning. They do not attract anything like the kind of political or scholarly attention in the United States that, for example, capital punishment or three strikes laws do, but they should, for the cultural and moral stakes at issue with parole and LWOP are as high as with almost anything else in the criminal justice system. Parole stands for the belief (or perhaps better, the commitment to believing, the duty or aspiration to believe, as with articles of faith) that all offenders are capable of leaving their criminality behind, that no one is past saving—that, in a word, criminality is mutable. None of this is protected under American constitutional law. Indeed, parole is essentially abolished under federal statutory law.[72] The difference is a matter of culture, not constitutions. There is no deep or intrinsic reason why the U.S. Supreme Court could not interpret the Eighth Amendment's provision on "cruel and unusual punishment" along the lines the European Court of Human Rights has interpreted the European Convention's provision on "inhuman or degrading . . . punishment"; the two provisions are similar in form and purpose and their minor textual differences would not constrain the U.S. Supreme Court if it did not wish to be constrained. (Just consider how flexibly the Court has interpreted constitutional terms like "commerce," "speech," or "due process.") We are not different because we have different constitutions; we have different constitutions because we are different.

Consider now the fourth formula of modern banishment: the analogues to civil death that permanently exclude American ex-cons from full community membership. Depending on the state and the crime, American felons who are not sentenced to death or life in prison are released into the community in a way that only partially leaves their criminality behind. They lose their membership status in the political community and

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[69] Guidelines §§ 2A2.1, 2A3.1, 2A4.1, 2B1.1, 2B3.1. One might question whether federal drug law doesn't distort the comparison—perhaps Europe and America punish drug crimes differently not because they have different attitudes to punishment but because they have different attitudes to drugs—but in fact many European countries oppose drug-dealing just as or almost as vigorously as does the United States, once one scales the punishments back to fit the rest of their criminal systems.

[70] *See Quick Facts*, Federal Bureau of Prisons, http://www.bop.gov/news/quick.jsp#3.

[71] *See* Council of Europe, Annual Penal Statistics 108 tbl.9 (2011).

[72] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473; *see also* U.S. DEPARTMENT OF JUSTICE UNITED STATES PAROLE COMMISSION, HISTORY OF THE FEDERAL PAROLE SYSTEM (2003).

suffer a variety of state-sanctioned private deprivations (e.g., employment opportunities) that go toward basic elements of community life. How does Europe handle these matters?

The differences start with prison conditions themselves. The German Code of Punishment Practice has a statutory requirement of *Angleichungsgrundsat*—"the principle of approximation" or "the principle of normalcy"—which "holds that prison life must resemble as closely as possible life in the outside world."[73] The German prisoner has a right to a job, as well as the duty to take a job. He earns wages on par with those outside of prison, cannot be terminated without cause, and even has a right to four weeks paid vacation (recently raised from three, but still short of the non-prisoner norm of six). Prisoners have rights to be imprisoned near their family, to see their spouses, girlfriends, or boyfriends, and to pursue new romantic relationships with those outside the prison. In political life, far from losing their right to vote like American felons, one of a German prisoner's first visitors is a civil servant whose job it is to train the prisoner in performing civic duties such as voting.[74] So far, it might seem simply that German punishment is more rehabilitative than American, and it is, but then the differences become so radical that the conceptual frame offered by the term "rehabilitation" is too small for it. After release, German criminals have a network of rights meant to promote their entire integration with and membership in ordinary German society. Perhaps the most astonishing from an American perspective is the right to have their criminal file destroyed, fingerprints and all.[75] They also have substantial rights not to have their crimes publicized. Whitman contrasts the two 1970s cases of *Paul v. Davis* and *Lebach*. In the first, the U.S. Supreme Court permitted the circulation of a photo of a "known" shoplifter, although the charges against him had been dropped. In the second, the German Constitutional Court forbade the release of a movie about a 1960s radical convicted of the terrorist murder of soldiers on the grounds that the movie would "violate his constitutional right of personality and impede the resocialization that was his entitlement as a German prisoner."[76] In Germany, there are no sexual offender registries, to say the least.

These practices are echoed in other European jurisdictions. The Italian criminal system aims to give prisoners some modicum of normalcy, with, for example, leaves for up to five days if a family member or spouse is near death and leaves of up to forty-five days per year for good behavior once a sufficient portion of the sentence has been served.[77] Giving prisoners jobs is also seen as a rehabilitative tool in Italy, and prisoners must be paid at least two-thirds of the wages paid to workers outside of the prison.[78] In France, the penal code provides for rehabilitation as of right when an offender sentenced to ten years imprisonment or less does not commit any new offense for a sufficient period of time; the

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[73] Whitman, *supra* note 1, at 87.

[74] German judges retain the power to temporarily suspend offenders' voting rights and other political rights, but it is rarely done.

[75] *Id*. at 92.

[76] *Id*. Again, Whitman associates this holding with Germany's dignity traditions.

[77] Adelmo Manna & Enrico Infante, Criminal Justice Systems in Europe and North America: Italy 50 (2000), *available at* www.heuni.fi/uploads/jrrqu.doc.

[78] *Id*.

effect of this rehabilitation is to eliminate any incapacity or forfeiture caused by the sentence.[79] Twenty-eight European countries allow either all or all but a handful of prisoners to vote.[80] And in terms of prison conditions, where many of America's prisons are essentially cages rife with gang violence and prison rape[81]—a place to house those whom we hate or don't care about—European jurisdictions generally insist that their prisons be humane, and some (Norway is a vivid example), actively aim to make prison personally enriching in a way designed to bring out the best in the prisoners.[82]

What we see here conceptually is a contrast between norms of full forgiveness on the European side and what might be called "residual criminality" on the American. The released criminal in America is a permanent suspect; that is what it means to have a record in a country like ours. Re-entry is partial and expected to be partial, which is why prison conditions can be so hellish and why it seems so strange even to suggest that ex-cons might have their criminal files destroyed. The conceptual difference between forgiveness and residual criminality reflects two ways of looking at the imprisoned and then released criminal. The criminal pictured in European practices is not a *them*, but one of us, a fellow-student who happens to be flunking the class and needs some extra tutoring. Such people landed in prison, the thought goes, not because they have a deformed nature but because they did a poor job of managing ordinary life, and the solution is to have them live ordinary life under extra supervision—as if the criminal were, not morally deformed but just poorly trained, an unskilled musician but not a tone-deaf one. The criminal pictured in American practices is a person whose crime exposes the truth about his character: he *is* a criminal; that is his nature, and efforts to change that fact are so likely to fail that they aren't worth bothering about in the first place.

Taking these four formulas of modern banishment together, we find ourselves in a landscape of symbolic practices. On one side is capital punishment, LWOP, decade or multi-decade imprisonment, and civil death and its analogues—all variations on a common theme of immutable criminality and its associated strategy of incapacitation rising to banishment. On the other side is a series of "No's" to all formulas of banishment and an emphatic, constitutionally protected "Yes" to parole, rehabilitation, and forgiveness—all variations on the theme that no crime shows the criminal to be bad by nature. Notice here that Europe's view is not just the absence or negative of America's view, but an affirmative view of its own. Europe doesn't just not share in the American belief in immutable criminality. It actively, insistently *denies* the existence of immutable criminality.

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[79] C. PÉN. 133-13, 133-16.

[80] Am. Civil Liberties Union, Out of Step With the World: An Analysis of Felony Disenfranchisement in the U.S. and Other Democracies 6 tbl.1 (2006), *available at* http://www.aclu.org/voting-rights/out-step-world.

[81] *See* Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601(2) (2011) ("[E]xperts have conservatively estimated that at least 13 percent of the inmates in the United States have been sexually assaulted in prison."); NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 25 (2009), *available at* http://www.ncjrs.gov/pdffiles1/226680.pdf ("Many still consider sexual abuse an expected consequence of incarceration, part of the penalty and the basis for jokes . . . .").

[82] *See* Alex Masi, *The Super-Lux Super Max*, Foreign Policy, July 25, 2011.

A last point: European and particularly German lawyers would likely object to the way I have run official sentences and parole together in this discussion. Something quite central to European legal culture resists going behind the norms to which the law gives official expression and questioning whether what is stated as a formal matter captures the reality of the legal system in fact. To interact with European lawyers fully socialized into their professional community can be like stepping into a time before legal realism. "The StGB states as a norm that certain crimes are sentenced to life or not less than ten years imprisonment," a German lawyer would say. "That is the sentence a judge must give and the true punishment, and nothing that parole does to shorten that sentence later on is relevant to the norm." I find this sort of formalism baffling. If a criminal system had two provisions of law, one of which stated that every theft must be punished with the gallows and the other of which stated that any taking of property not one's own is to be considered "coercive trading" rather than theft and punished with compensation to the owner and a fine, could anyone really say in seriousness that the system is committed to punishing theft with death? Even the strictest formalists should make room for reading one provision of law against another and taking account of the system as a whole. And for all who are not strict formalists, our claims about our norms should answer to the facts of what we do. When Europe's criminal systems are regarded in light of their facts, what emerges is a pattern of short sentences, with (in some jurisdictions) the possibility of a putative life sentence, with a real but fairly small chance of a term longer than a decade and an enforced demand that, in all cases, parole must be possible. A "norm" of life imprisonment in such a context is not to be taken seriously.

B. Recidivism: Punishing the Act versus Punishing the Person

American and European responses to recidivism are a special case of the membership/banishment dynamic just discussed. The goal here is not just to see *that* America commonly banishes repeat offenders and Europe does not, but to see *how* America goes about that banishment and how Europe avoids it. Serious repeat offenders present a practical problem every criminal system must deal with, and the way a criminal system deals with it speaks to the balance that system strikes between punishing acts and punishing persons.

A criminal system that took the act/person distinction completely to heart would be *memoryless*: it would ignore an offender's past offenses on the grounds that they change nothing about the instant offense. To take account of past crimes in sentencing is to cross that act/person line; it is to punish the person in light of his patterns of action. It thus implies a view of the person standing behind the crime. The obvious inference is that a repeat offender is enduringly wicked, dangerous, or damaged. Thus a criminal system that suspects offenders of being immutably criminal, that is looking for evidence to see whether the offender before it is one of the incorrigible ones—a system oriented at all times to persons more than acts—should be highly responsive to repeat offenses. On that note, I would like to point out something so obvious it can pass beneath notice: American criminal sentencing is extremely interested in offenders' criminal history.

There are two great symbols of this criminal history orientation in American law. The first is the Federal Sentencing Guidelines (along with many state guidelines). The Guidelines are structured as an X-Y graph. One axis is devoted to the offense (the act); the other to the offender's criminal history category (the person); act and actor are jointly the two major considerations in determining a sentence. Pages of text within the Guidelines go to explaining how to assign criminal history categories,[83] but simplifying greatly, each past crime leading to a sentence of one year or more moves an offender one step along the horizontal axis, increasing his or her punishment typically by about 12%.[84] Where the Guidelines encourage upward and discourage downward departures, they do so on a criminal history basis as well: judges should depart upwards where "the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes"[85] and should not depart downwards for an "armed career criminal" or a "repeat and dangerous sex offender."[86] The Guidelines were part of a turn toward determinate sentencing in the 1970s. Determinate sentencing—taking the idea in the abstract—might have been very different: it might have consisted in an insistence that judges give like acts like punishment; the objection to indeterminate sentencing might have been that judges were too concerned with offender characteristics. But American determinate sentencing is, if anything, an insistence that like acts be punished differently based on offender characteristics. It *requires* judges to focus on offender characteristics, or at least, one particular offender characteristic.

The other great symbol of America's interest in (and severity toward) offenders' criminal history are three-strikes-you're-out laws. One interesting feature of these laws is that they began with referenda, first in the state of Washington in 1993[87] and then in California in 1994.[88] The citizens intervened directly in criminal punishment with ferocious unity—72% in favor, 28% against in California—and within ten years, twenty-four states and the federal government had adopted similar measures. The statutes typically provide that a third felony conviction brings a sentence of life in prison either without parole or without parole until some lengthy period (usually twenty-five years) is served. A fair number of the statutes count drug and even non-violent property offenses among the relevant felonies; sometimes those offenses even "interact with enhancement statutes, which re-grade prior misdemeanors as more serious felonies."[89] California's version of the statute is particularly harsh: any third felony merits a lifetime sentence without parole so long as the first two felonies were either "violent" or "serious."[90] This has led to astonishing sentences: in one case, twenty-five years to life for a defendant who

[83] Guidelines § 4A1.1.

[84] For example, armed robbery with a firearm might earn a first-time offender 57-71 months in prison, but a second-time offender 63-78 months.

[85] *Id*. § 4A1.3(a).

[86] *Id*. § 4A1.3(b).

[87] Initiative 593.

[88] Proposition 184.

[89] WHITMAN, *supra* note 1, at 56-57.

[90] CAL. PENAL CODE § 667.

shoplifted golf clubs and had never been convicted of an act of violence;[91] in another, fifty years to life for a defendant who shoplifted videotapes and had also never been convicted of an act of violence.[92] But the Supreme Court upheld both sentences against constitutional challenge: the sentences were rational, in the Court's judgment, given California's felt need to see that "offenders who have committed serious or violent felonies and who continue to commit felonies" are "incapacitated."[93]

America, then, has a massive apparatus for identifying and banishing those who reveal themselves by means of repeat offenses to be of a corrupt nature. On the surface, our criminal codes consist in lists of forbidden acts, not forbidden character traits, and it is a commonplace to say that American criminal law punishes acts not people. But the creed is false: an act is the trigger for the criminal process, but once the guilt phase is settled—once it is clear that that the defendant did the thing of which he was accused—the sentencing phase is about the person at least as much as it is about his act and every past crime is evidence that the criminal standing behind the crime is permanently criminal. In America, we prosecute crimes, but we sentence criminals.

What does Europe do about repeat offenders? Recidivism poses a challenge to any criminal system that insists upon criminality's mutability, for recidivism suggests an offender whose criminality is part of his character. The act/person distinction is always unnatural to some extent. When we hear someone speak intelligently, we think she is intelligent—at least defeasibly, until more acts give us more evidence one way or the other. When we see someone betray her principles when expedient, we think she is a hypocrite, or an opportunist, or *something*—we may not know what to think or disagree about what to think, but we do not (because we cannot) take the act to mean nothing about the actor. Acts and actors are linked, and it is neither rational nor psychologically possible to unlink them, any more than it would be rational or possible to attend to effects without ever thinking about causes. Furthermore, a criminal system can't afford to be truly memoryless: it has practical problems to deal with, and serious repeat offenders are a reality no polity could just put up with. They are indeed a reality that embarrasses the very idea on which the system is in some measure based: the idea that criminality never reaches to the roots of character. Recidivism thus puts the mutability thesis under enormous conceptual and practical pressure.

The recidivism puzzle facing European law, then, is how to bow to the necessity of giving more lengthy sentences to repeat offenders without ever accusing itself of false premises. The European response to this puzzle is threefold. First, European jurisdictions have, in light of the pressures pointing against it, gone surprisingly far toward being memoryless. Legal reform throughout Europe, largely in the 1970s (a pregnant moment for the great divergence), sharply reduced the significance of recidivism. Second, European jurisdictions have made artful use of discretion to allow judges to detain serious recidivists without ever requiring them to do so (and therefore without ever having to

[91] Ewing v. California, 538 U.S. 11 (2003).

[92] Lockyer v. Andrade, 538 U.S. 63 (2003).

[93] *Ewing*, 538 U.S. at 11.

establish special laws for recidivists). And third, European jurisdictions have found ways to detain recidivists without characterizing the detention as punishment.

Italy, France, and Germany all illustrate the first two techniques: the movement toward being memoryless, and the use of discretion to contain some of the risks of being memoryless. Italy in 1974 made recidivism an optional rather than obligatory aggravating factor.[94] France permitted recidivism to raise the maximum allowable sentence for a crime, but not the minimum sentence, and left the decision as to whether to make use of the new maximum to judges.[95] (New reforms under President Sarkozy have introduced mandatory minimums for repeat offenders.) Germany until the 1970s had a recidivist statute that functioned much like the career offender provision in the Federal Sentencing Guidelines,[96] but its Constitutional Court struck the statute down. Today, Germany's basic sentencing concept is that, for any given criminal act, there is a "frame"—that is, a maximum and a minimum sentence—determined solely by retributive principles with reference to the offender's act alone. Within that retributive, act-specific frame, judges are authorized to take account of past crimes, either for utilitarian reasons (to deter additional offenses) or retributive ones (conceptualizing the past crime as making the present one more blameworthy).[97] But however long the offender's criminal record, her sentence can never exceed the window set by the instant offense. Thus, for example, theft under the StGB is punishable by imprisonment not to exceed five years or a fine;[98] it is likely that a German judge would sentence a first-time thief lightly, perhaps with a fine, and also likely that the judge would sentence a third-time thief more harshly, perhaps with prison time. (German judges usually do increase sentences for recidivists.) But if it were the thief's hundredth theft, still the punishment could never exceed five years. To do otherwise would be to violate the constitutional principle of proportionality, "which holds that sentences, though indeterminate, cannot be disproportionate to the gravity of the [individual] offense"[99]; the constitutional principle of *Tatstrafrecht*, which holds that only acts, not people, may be punished; and the constitutional principle of blameworthiness (*Schuldprinzip*). Thus repeat offenders who commit even terrible crimes again and again, short of murder, can never be sentenced to a punishment longer than the statutory maximum of fifteen years.

What complicates the German case considerably—and quite revealingly—is the third component of its response to the recidivism puzzle: detention of recidivists that is not classified as punishment. Germany has two tracks that lead to criminal detention. We

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[94] Adelmo Manna & Enrico Infante, Criminal Justice Systems in Europe and North America: Italy 42 (2000), *available at* www.heuni.fi/uploads/jrrqu.doc.

[95] *See* Mathilde Hamel, Les Misérables: French Prisons Bursting at the Seams, International Business Times (June 14, 2013, 5:48 AM), http://www.ibtimes.com/les-miserables-french-prisons-bursting-seams-1306761; Associated Press. *France: Tougher Punishments for Repeat Offenders, Including Children*, Child Rights International Network, http://www.crin.org/resources/infoDetail.asp?ID=13961.

[96] StGB a.F. 48.

[97] StGB § 46 (listing past offenses as aggravating elements in sentencing).

[98] StGB § 242.

[99] WHITMAN, *supra* note 1, at 56. This principle is also part of EU human rights law. *See* EU Charter of Fundamental Rights of the European Union, Chapter VI, Art. 49, Principles of Legality and Proportionality of Criminal Offences and Penalties.

have so far been discussing the first and more primary of those two tracks, Title One of Germany's Penal Code, entitled "Punishments." That is where the idea of a retributive "frame" is to be found. But the second track, entitled "Measures of Reform and Prevention," has provisions that look like American three strikes laws, providing for indefinite "preventive detention" for three-time offenders whose two prior sentences were for a year or more, and whom the court judges to be a be a serious danger to the community.[100] The provisions are a recent development in German law in response to public outrage over repeat child sex offenders. (Some American states also use involuntary commitment for child sex offenders, of course.) Yet what is striking about preventive detention under these provisions is that they picture the detention of recidivists as akin to involuntary commitment of the dangerously insane. When it is ordered, it is ordered "collateral to punishment," outside the track entitled "Punishment," and typically preceding or following any term of imprisonment.[101] Indeed, perhaps what is most interesting about the preventive detention law is the company it keeps. The "Measures of Reform and Prevention" target three groups: the criminally insane, drug addicts, and chronic recidivists.[102] Recidivists are thus conceptually assembled with the blamelessly or semi-blamelessly ill, and are, like the insane, in need of treatment. Indeed, the German Constitutional Court has ruled that they have a right to treatment.[103] In addition, the statutory scheme allows judges to take measures to assure the detainee's "resocialization"[104] and the detainee has a right to have his detention reviewed every two years to see if the court judges his resocialization successful.[105] After ten years, there is a rebuttable presumption that the defendant is rehabilitated and may be released.[106] (Formerly, preventive detention could not last longer than ten years under any circumstances, but a recent media firestorm concerning sex offenders led to legislative change.)

There is another reason the Measures of Reform and Prevention in Germany don't change the basic story of a comparatively memoryless system with an overlay of judicial discretion. As of 1998, the grand total of detainees under Germany's preventive detention law, out of a population of over eighty-two million, was sixty-one.[107] I contend that an exception that tiny shows, not that Germany genuinely targets serious recidivism for special punishment, but that it doesn't; this is exactly the exception that proves the rule.

It is interesting to compare in a specific case how a repeat offender would actually fare in the German and American systems. Imagine someone who robs at gunpoint three times, never causing physical injury, and never taking more than a wallet's worth of cash. Under

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[100] StGB § 66.

[101] StGB § 66.

[102] *Id*. § 61.

[103] HERBERT TRÖNDLE & THOMAS FISCHER, STRAFGESETZBUCH UND NEBENGESETZE §§ 67d, e (52d ed. 2004).

[104] StGB § 67d.

[105] *Id*. § 67e.

[106] *Id*.

[107] MEIER, *supra* note 62, at 227.

U.S. federal law, his first offense would see him imprisoned for five or six years.[108] His sentence in Germany is harder to determine, but the StGB gives a floor of five years and a ceiling of fifteen years;[109] the general rule in Germany is that the sentences of first-time offenders hew to the minimum and in all likelihood, he would be paroled in about two and a half years.[110] His second offense would lead to about a six year sentence in the U.S.;[111] Germany is again more open-ended (the offender would qualify again for the same five to fifteen year range), but perhaps the aggravating factor of a second offense would lead to a seven year sentence, three and a half years to serve. Thus far, the American sentences are roughly double the German sentences. But things change on the third offense. In America, the offender would now qualify as a career criminal, and not just that, but an "armed career criminal," giving a sentence of twenty-five years (and life in California and many other states).[112] In Germany, the offender would obviously not join the sixty-one child sexual predators presently under preventive detention. His sentence would rise perhaps to ten years, with five to serve. Suddenly, on the third offense, America's punishment is not just twice as harsh but five times as harsh as Germany's (or even more under California law).

Let's try that comparison again with another crime. Imagine an offender who twice commits forcible rape upon other adults, in circumstances involving sexual penetration and physical compulsion, but without use of a weapon and without causing serious bodily injury other than the rape itself. In New York, this crime, on a first offense, would constitute rape in the first degree, a class B felony carrying a minimum sentence of one year and a maximum of twenty-five years.[113] In Germany, it would carry a two year minimum and a fifteen year maximum.[114] Now, these are large discretionary windows, and it is difficult to say how different the actual sentences and actual time served in the two jurisdictions would turn out to be (both permit parole). But at least the statutory windows are not so different. On a second offense, however, New York would reclassify the crime, due to the prior conviction, as "predatory sexual assault"—a class A-II felony carrying a ten to twenty-five year minimum and a maximum of life imprisonment; parole would be

[108] Guidelines § 2B3.1.

[109] StGB §§ 38(2), 250(2).

[110] Recall that a majority of those imprisoned are released after serving half their sentence. In addition, German judges typically (and one would think, certainly on the first offense) sentence in the bottom third of the permitted range. GERHARD SCHAEFER, PRAXIS DER STRAFZUMESSUNG 290-92 (3d ed. 2001).

[111] Guidelines § 4A1.1.

[112] Guidelines § 4B1.4; Cal. Penal Code § 667.

[113] N.Y. Penal Code §§ 70(2)(b), 70(3)(b), 130.35.

[114] StGB §§ 38(2), 177(2). Given the usual rule in Germany that first time offenses hew to the minimum and the usual expectation of parole, this two to fifteen year window would mean something like one to two years to serve for forcible rape. I've found that even Americans who are generally sympathetic to German criminal sentencing often find something deeply objectionable about this level of mildness in this context. And in fact, the case is more extreme than it might appear: By German standards, the crime described in the hypothetical above constitutes an "especially serious" form of rape due to the sexual penetration; absent that, the use of force to compel a sexual act would ordinarily earn a minimum sentence of only one year, which often means no time to serve. *Compare* StGB § 177(1), *with* § 177(2).

impossible before the minimum of at least ten years had expired.[115] Germany would simply trend upwards within the same two to fifteen year window, with the usual expectations of parole. So again we see the pattern of roughly comparable levels of punishment on a first offense and vastly different levels of punishment for repeat offenses.

A detailed empirical study is beyond the scope of this essay, but the examples are suggestive: the difference in harshness between America and Germany appears not to be evenly distributed across multiple instances of an offense.[116] America's relative harshness swells as repeat offenses mount. If what is true of Germany is true as well for other European jurisdictions, it would turn out that a considerable portion of the great divergence consists in the difference between the American and European response toward recidivists. If that is right, it is a revealing location. It speaks to the degree to which America punishes the person, Europe the act, and thus the degree to which American condemnation of certain forms of crime become a condemnation of the criminal's enduring character, while Europe refuses to let the condemnation spread so far or sink so deep.

C. Capital Punishment: Inalienable versus Alienable Human Worth

The arguments thus far have largely tracked the immutability aspect of the concept of evil: banishment has moral overtones that tend to devalue the offender, to be sure, but its chief implication is that criminality is a permanent feature of the self. I would like now to turn to the "moral devaluation" part of my thesis: the idea that, insofar as immutable criminality shows an offender to be a morally deformed person rather than an ordinary person who commits a crime, this deformed character also devalues the offender. To put this thought most simply and starkly: a person who is fundamentally criminal is also fundamentally worthless. Capital punishment brings out most clearly this aspect of the concept.

For all the energy and controversy directed toward capital punishment, the arguments on offer about it tend toward two repetitively narrow types. First there is scientific policy analysis (e.g., arguments to the effect that the death penalty does or does not deter), and second there is moral exhortation (e.g., arguments to the effect that the death penalty is hard-hearted, barbaric, or racist). In either case, to inquire *about* the death penalty is to argue *for* or *against* it. The arguments, that is, are overwhelmingly normative. But the normative question is not the only one. Capital punishment is a matter of symbolic politics, and alongside the question of whether we should execute is the question of *what the symbols mean*. That America permits and Europe prohibits capital punishment is the most vivid element of the great divergence and to grasp what is in dispute in that divergence requires understanding what capital punishment represents.

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[115] N.Y. Penal Code § 130.95.4.

[116] Further statistical work could perhaps explore whether this pattern holds across different types of offenses—drug crimes, white collar crimes, etc.—and test it with more definite data.

Let me begin by explaining the cultural context that makes purely normative argumentation about capital punishment so inadequate to the project of understanding capital punishment. Attitudes regarding capital punishment are, relative to most policy issues, both unusually intense and intense among unusually large groups. Capital punishment is not a matter of small but galvanized groups dragging along a largely indifferent country, but a matter of galvanized majorities and even galvanized societies. On the European side, capital punishment is considered a profound human rights abuse. Its abolition is written into the basic human rights law of both the European Union[117] and the Council of Europe,[118] is a requirement of membership in either the European Union or Council of Europe,[119] and apart from those unions is commanded by the national (often constitutional) law of every European state but Belarus and Russia (where there is a moratorium on the punishment).[120] It is, like torture or legally mandated racial discrimination, the kind of thing that to the European mind falls outside the pale of civilized state conduct. In a film by the great Polish director Krzysztof Kieslowski, the protagonist, a defense lawyer, tries and fails to save the life of a young man condemned to death for murder. The penultimate scene shows the young man being hung and the film ends with the lawyer crying out into the empty sky, over and over, "I abhore it! I abhore it! I abhore it!"[121] That cry seems to me the very emblem of European opposition to the death penalty.

On the American side, the basic statistical finding is that about two-thirds of Americans support capital punishment and have supported it unwaveringly for decades, down from still higher numbers before a substantial adjustment in approximately the last ten years.[122] It's useful to distinguish American opinion on this issue at two points in time. From 1982 through 1996, in twenty-one separate GSS polls, 70% to 76% of respondents affirmed that they "favor . . . the death penalty for persons convicted of murder,"[123] with a 1988 spike to 78% and 79%.[124] When the question was framed as a choice between death and life "with absolutely no possibility of parole," 15% to 20% of that support broke away, such that roughly 50% to 60% of respondents favored the death penalty and 29% to 37%

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[117] CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION art. 2, § 2 (2000).

[118] CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, PROTOCOL NO. 13 CONCERNING THE ABOLITION OF THE DEATH PENALTY IN ALL CIRCUMSTANCES art. 1 (1998).

[119] COUNCIL OF EUROPE, *Human Rights* at http://hub.coe.int/what-we-do/human-rights/death-penalty.

[120] AMNESTY INTERNATIONAL, DEATH SENTENCES AND EXECUTIONS 26-28 (2012).

[121] THE DECALOGUE (Warner Bros. 1989).

[122] *See* GALLUP HISTORICAL TRENDS: DEATH PENALTY (2013), *available at* www.gallup.com/poll/1606/death-penalty.aspx?version=print; Samuel R. Gross & Phoebe C. Ellsworth, *Second Thoughts: Americans' Views on the Death Penalty at the Turn of the Century*, *in* CAPITAL PUNISHMENT AND THE AMERICAN FUTURE (Stephen P. Garvey, ed., Duke University Press 2001); Samuel R. Gross, Update: American Public Opinion on the Death Penalty—It's Getting Personal, 83 Cornell 1448 (1998).

[123] *See* Gross, *supra* note 122 at 1448-49. Though dated at this point, Gross's article was in its time, in my opinion, the best extant summary of empirical research into Americans' views of the death penalty.

[124] *See* Gross & Ellsworth, *supra* note 122 at 6.

favored permanent imprisonment[125]—still a decisive majority in favor of the death penalty when all instrumental, incapacitative concerns are taken out of the picture. And otherwise, to a striking and unusual extent, support for the death penalty varied little with the way pollsters framed the question (and only 5% to 10% of respondents declared themselves "undecided"). As one leading researcher put it, "Most Americans know whether they favor or oppose the death penalty, and say so in response to any question that can reasonably be interpreted as addressing that issue."[126] That support through the 1980s and 1990s was also passionate. Those polled consistently said the issue was one they feel "very strongly about," but that really doesn't do enough to get across the depth of the passion. Try this: in the Bush/Dukakis presidential election of 1988, exit polls showed that the candidates' position on capital punishment was the second most important consideration determining whom voters chose, ahead of even the candidates' party affiliation.[127] (Only abortion mattered more.) The feeling in the country was that a man with Dukakis's attitudes toward crime and criminals was just too morally unsound to be president, and every president since then, including Democrats Obama and Clinton, has gone on record to declare support for capital punishment—which is to say that America over the last three decades hasn't just approved of capital punishment but has strongly disapproved of those who oppose it; American beliefs that this punishment is right are almost as fervent as European beliefs that it is wrong. The amazing thing is that the American presidency has, as a legal matter, almost nothing to do with capital punishment. The issue is almost purely symbolic. Furthermore, until 2007, thirty-eight states provided for the death penalty, and both New York (with Pataki and Cuomo)[128] and California (with Justice Bird)[129] saw dramatic political losses inflicted by a furious populace on those who opposed it. Now, as I've indicated, the last few years has seen movement on this issue. Six states have abolished the punishment since 2007, and public support has declined. As of 2001, "[a] good estimate is that it has gone down by about 6 to 8 percentage points, from the 70-75% range, to the 63-68% range,"[130] and as of 2012, that estimate continues to hold, with greater consistency around the lower bound of 63%.[131] The country remains decisively behind the death penalty but attitudes toward it are malleable; it would be a mistake to think America or Europe are historically determined always to hold the views toward capital punishment they hold at present.

Indeed, for all this furious passion, the shape of today's controversy is of recent vintage. France had its last execution in 1977, did not abolish the penalty by statute until 1981, and just one month before abolishing it, 62% of the French people expressed support

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[125] *Id*. at 1456, tbl. 1.

[126] *Id*. at 1452.

[127] Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, 50 J. SOC. ISSUES 19, 21 (1994); *see also* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 276 (2002).

[128] Banner, *supra* note 127, at 276-77.

[129] *Id*.

[130] *See* Gross & Ellsworth, *supra* note 122 at 7.

[131] GALLUP, *supra* note 122.

for it and disapproved of its abolition.[132] Yet politicians from the Left and the Right supported the ban, and ultimately abolished by a vote of 369 to 116.[133] And, though Germany abolished it constitutionally in 1949, polls from West Germany from that year, on the very eve of the new constitution, showed that 77% of the population opposed abolition, and support stayed over 70% into the 1960s.[134] It was only in and mostly after the 1960s that European elites shifted from supporting capital punishment to disapproving of it to seeing it as abhorrent, and more recently still that popular European attitudes have come into accord with elite ones.[135] The American side is a picture of social change as well. Support for capital punishment declined throughout the 1950s and early 1960s, from about 60% support in 1949 to a low of 47% support in 1966. When the Supreme Court imposed a constitutional moratorium on the practice, it seemed on the verge of abolition. The moment passed. Capital punishment was resuscitated and support rose swiftly from its 1966 low to present levels.[136] So this strange, thick plot gets thicker: capital punishment turns out to be a central, symbolic element in the great divergence, but also a highly contingent one. Things might have been otherwise.

And yet, though the European/American division over capital punishment is of recent vintage, a civilizational fight over capital punishment has been raging continuously since the Enlightenment, and indeed, its beginning is an element in the historical definition of the Enlightenment. As late as 1760, capital punishment was a non-issue; there were glimmers of opposition (from the American Quakers for example) but no significant public controversy. The first major attack on capital punishment ever issued was Cesare Beccaria's *On Crimes and Punishments* in 1764—a work that almost immediately became one of the seminal events in the intellectual life of its time.[137] It did not command consensus, not even among other Enlightenment intellectuals; it rather began the great controversy that now continues. In Germany, for example, Immanuel Kant railed against Beccaria's position in the *Metaphysics of Morals*, calling it (with at once the percipience and strangeness so characteristic of him) the "overly compassionate feelings of an affected humanity."[138] In America during the founding period, James Madison, Thomas Jefferson, and Benjamin Franklin all staked out positions on the issue (conflicting positions, incidentally),[139] and the newly unified states clashed over it.[140] (Indeed, Virginia,

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[132] Michel Frost, *The Abolition of the Death Penalty in France*, *in* THE DEATH PENALTY: ABOLITION IN EUROPE 105, 113(Tanja Kleinsorge & Barbara Zatlokal eds., 1999).

[133] *Id*. at 495.

[134] M. Mohrenschlager, *The Abolition of Capital Punishment in the Federal Republic of Germany: German Experiences*, 58 Revue Internationale de Droite Pénal 509, 513 (1988); *see also* Allensbach Institute, Poll on Capital Punishment.

[135] Death Penalty Information Center, *International Polls and Studies: France*, http://www.deathpenaltyinfo.org/international-polls-and-studies#France; RICHARD J. EVANS, RITUALS OF RETRIBUTION: CAPITAL PUNISHMENT IN GERMANY, 1600-1987, at 802 (1998).

[136] Ellsworth & Gross, Hardening, in The Death Penalty in America 91 (Bedeau, ed.).

[137] Banner, *supra* note 127, at 91-92.

[138] IMMANUEL KANT, THE METAPHYSICS OF MORALS 475 (6:335), *in* IMMANUEL KANT: PRACTICAL PHILOSOPHY (Mary J. Gregor ed. & trans., Cambridge University Press 1996) (1797).

[139] Banner, *supra* note 127, at 88.

Kentucky, and Pennsylvania's effort to limit capital punishment is how murder first came to be divided into degrees, just as in the early common law capital punishment drove the sub-division between murder and manslaughter, and, today, capital punishment has driven the sub-division of first-degree murder into aggravated and non-aggravated forms. We are, historically considered, in phase three of that process.) By 1793, the debate had burned so hot and so long that you can find in the archives of Columbia University a class essay by a college student who, unable to think of an original topic and with the hour growing late, found himself compelled for "[w]ant of time . . . to take refuge in some old thread bare subject as capital punishment."[141] That is a lot of change for thirty years. I think it must have been something like homosexual marriage is today, moving in just a few decades from something few people had ever thought about to something an engaged person cannot help having thought about (and, as with capital punishment, clearly representing something beyond itself). In historical perspective, the present conflict over capital punishment in America is best seen as an intense period in an old fight.

Yet why should the publication of a book opposing capital punishment be one of the seminal events of the Enlightenment? Why should the controversy last for two-and-a-half centuries and engage much of the Western world? In the clamor of policy arguments about capital punishment, perhaps there are some that should persuade, but to think the controversy over capital punishment could be *understood* on such a basis—to think, for example, that the controversy over capital punishment could be understood as a disagreement over whether capital punishment deters[142]—seems to me culturally tone-deaf. The number of lives lost to or saved by capital punishment is so small relative to other causes of death in our society that the passion and controversy swirling around the issue is out of all proportion to its measurable effects. Without for a moment minimizing the importance of the lives at stake, there is a mystery in this issue that the purely normative argumentation leaves untouched. My point is not that the passion and controversy is irrational. My point is that the meaning of capital punishment is not exhausted by its measurable effects.

So I do not wish here to argue for or against the death penalty. I mean to ask a different question and indeed a different sort of question. My question is: what does it *mean* for a society to be for or against capital punishment? And to get at that question, I'll ask another, more philosophical one: what view of justice could make sense of a society's being for or against capital punishment? How does one have to think about the right to life to make sense of killing someone for committing a crime?

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[140] *Id*. at 98.

[141] *Id*. at 88.

[142] The belief that capital punishment does or does not deter is an empirical one, and furthermore an uncertain one: no social science to date has been able to demonstrate it or falsify it. *See generally* NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, DETERRENCE AND THE DEATH PENALTY (2012). It is ridiculous to think that sort of tentative empirical judgment would motivate constitutional law and galvanize a nation.

This much must necessarily be true: if the death penalty is ever just, then the right to life must be such as to be forfeit for the worst wrongdoing. And if that is true, then the feature of the person to which the right to life attaches cannot be humanity *simpliciter* (mere biological humanity), nor any aspect of humanity that is invariant with wrongdoing, such as consciousness, the capacity to suffer, the capacity for rational autonomy, or intelligence. The foundations of the right to life have to be the sort of thing wrongdoing can uproot.

The other side of the coin does not quite work symmetrically. For those who think the death penalty is never just, a possible and natural position is that the right to life is never forfeit for any wrong, and, further, to think that the right to life is never forfeit for any wrong because the right's foundations are attached to a feature of humanity that is orthogonal to wrongdoing (e.g., consciousness or the capacity to suffer).[143] But that position does not follow *necessarily* from an absolute opposition to capital punishment. One might think capital punishment always impermissible because the state can never be trusted with the power to execute, or because the risk of executing innocents is always too great, or something of that variety; one might, in other words, absolutely reject killing while yet thinking some people deserve to die. Yet I submit that, although not necessarily the case, it is contingently the case that Europe's opposition to the death penalty reflects the belief that the right to life is inalienable. Europe is generally *less* skeptical of state power than the United States. And the blazing passion behind Europe's rejection of the death penalty—the fact that Europe has written that rejection into its basic charter as a political community—suggests something more than the sort of pragmatic, slippery slope rejection of the death penalty implied by the idea that the power to execute might be abused or inappropriately applied. It suggests that Europe regards capital punishment as not merely risky but as wrong in itself, and not merely as a dangerous or abusive exercise of power but as a violation of the person killed—and that because the right to life is understood in Europe as an genuinely inalienable human right. Thus I suggest a stark contrast in the European/American divide over capital punishment. On one side is the belief that the right to life is forfeit for wrongdoing and on the other, that it is inalienable no matter the wrongdoing.

Why would one think that the right to life is or isn't forfeit for the worst wrongdoing? That question could, I think, be answered in many different ways; without pretending to exclude all rivals, then, let me offer one possible answer, one pattern or line of thought that I believe sheds light on the European/American difference. There is a body of work on why human beings have rights at all—what philosophers sometimes call the question of "moral status." Within that literature, one common move is to locate the foundations of human rights in human *worth*—in the ways in which human beings are characteristically and distinctively precious, valuable, or sacred. "[R]ights are what respect for worth

[143] We are speaking here of moral or natural rights—"rights" in the sense the Declaration used the term when it held "that all men . . . are endowed by their Creator with certain unalienable Rights" (and first among them, incidentally, "Life")—rather than merely positive rights. Obviously an absolute prohibition on capital punishment means that, as a matter of positive criminal law, the right to life is never forfeit for any wrong.

requires," as the philosopher Nicholas Wolterstorff puts it.[144] One could also say, "Rights are what respect for dignity requires," where "dignity" is understood as a way of expressing the idea of great or measureless worth. It is this line of thought that enables claims of the form, "Human beings have a right to life because human life is precious." To say that is to say, "Human beings have a right to life because human life is of great worth; to give due recognition to that worth is to give due protection to those lives." Of course, it remains to explain that preciousness: to ground human rights in human worth is only to begin an explanation, not to finish one. But the focus on human worth gives the explanation a certain structure: some feature or capacity of human beings will be identified and defended as having great moral importance, and rights will then be seen as an implication or in some other way a concomitant of that feature or capacity.

This structure also implies a certain analysis of what it is to wrong someone. "To wrong a human being," Wolterstorff explains, "is to treat her in a way that is disrespectful of her worth" or "incompatible with an acknowledgment of her true worth."[145] To wrong someone is thus to devalue them. Often, the wrongdoer does not see himself as such because he thinks the person in question is not entitled to much respect to begin with: "[T]hose members of the American military who were guilty of torturing and sexually humiliating Iraqi prisoners in the Abu Ghraib prison complex near Baghdad would have thought it wrong to treat an upstanding American this way. The Iraqi prisoners were a lower grade of human beings. In treating them thus, one was not showing disrespect for their worth. They did not have much worth to show disrespect for."[146] Likewise, to borrow Wolterstorff's other examples, of the Antebellum Southerners who enslaved blacks but would have thought it wrong to enslave whites and the Serbian solders who raped Bosnian women but would have thought it wrong to rape Serbian women. This is not to say it is impossible to treat a person inconsistently with that person's worth knowing one is doing so—knowing one is doing a wrong. But it is often the case that a wrongdoer regards his or her victim as a being of low worth. It is also the case that people who take lives are not seen as wrongdoers when their attributions of dis-worth are generally seen as correct. We can slap and kill the mosquito who lands on our arm because we regard the mosquito as being of fairly low worth; if we thought its life to be as precious as a human being's, we could not kill it in response to the irritation of its landing on our arm. Likewise when we kill the pig for its meat. There are those, of course, who think it is wrong to kill the pig for its meat or even the mosquito for its irritation, but to the extent they claim that it is wrong, they argue precisely that the lives of other animals are of high worth. Even as we may disagree in our assessments of worth, the structure holds; indeed it explains the nature of the disagreement.

Let us return to the interpretation of capital punishment with this structure in place. A person's right to life on this line of thought rests on that person's worth. To say as a claim of justice that a person lacks the right to life, then, is exactly to say that the person is

[144] NICHOLAS WOLTERSTORFF, JUSTICE: RIGHTS AND WRONGS 317.

[145] *Id*. at 296-97.

[146] *Id*. at 302.

worthless; to say as a claim of justice that a person's right to life is forfeit for wrongdoing is to say that the person's worth is *lost*. Capital punishment thus represents a statement about the value of the person executed. He is subject to death because he is no longer valued. The impulse to kill him may come from anger at his deeds, disgust with his character, a desire to deter others, or just the cost of keeping him alive in prison. It is not the impulse to kill the worst criminal offenders that needs to be explained; nothing could be more natural. What needs to be explained is why the offender is not protected by the right to life. My point is that the offender is not protected by the right to life because he is regarded as being of low worth. Now, all of Wolterstorff's examples of such claims (the Abu Ghraib prisoners, enslaved blacks, raped Bosnian women) involve members of disfavored groups. The trigger for capital punishment in America is not being a member of a disfavored group (tabling race issues for the moment) but committing a terrible crime. Thus the assertion in America is not merely that some people are worthless but that *wrongdoers* are worthless, provided they are wrongdoers of a serious enough sort.

If the above steps are true, the following logic describes majority attitudes to capital punishment in America: people's rights, including the right to life, depend on their worth or value as human beings, and their worth or value as human beings in turn depends on their moral humanity. The very worst kinds of wrongdoing, the sort of wrongdoing we call "inhuman" (a revealing term), thus deprives a person of value and his or her right to life is then forfeit. The parallel logic on the European side would be this: people's rights, including the right to life, depend on their worth or value as human beings, and their worth or value as human beings depends on their biological humanity. Wrongdoing can have nothing to do with it for no matter how serious the wrongdoing is, Europe thinks the right to life is never lost. No one is ever worthless, or a monster, or a blight upon the land; even the most vicious Nazi killer is biologically human and therefore precious. In Europe, this humanness *simpliciter* would be termed "dignity." Dignity as Europe conceives it bestows value and does not depend on moral decency.

This is, let me emphasize, one interpretation of what capital punishment means when understood as a symbol in a centuries-old, civilizational controversy. In my view, capital punishment has been an important issue in the intellectual history of the modern West because the question of death for wrongdoing bears on the nature and grounding of all rights. But other interpretations are possible and, while I'll speak to a few of them in the historical discussion of the next Part, my point here is not to establish this interpretation as against all others. It is rather to explain why capital punishment implies two different ways of looking at the worst criminal offenders. Europe pictures the worst criminal offenders as biologically human and therefore of worth; America pictures them as morally inhuman and therefore as worthless.

D. The Concept of Evil

The distinction between immutability and moral devaluation is in a certain sense artificial. The two in practice are woven together; they represent a unified idea of what it is to be a serious criminal. American criminal law pictures offenders as people whose

character is ruined or morally twisted to its roots; European criminal law insists that the prick of criminality never goes so deep. The disagreement sounds very much like a disagreement about the existence of human evil. I turn to that possibility now.

"Evil" is an uncomfortable and disquieting thing to talk about in academic legal writing—even a sort of taboo. The concept seems antiquated, religious, absolutist, and rigid, an intellectual inheritance from another age that we neither need nor should want in this one. Contemporary criminal law scholarship is almost totally silent on the concept of evil.[147] But I submit that the silence should be pierced and the taboo lifted, not because the belief in evil is true or false but because the concept is necessary to understand certain cultural currents at work in American and European law. If we look at American and European criminal punishment from the standpoint of tracking those law/culture links, what we see is that, much as we might pretend to live in a cool-headed and rational modernity, there are older, darker, and more mysterious ideas at work in our law. Actually, that shouldn't be surprising: criminal law, particularly in a democratic society, is the yield of a culture, and American culture is anything but silent on the matter of human evil;[148] why should one, then, expect American criminal law to be above the concept? And finally, even if the concept of evil is pernicious (as I think it is in some instances), surely we do best to see clearly the role it plays in our practices, if only to correct those practices on the basis of a clear understanding. We should lift the lid on the dark passions under the surface of the criminal law.

There is actually a magnificent intellectual tradition centered on the concept of evil, unpopular as that concept is in contemporary academia. Evil was a subject of interest in

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[147] Not one piece of legal writing on domestic criminal law explicitly thematizes the concept of evil, according to my research (with the possible exception of Klaus Lüderssen's *Enlightened Criminal Policy, or the Struggle Against Evil*, 3 Buff. Crim. L. Rev 687 (2000)). Usually, when legal scholars use the words "evil" and "criminal" in one breath, they have in mind international law's crimes against humanity. *See, e.g.*, Roger S. Clark & Madeleine Sann, *Coping with Ultimate Evil Through the Criminal Law*, 7 Crim. L.F. 1 (1996). Martha Duncan has stressed the "metaphor of filth in criminal justice" in her explorations of the premises and motivations behind criminal law. Martha Grace Duncan, Romantic Outlaws, Beloved Prisons: The Unconscious Meanings of Crime and Punishment (1996). There are also a few pieces that have explicitly opposed the notion of criminal evil (and many that have opposed it implicitly). *See, e.g.*, Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 Cardozo L. Rev. 1019 (2004). Perhaps legal scholarship on criminal law has neglected the concept of evil in part because of the dominance of empirical, social scientific approaches in the wider field of criminology. Yet the sociologist James Q. Wilson has come as close as anyone to writing directly about criminal evil, though the concept never quite comes to the surface. *See, e.g.*, James Q. Wilson & Murray J. Herrnstein, Crime and Human Nature (1985).

[148] President George W. Bush, Address on the State of the Union (Jan. 29, 2002) ("We've come to know truths that we will never question: Evil is real, and it must be opposed."). Smart popular writing has edged toward the concept in the context of crime. At the climax of Truman Capote's famous report on the slaughter of the Clutter family, *In Cold Blood*, the killer says: "Am I sorry? If that's what you mean—I'm not. I don't feel anything about it. I wish I did. But nothing about it bothers me a bit. Half an hour after it happened, Dick was making jokes and I was laughing at them. Maybe we're not human. I'm human enough to feel sorry for myself. Sorry I can't walk out of here when you walk out. But that's all." Truman Capote, In Cold Blood 290-91 (1965). Semi-scholarly, semi-popular writing about crime has certainly emphasized moral ideas. *See, e.g.*, William J. Bennett et al., Body Count 13 (1996) (linking "human carnage" and "moral poverty").

ancient times, to start with. Saint Augustine viewed it as "naught but a privation of good"—as fundamentally an absence, a lack, rather than a positive force of its own.[149] There is something characteristically classical about this sort of view. Plato similarly treats evil as a form of privation when he argues that people only do evil from ignorance of the good—evil as intellectual failure.[150] Christine Korsgaard has labeled this "the privative conception of evil," for which "[e]vil is weakness," the evil person someone "pathetic, and powerless—the drunk in the gutter, the junkie, the stupid hothead."[151]

The Christian tradition came in time to a different view, regarding evil as an existential choice to stand in opposition to God. One sees this thought in the Satan of *Paradise Lost*, cast from heaven to earth, in one moment despairing his rebellion against God and in the next resolving himself upon it:

> O then at last relent: is there no place
> Left for repentance, none for pardon left?
> None left but by submission; and that word
> Disdain forbids me, . . .
> . . .
> So farewell hope, and with hope farewell fear,
> Farewell remorse: all good to me is lost
> Evil be thou my good; ….[152]

For Milton, evil was not, as it had been for the ancients, essentially a privation, but was rather a misuse of free will—a certain kind of wrongful choice. Christine Korsgaard calls this "the positive conception of evil," where "[e]vil is power and goodness is weakness" and the evil person is someone "ruthless, unconstrained."[153] (Certainly that is one's impression of Milton's Satan.) Kant too, standing within this broadly Christian tradition, characterized evil as basically a misdirection of free will, an "inversion" of our "maxims."[154] Evil thus being fundamentally a certain kind of choice, its ground was not intellectual failure, as it had been for the ancients, but a deformation of the will—a vice. For Milton, the vice was pride. For Kant, it was "venality or selfishness . . . . His model, when he thinks about evil, seems to be the cheat, the chiseler, the guy who bends the rules in his own favor, not the tyrant or the mafia kingpin, and not the serial sex killer or the

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[149] AUGUSTINE OF HIPPO, THE CONFESSIONS OF ST. AUGUSTINE 37 (J.G. Pilkington trans., Easton Press 1979) (397-401 A.D.).

[150] PLATO, *Protogoras*, *in* SELECTED DIALOGUES OF PLATO 25 (Benjamin Jowett trans., Modern Library Classics 2001) (380 B.C.?). There's reason to question whether the ancients really had in mind what we do when they used the term "evil" in this way. Nietzsche has argued that the concept of evil is a Judaeo-Christian one. *See* FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALITY (Keith Ansell-Pearson ed., Cambridge University Press 1994) (1887) (contrasting the ancient distinction between "good" and "bad" with the Judaeo-Christian distinction between "good" and "evil").

[151] CHRISTINE M. KORSGAARD, SELF-CONSTITUTION: AGENCY, IDENTITY, AND INTEGRITY 170 (2009) ("According to one view, the bad or evil person is pathetic, and powerless . . . . Call that the privative conception of evil: evil is a privation, a lack.").

[152] JOHN MILTON, PARADISE LOST V.73-110.

[153] KORSGAARD, *supra* note 151, at 170-71.

[154] IMMANUEL KANT, *Religion within the Boundaries of Mere Reason*, *in* RELIGION AND RATIONAL THEOLOGY (Allen W. Wood & George Di Giovanni trans., Cambridge University Press 1996) (1793).

addict."[155] Crucially, this conception of evil as choice also implies that evil is not permanent or irrevocable. Bad choices can be made into good choices; a free will can reverse itself. Evil, on this broadly Christian view, is always open to rehabilitation.

A darker view emerged with the peculiar horrors of the twentieth century. Hannah Arendt, in her struggle to find a conceptual apparatus adequate to twentieth century genocide and totalitarianism made the concept of evil one of her basic intellectual projects: "I have been thinking for many years," she wrote, "or, to be specific, for thirty years [since the Reichstag fire of 1933] about the nature of evil."[156] She expressly rejected the Kantian (and Miltonian) view: Kant and those of his era, she argued, did not understand that there can exist "goodness beyond virtue and evil beyond vice," that there can be a form of evil that "'partakes nothing of the sordid or sensual'" but is "'a depravity according to nature.'"[157] In trying to wrap her mind around this sort of "depravity according to nature," Arendt actually proposed two versions of the concept of evil. The first was her concept of "radical evil"—a demonic opposition to the good that starts in the "lust for power" but over time becomes a desire "not only to kill whoever is in the way of further power accumulation but also innocent and harmless bystanders, and this even when such murder is an obstacle, rather than an advantage, for the accumulation of power."[158] Later, after seeing Adolf Eichmann on trial in Jerusalem and being struck by his bureaucratic thoughtlessness, his utter blankness of mind, she changed her view: "It is indeed my opinion now that evil is never radical, that it is only extreme, and that it possesses neither depth nor any demonic dimension. . . . It is 'thought-defying,' as I said, because thought tries to reach some depth, to go to the roots, and the moment it concerns itself with evil, it is frustrated because there is nothing. That is its banality. Only the Good has depth and can be radical."[159] The banality of evil refers to the capacity of some human beings to be un-adhered to the good, unattached to it, such as to be able not to think or care about the moral character of what they do.

Within Arendt's two proposals are the seeds of a workable conception of evil with which to probe European and American criminal law. What she gives us is psychological characterization, not philosophical definition (philosophical definition was not her style), yet it is possible to abstract a definition from her two proposals. First, in rejecting the Kantian and Miltonian conception, she came to see evil not as a certain kind of choice but

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[155] KORSGAARD, *supra* note 151, at 171-72.

[156] Letter from Hannah Arendt to Samuel Grafton (1963), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=mharendt_pub&fileName=03/030160/030160page.db&recNum=21 (last visited August 19, 2013).

[157] HANNAH ARENDT, ON REVOLUTION 83, 81-83 (1963) (quoting HERMAN MELVILLE, BILLY BUDD).

[158] Hannah Arendt, "Ideology and Propaganda," Lecture at the University of Notre Dame, (1950), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=mharendt&fileName=05/051480/051480page.db&recNum=0 (last visited August 19, 2013).

[159] Letter from Hannah Arendt to Gershom Scholem (July 24, 1963), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=mharendt_pub&fileName=03/030170/030170page.db&recNum=32 (last visited August 19, 2013).

as a certain kind of self—as, again, a "'depravity *according to nature*.'" She (and Melville, whom she was quoting) meant by this not the biologist's conception of nature as one's genetic makeup; she was not taking a position in the nature/nurture debate. She meant the humanist's conception of *a* nature, of a person's essential and enduring self. There is thus something immutable in evil, something twisted in a way that cannot be undone by simply re-orienting the will. If the self were a ship and the world the sea, for Kant and Milton, evil is a direction in which to sail, while for Arendt, evil is the ship. That is not to say that, evil being a part of one's essential and enduring self, it is *totally* immutable; even the most deeply rooted elements of a person's makeup can change. But it is largely immutable, like a naturally curious person's curiosity or a naturally neurotic person's emotionality. Evil is a deeply rooted, totalizing, and lasting or permanent form or kind of character.

Second, in Arendt's early concept of radical evil, there is the notion of an active hostility, a malevolence, toward the good things in the world. Arendt speaks of killing innocents "even when such murder is an obstacle, rather than an advantage"—thus gratuitous murder, murder for its own sake. She had in mind the Nazi decision to continue exterminating Jews after it had become clear that the resources required for the genocide were hampering the German war effort.[160] But there is no reason to limit the scope of her insight to that context. Philosophers conventionally use the notion of "the good" as an umbrella term encompassing all the good things in the world (or rather, the thing in virtue of which all those good things are good).[161] Thus "the good" can be entirely various, encompassing everything from other human lives, to objects of beauty, to relationships held together by love or friendship, to societies held together by justice, to whatever else is the sort of thing we recognize as being fundamentally worth creating or preserving. What Arendt was getting at in her notion of radical evil was a disposition of hostility or malevolence toward those things—toward the good itself, in whole or in part. Let us then take this stance toward the good as the second element in our philosophical definition of evil.

Third, in Arendt's concept of the banality of evil—which in my view should not replace the concept of radical evil but complement it—there is again the notion of a certain disposition to good things in general, to "the good." But it is a different disposition. Some have thought Arendt's treatment of evil as "banal" trivializes evil, removes from it the sting of serious condemnation, but that misunderstands her. It was Arendt's insight, as she watched Eichmann, that evil of the very worst sort manifests not just in the powerful malevolence of an Iago ("I hate the Moor. . . . I'll pour this pestilence into his ear, . . . [And] make the net/That shall enmesh them all."),[162] but also in the carping rationalizatons and willful indifference of small souls whose essential failure is the failure to think or care about what they are doing at all. Indeed, in a way, the banality of evil almost doubles back to the Platonic conception of evil as intellectual failure—the classical conception plus modern bureaucracy. There is a great deal going on in this line of Arendt's thought, but

[160] Arendt, *supra* note 158, at 3.

[161] *See, e.g.*, MARILYN MCCORD ADAMS, HORRENDOUS EVILS AND THE GOODNESS OF GOD 2 (1999).

[162] WILLIAM SHAKESPEARE, OTHELLO act 1, sc. 3, act 2 sc. 3.

for purposes of philosophical clarity, let us treat this rich notion of the banality of evil in a relatively simple way: as *indifference* to the good, or at least, indifference to the good when weighed against even quite trivial varieties of self-interest. Thus we have a third element in our philosophical definition of evil.

Assembling these pieces, we come to this: human evil is the possession of a certain kind of self, one that is twisted or fallen such that it stands toward the various good things in the world in a relationship marked at the core by indifference or hostility. In short, evil is an immutable indifference or hostility to the good. Now, Arendt advises that if we are to come to terms with good and evil, "we had better turn to the poets."[163] Earlier I quoted Milton's grandiose conception of evil in Satan's soaring, defiant verse. It is great poetry. But it is, to my ears, psychologically ridiculous. There is no such thing, or anyway, if it has ever existed, it is an obscurity of no great social importance. If we want to understand evil, forget Milton. We'd do better to read Don DeLillo:

> He comes across the sleeping girl and feels a familiar anger rising and knows he will need to do something to make her pay. He's on her like that. She tries to fight but does not cry out. He beats her with the end of his fist, sending hammerblows to the head. Struggle bitch get hit. He wants to turn her over on her face and put it up inside her. She fights and whisper-cries in a voice that makes him angrier, like who the fuck she think she is, ... Either way he's gonna hit her, she struggle or not, and he looks away when he does it, sidle-type. No eye contact, cunt. Last woman he looked at was his mother. After he does it, driving it in and spilling it out, he hits her one last time, hard, whore, and drags her up on the ledge and leans her over and lets her go. You dead, bitch. Then he goes back to thinking his nighttime thoughts.[164]

This, *this* is the real thing. Not the proud and complicated choice of a fallen prince to fight a king, but the blank and feral desire to harm of the kind of person who hates what is good, or just doesn't give a damn about it, because it is good, or because he doesn't care about it, or for no reason whatsoever. That is the evil of our modern era. Are there such people in the world? American criminal law, could it speak, would say there are; European criminal law, could it speak, would say there are not.

An interesting feature of this concept of evil is how un-Christian it is, at least for certain Christian denominations. (The denominations differ a great deal on this point.) I have been anxious to defend the concept of evil against its "cultured despisers,"[165] but there are those in our society—often religious and often Christian—for whom the concept does not need defending: they have a theologically rooted understanding of evil and know themselves to believe in the concept. Yet the concept they believe in is not *this* concept of evil, not the one to be found in American criminal law—for if I'm right about American criminal law, it contains a concept of evil with no forgiveness in it, no salvation or grace, no respect in which the evil person remains in the image of God. Just as secular

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[163] ARENDT, *supra* note 157, at 82.

[164] DON DELILLO, UNDERWORLD, 816-17 (1997). The poet/novelist Michael Ondaatje called the book "an aria and a wolf-whistle of our half-century." *Id*., front matter.

[165] *See* FRIEDRICH SCHLEIERMACHER, ON RELIGION: SPEECHES TO ITS CULTURED DESPISERS (Richard Crouter, ed., Cambridge 1996) (1799).

Americans might be stunned to find a concept with such ancient, religious inflections in their law, so many religious Americans should be stunned to find that concept so cut off from whatever Christian roots it might once have had.

III. CAUSES: WHY HAVE EUROPE AND AMERICA DIVERGED?

The object of this essay thus far has been to expose the assumptions about the character of criminals embedded in American and European criminal punishment. I have not taken a position on why, causally, American and European criminal punishment have become so different. But one can scarcely take account of the divergence without asking what is going on in our country, and what is going on in Europe too. And once one begins that discussion, a multitude of possible explanations bursts forward—some more interpretive, some more causal (the variety of "takes" on the great divergence makes that distinction difficult to apply); some inconsistent with one another and competitors, others potential complements; some focused broadly on the whole phenomenon of the great divergence, others focused narrowly on a part of it, such as capital punishment. It is not realistic for me here to eliminate all possible rivals to the interpretation I've given. But I'd like to comment on four rival explanations that are particularly prominent in the literature, and also to indicate how my interpretive view "fits" with and complements certain causal explanations.

One alternative explanation holds that criminal punishment in America and Europe diverged because Europe experienced the horrors of fascism and learned from experience how terrible the power of the state can be, while America did not. This is often the story Europeans tell themselves,[166] but I think there are four problems with it. First, it only explains why Europe would become more mild, not why America would become more severe. (There is no question that America has become more severe; it is not as though the divergence is merely a matter of America holding steady while Europe changes.) Second, the timing doesn't fit: the changes in American and European criminal punishment and the associated attitudinal changes among Americans and European peoples date mostly from the 1960s and 1970s and from the generation who came into adulthood at that time, not from the 1940s and 1950s and the generation of World War II.[167] The social revolution of 1968 (which was, incidentally, experienced in Europe at least as intensely as it was in the United States) probably has more to do with the transformation in criminal justice than fascism. Third, as touched on above, Europe is generally *more* statist than the United States. It seems implausible to think Europeans would become suddenly skeptical of state power and Americans suddenly trusting of it in the criminal justice context where the positions are reversed in other contexts. Indeed, one of the mysterious features of the great divergence is that not only the society, but the very individuals most skeptical of the state

[166] *See* RICHARD J. EVANS, RITUALS OF RETRIBUTION: CAPITAL PUNISHMENT IN GERMANY, 1600-1987 (1998).

[167] Whitman also rejects the fascism-based explanation for timing reasons—although he takes the key period of time to be *before* the experience of fascism, directly contrary to my view. WHITMAN, *supra* note 1, at 16.

in America are commonly the ones most sympathetic to the use of state power involved in harsh punishment, while the society and even the very individuals with the most faith in the state in Europe are the ones most in favor of mild punishment. Attitudes to state power are not driving American or European attitudes to criminal punishment. Fourth, if the turning-away-from-fascism explanation were true, it should be true above all of Germany, which experienced the worst of fascism and which prohibited capital punishment in its constitution of 1949, in the immediate wake of the Nazi experience. And indeed, this is precisely the story modern Germans tell themselves. But the story historians tell is this:[168] as the Nuremberg and other war crimes trials got underway, a group of influential Right-wing German politicians with Nazi sympathies became anxious to save their brethren from execution. They formed a political alliance with a group of Left-wing politicians whose parties had been opposed to capital punishment since the Revolution of 1848. Those two together inserted the ban in the new German constitution, after which those on the Right immediately wrote letters to the Allies insisting that, as a matter of high principle and German law, the former Nazis be spared. That is not to say that modern German opposition to the death penalty is insincere or unrelated to the cultural memory of Naziism; clearly, a new generation has re-fitted old law with new meanings. And this is not to say that no one among the German leadership at the time of the abolition was acting on principle; the Left was acting on a principle it had embraced for a century. But it is to say this: *none* of the major actors who banned capital punishment in the 1940s had "learned from fascism how terrible the instrument of state killing can be."

Two other alternative explanations, often focused on capital punishment, should be taken up together. One regards American harshness as a manifestation of American racism. The other regards it as a manifestation of American populism (including state control of penal codes, the election of judges and prosecutors, and other features of popular criminal justice). There are kneejerk versions of these explanations, but there are sophisticated versions of them as well, and among the best of them is David Garland's remarkable study of capital punishment, *Peculiar Institution*, which ties the racism and populism explanations together in a synergistic way.[169] Garland begins with Foucault's famous depiction of capital punishment in *Discipline and Punish*, in which Robert Damien is torn limb from limb in the public square in a "theater of cruelty" meant, Foucault argues, to impress upon the populace the awesomeness of the absolute power of the sovereign state. Arguing that Foucault's theory is dated and inapplicable in modern America, Garland then substitutes for that image another, which he thinks represents the core meaning of American capital punishment, in which Henry Smith, a black man and former slave alleged to have sexually assaulted and murdered a white child, is ceremonially lynched in in Paris, Texas, in 1893. What happened in the Smith lynching, Garland argues, was an explosive, peculiarly American combination of racism and populism:

> Contemporary capital punishment continues to have many substantive features in common with those lynchings that it does its best to disavow. It continues, where

[168] *See generally* EVANS, *supra* note 166.

[169] DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION (2010).

> executions are concerned, to be concentrated in the South. It continues to be driven by local politics and populist politicians. It continues to be imposed by leaders and lay people claiming to represent the local community. It continues to give a special place to victims' kin. It continues disproportionately to target poorly represented blacks, convicted of atrocious crimes against white victims. The passions aroused by heinous crimes, together with racial hatreds and caste distinctions, still provide much of its energy.[170]

Localism can have other effects as well, Garland argues, as when Michigan abolished capital punishment in 1846. Indeed, part of the power of his account is that "[t]he vanguard abolitions of capital punishment that characterized America then, and the laggard survivals that characterize it now, may be explained within one and the same framework."[171]

Yet there are serious evidentiary shortcomings here. First, while it is true, as Garland and many others emphasize, that the bulk of American executions take place in the states of the former confederacy, the bulk of death sentences are given elsewhere. They are just not carried out.[172] And they are not carried out, not because of popular sentiment, which is and has been highly supportive of capital punishment in virtually all regions of the country,[173] but because of the actions and beliefs of certain powerful officials who disagree with popular views. As of 2010, for example, California had 690 death row inmates but had, since 1976, carried out just 13 executions.[174] Texas, by contrast, had 342 death row inmates and had in the same span carried out 449 executions.[175] Or to contrast another Southern/non-Southern pair, Ohio had in the same time periods 176 death row inmates and 34 executions, while Virginia had 16 death row inmates and 105 executions.[176] Something like this pattern holds for a great many states throughout the country. For those numbers to be what they are, Californians and Ohioans had to insist on the death penalty at the only points at which they were given the opportunity: when they voted and when they sat on juries. That is not consistent with the capital-punishment-as-Southern-racism theory. And as to popular control, what the numbers really demonstrate is the degree to which Californians and Ohioans could not control their officials; the reasons those states have so many death row inmates and so few executions is that officials, particularly judges, were able to effectively use their power to block executions the people had approved (this is exactly Justice Bird's story in California and also Mario Cuomo's story in New York, until George Pataki beat him in a campaign substantially focused on Cuomo's opposition to and Pataki's support of the death penalty).[177] It is interesting that some kinds of states appear to be more prone to fissures between elite and popular opinion than others, but that does

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[170] *Id*. at 35.

[171] *Id*. at 38.

[172] Death Penalty Information Center, January 31, 2010.

[173] Gross, *supra* note 122, at 1451.

[174] Death Penalty Information Center, January 31, 2010.

[175] *Id*.

[176] *Id*.

[177] Gross & Ellsworth, *supra* note 122, at 41-42.

not support a general capital-punishment-as-popular-justice theory. Indeed, it seems to me that California alone is too great a problem for explanations of the kind Garland proffers to be maintained. (When is an exception too big and too prominent to be an "exception"? When it involves the country's largest state in terms of population, economy, and arguably cultural influence, not to mention the country's most racially diverse state? A car that is in perfect repair except for its engine is a broken car.) But in any case, California is emblematic of patterns at work throughout the United States. American voters across racial lines have supported capital punishment in many states from all regions of the country (though a far smaller majority among blacks than whites),[178] often with great political passion; there were, after all, thirty-eight states in the yea column until the last few years. In fact, American sentiment in support of the death penalty, though basically strong everywhere, is strongest in the West, not the South, and may indeed have more to do with frontier attitudes than racial ones.[179]

There are also two conceptual problems with Garland's view. First, even if one accepts, as I do, that the instrument of capital punishment is sometimes used in racist ways, that does not mean it exists for racist reasons. Black people are disproportionately imprisoned; surely racism plays a part; does that mean racism is why we have imprisonment? Second, for purposes of explaining the great divergence, we need not only to explain why America has capital punishment, but why Europe does not, and as Whitman points out, "Europe is racist too."[180] In Germany, for example, capital punishment was banned in 1949; anti-Semitism did not evaporate into the night in the four years between the Holocaust and that date. Now, it is true that Europe has a more bureaucratically insulated judiciary than the United States and there are prominent respects in which popular European opinion favors stronger criminal punishment than elite opinion does. I acknowledge that this is part of the story of the great divergence. But I do not accept that it is anything like a sufficient explanation. Most of the mildness in the European system is statutory, and those mild countries are democracies in full. Occasionally a law and order candidate will run for office in Europe, and may get somewhere, so long as he doesn't go too far with it. But if he does, the European people turn against him, for at the end of the day, European public opinion does not support American-style harsh punishment. The great divergence is finally *ideological*—based not on differences in government but differences in moral ideas.

Probably the leading work directly addressed to the great divergence is James Whitman's *Harsh Justice*;[181] his explanation, which is like mine in type—that is, ideological, focused in the main on differences in moral ideas—is the fourth in this survey of four rivals. Whitman devotes his book to a nuanced historical explanation of how degrading forms of punishment traditionally reserved for persons of the lowest social status (such as hanging) were in America gradually generalized to the whole population,

[178] Gross, *supra* note 122, at 1451.

[179] *Id.*

[180] WHITMAN, *supra* note 1, at 6.

[181] WHITMAN, *supra* note 1.

while less degrading forms of punishment traditionally reserved for aristocrats were generalized in Europe. In so doing, Whitman argues, both Europe and America were acting on their conceptions of what equality demands—conceptions that were set into place in America at the Founding and in Europe at its various points of democratic re-founding. But they had two different conceptions of equality: Europe leveled up, America leveled down. "A yearning for 'aristocratic equality' is indeed a constant in continental Europe. . . . [T]he idea hangs on that 'honor' is of central importance, and the commitment to equality on the continent is partly a commitment to generalizing honor to all."[182] American equality, by contrast, has been a matter of cutting aristocrats down to the same size as everyone else. As Whitman explains, "There are simply two different roads, to two different forms of equality."[183]

I regard Whitman's insight into these "two different roads, to two different forms of equality" as a profound truth that goes to the very roots of European and American differences in matters of politics and culture. But it can be a profound truth without being a sufficient explanation, and the problem with it as an explanation of the great divergence is that it cannot explain why the split started suddenly in the 1960s—why then?—and cannot explain why the period before the split was a long stretch of American mildness in punishment—the mildness of the early American penal reforms, of the prisons Tocqueville and Beaumont came to see, and of the low prison rates, rehabilitative culture, and widespread opposition to capital punishment that lasted throughout the first half of the twentieth century. Indeed, there is (though he tries to disavow it) a flavor of historical determinism in Whitman's account; what matters is only the pitch—the founding ideas—and the ball then sails to its destination no matter what the wind is doing in the meantime. But the evidence shows a great deal of contingency: America had a rehabilitative prison culture and a moratorium on the death penalty just a few decades ago. Things could have been otherwise; there are contemporary reasons why they are as they are. Now, that said, Whitman's evidence that contemporary American punishments resemble those once used for the low-status, while European punishments resemble those once used for the high-status is compelling, and I don't think Whitman is wrong to relate these patterns to ideas of equality. But if our conception of equality shapes the manner of our punishment in an age of harsh punishment, it does not explain why we embarked upon an age of harsh punishment.

In my view, Whitman, along with many of the scholars to whom he is replying,[184] makes far too little of the vast increase in crime in the United States from roughly the 1950s through the 1990s, which Germany and other continental European countries simply did not experience. "We seem to be in the midst," the historian Lawrence Friedman has written, speaking of the last half-century, "of a horrendous crime storm—a hurricane of

[182] *Id*. at 192.

[183] *Id*.

[184] An important exception is David Garland, albeit not in *Peculiar Institution*. Garland's analysis of contemporary American and British penal harshness in *The Culture of Control: Crime and Social Order in Contemporary Society* (2002) touches off from "the prevalence of high rates of crime and disorder in late modern society."

crime."[185] One of the great scholars of this crime wave, James Q. Wilson, who devoted most of his career as a sociologist to understanding it, wrote: "Americans believe something fundamental has changed in our patterns of crime. They are right. . . . [W]e are terrified by the prospect of innocent people being gunned down at random, without warning and almost without motive, by youngsters who afterwards show us the blank, unremorseful face of a seemingly feral, presocial being."[186]

The American public was passionately concerned about this hurricane of crime. The 1950s anthem of juvenile delinquency in *West Side Story*—"Dear kindly Sergeant Krupke,/You gotta understand,/It's just our bringin' up-ke/That gets us out of hand./Our mothers all are junkies,/Our fathers all are drunks./Golly Moses, natcherly we're punks!"—was an early indication of America's alarm (it wouldn't have been so funny, after all, if it hadn't struck a chord).[187] Eventually, crime became a "major political issue."[188] Richard Nixon made it part of his campaign platform in his acceptance speech at the 1972 Republican National Convention: "Four years ago crime was rising all over America at an unprecedented rate. . . . I pledged to stop the rise in crime. . . . We have launched at all-out offensive against crime . . . ."[189] The irony, as I remark above (in the context of another presidential campaign fought out over crime), is that the office of the president has very little to do with crime control. Furthermore, not only the public, but also criminologists openly turned to retributivism and incapacitation, and lost faith in rehabilitation, at the time the country's punishments became notably harsher than Europe's.[190]

It was around the time of Nixon's pledge that America's incarceration rates started rising, rising, rising: "The fifty-year period from the early 1920s to the early 1970s," writes the criminologist Alfred Blumstein, "was characterized by an impressively stable incarceration rate averaging"—roughly like Germany today—"110 per 100,000 . . . ."[191] And then everything changed. It was in the 1970s ferment, a year before Nixon's speech and right around the time that America's incarceration rate started to rise, that Clint Eastwood released the first *Dirty Harry* movie, featuring a villain of baby-faced, giggling,

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[185] FRIEDMAN, *supra* note 197, at x-xi, 449-65 (1993).

[186] JAMES Q. WILSON, *Crime and Public Policy*, *in* CRIME AND PUBLIC POLICY 492 (James Q. Wilson ed., 1983).

[187] Leonard Bernstein & Stephen Sondheim, *Gee, Officer Krupke*, *in* West Side Story (1956).

[188] Friedman, *supra* note 197, at x-xi.

[189] President Richard Nixon, Republican Nat'l Convention, Acceptance of Nomination Speech (Aug. 23, 1972).

[190] As to rehabilitation, consider Zimring's classic essay, *supra* note 19, at 166 ("Of all the institutions that comprise the present system, parole is the most vulnerable—a practice that appears to be based on a now-discredited theoretical foundation of rehabilitation and predictability."). *See also* Blumstein, *supra* note 26, at 395 ("[F]aith in rehabilitation was severely challenged in the early and mid-1970s by a succession of experimental studies . . . ."). As to incapacitation, *see* M. WOLFGANG ET AL., DELINQUENCY IN A BIRTH COHORT (1972); Norval Morris, *"Dangerousness" and Incapacitation*, *in* A READER ON PUNISHMENT 241, 242 (Antony Duff & David Garland eds., 1994). As to retributivism, *see* ERNST VAN DEN HAAG, PUNISHING CRIMINALS (1975); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976); DAVID FOGEL, WE ARE THE LIVING PROOF: THE JUSTICE MODEL OF CORRECTIONS (1975).

[191] Alfred Blumstein, *Prisons*, *in* Crime 387, 387 (James Q. Wilson & Joan Petersilia ed., 1995).

irredeemable malevolence, a villain who kills, in Harry's (Eastwood's) words, "[b]ecause he likes it."[192] (The movie, with its furious treatment of Warren Court criminal procedure, should be a classic for lawyers.) After decades of crime, America had come to a certain conclusion about its criminals. *West Side Story* anticipated it. At first, the juvenile gangsters sing, "We ain't no delinquents,/We're misunderstood./Deep down inside us there is good!" But a verse later: "Officer Krupke, you're really a square;/This boy don't need a judge, he needs an analyst's care!/It's just his neurosis that oughta be curbed./He's psychologic'ly disturbed!" Then: "Officer Krupke, you're really a slob./This boy don't need a doctor, just a good honest job./Society's played him a terrible trick,/And sociologic'ly he's sick!" By the end, we know the truth: "Officer Krupke, you've done it again./This boy don't need a job, he needs a year in the pen./It ain't just a question of misunderstood;/Deep down inside him, he's no good!" And the boys chant: "We're no good, we're no good!/We're no earthly good,/Like the best of us is no damn good!"

Just what can realistically be expected from citizens in a democratic legal order confronted by this sort of a massive reduction in personal security? A punitive mixture of fear and anger seems to me a very natural response. In short, I submit that the basic trigger of America's harshness in criminal punishment was the crime wave between the 1950s and 1990s. Europe, which never experienced a crime wave, continued along the same path America was going down and would have continued down if not for the crime wave's shock. Indeed, as a causal matter, I think the ubiquity of fear was a more important factor in the European/American punishment split than the concept of evil. If a young man is walking behind a woman on an empty street at night in an American city, she will—even if the neighborhood is not a bad one and the man is not particularly threatening—very likely glance back nervously several times and quicken her pace, perhaps even jog or run forward. In continental Europe, that same woman in that same situation is unafraid. *That* is the legacy of the crime wave and the main impetus behind the great divergence. The concept of evil comes into the story less as input than as output: when we built a criminal system designed above all to identify, remove, and control threats, we wrote the concept of evil into the law as a sort of side-effect. We *implied* the concept of evil insofar as we wrote law that treated criminals as a dangerous other to be killed or banished. The concept of evil is not what we set out to make the foundation-stone of a criminal order. It is what we have wrought.

Having said that, however, I do think the concept of evil played an important *secondary* role in shaping the character of our response to the crime wave. Consider this question: why should a society confronted with a new social problem—a problem, that is, involving groups of people on a massive scale—take as moralistic and individualistic a view of it as America did? The idea of "evil" is not an idea that scales up well; why, then, didn't America understand the problem in more sociological terms? We might have seen terrible criminals as the stunted products of broken communities or poverty rather than as moral monsters. Why didn't we? To some extent, the answer is that, much as we might think the ultimate problem one of poverty or broken communities, still one has to deal with the particular offender at hand, and that offender, for whatever ultimate reason, might

[192] Dirty Harry (1971).

really be a moral monster. And to some extent, the answer is that cultures do not like to condemn themselves and to understand our crime wave as the byproduct of our deficiencies as a society is a painful, dissonant thought to accept. But it is also the case that we were culturally primed to reject the belief in every human being's natural goodness and take a dark view of the potential of the human spirit.

It seems to me that none of the four rival explanations discussed above take proper account of Europe's utopian traditions—its rosy, Rousseauian picture of the perfectibility of human nature—in contrast to America's more jaundiced, Madisonian view.[193] A belief in human evil relates to the darkness of a vision of government filled with devices designed to control power and prejudice, a system of rule premised on human corruptibility. America is the land where Madison wrote: "If men were angels, no government would be necessary."[194] The government he participated in designing emphatically assumed that human beings are not angels. Against these influences, Europe is a land lapped by the tides of the French Revolution, whose leading thinker, Rousseau, held that human beings are by nature good, and only go wrong when corrupted by society.[195] Germany in particular is also a nation that has itself committed unspeakable acts of evil, and one wonders if it embraces the ideals of forgiveness and rehabilitation so ardently because it has stood in such great need of them. (This indeed is my sense of Germany after having lived and worked there for some years—that it is a country whose people feel a burning need to deny that there is such a thing as *immutable* evil, *unforgiveable* evil, in order to reconcile themselves to what the people they love, their parents and grandparents, have done. To be evil is to be hateful, and it is not psychologically viable for a people collectively to hate itself.)

In addition, none of the four rival explanations above contend fully with America's religious traditions. Whitman, to his credit, recognizes the importance of "some distinctively fierce American Christian beliefs,"[196] but he then sets that issue aside in order to pursue his main thesis on equality, which doesn't connect very closely with those fierce beliefs. Evil, on the other hand, does connect with them; it is a religiously inflected concept, fitted out for a land that at least in the colonial era "made little or no distinction between sin and crime."[197] America is the land of preachers like Jonathan Edwards, who sermonized that sinners "deserve to be cast into hell," that "the wrath of God burns against

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[193] *See generally* THOMAS SOWELL, A CONFLICT OF VISIONS 18-39 (1987) (contrasting utopian and anti-utopian political outlooks, characterizing the one as a "constrained" view of human nature and the other as an "unconstrained" view).

[194] THE FEDERALIST NO. 51 (James Madison).

[195] *See* JEAN-JACQUES ROUSSEAU, DISCOURSE ON THE ORIGINS OF INEQUALITY AMONG MEN (G.D.H. Cole trans., Dodo Press 2009) (1754).

[196] WHITMAN, *supra* note 1, at 6.

[197] LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY, 33 (1993). *Id.* at 23. Notably, German law is thoroughly positivistic, something Whitman thinks helps lead it to mildness. WHITMAN, *supra* note 1, at 14. Clarence Darrow, too, an American lawyer from another generation, thoroughly persuaded of the need for mildness in punishment, is so positivistic as to see criminals simply as those who "leave[] the pack" and crimes not as natural sins but as things that "come and go with new ideals, new movements and conditions." CLARENCE DARROW, CRIME: ITS CAUSE AND TREATMENT 8, 10 (1922).

them."[198] Virginia's first code of law (1611), usually called "Dale's laws," were formally entitled "Lawes Divine, Morall and Martiall."[199] The "draconian bite" of this code suggests how a natural law perspective on crime—the equation, that is, between sin and crime written so deeply into the very idea of a common law of crime—tends to lead to harsh punishment, for the wrongdoer has not merely violated human law but God's law, and is not morally bad in virtue of breaking the law but breaks the law in virtue of being morally bad.

Thus my view in full is that Europe's mildness and America's harshness in criminal punishment trace their origins in part to the differences between the political ideologies of the American and French revolutions; in part to the distinctiveness of American Protestantism; and in part to a natural democratic reaction to terrible, rising crime. The last is the engine of punitiveness; the first two give it conceptual shape. And the shape it takes is a belief in criminal evil.

Let me be clear: it would be easy and not altogether false to make the following claim about psychology and sociology: many or most Americans believe criminals are evil and relatively few Europeans do. Furthermore, American criminal justice is much more open to popular opinion than European, and the belief in criminal evil is partly one of class, with more ordinary Americans and Europeans believing in it than elites in both societies. Thus the comparison is a system of criminal justice fashioned by ordinary American opinion versus one fashioned by elite European opinion—no wonder they should differ as to the concept of evil. This explanation is, as I said, quite natural given the arguments above, and it comes ready-made with complementary lines of scholarship about, e.g., elite versus non-elite opinion, and popular versus bureaucratically insulated systems of criminal justice. The explanation is very tempting. And I think it is partly true and wish to include as part of my explanation. But I just don't think it is the whole truth. The whole truth has to do

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[198] JONATHAN EDWARDS ET AL., SINNERS IN THE HANDS OF AN ANGRY GOD AND OTHER PURITAN SERMONS (2005). Friedman fills out the moral cosmology that Edwards and other early Americans lived within: "Every period asks the question: Why is there evil in the world? Why do people do terrible crimes?" Colonial America answered with a distinction between two types of people: "For most offenses, the colonial answer was: simple weakness and bad character," but, for people who were "very bad, even incorrigible," who "seemed to embrace evil boldly and with enormous relish," the answer early Americans gave was religious and metaphysical. The colonists "firmly believed" in an "'invisible world,' the world of angels and spirits"; this world was a "crucial aspect of the colonial theory of criminality." One half of this invisible world was "dominated" by "Satan, the eternal adversary." The worst criminals had "sold out" to him, were "in league" with him; they had become "human in form, but inhuman at heart." FRIEDMAN, *supra* note 197, at 47. I am aware that the relationship between early America's conception of evil and present-day America's treatment of crime is robust enough that I might have respectably grounded this essay entirely in it. I have tried to treat the subject more cautiously. One often hears that contemporary America's treatment of various matters—sexual matters for example—traces back to the country's Puritan origins. Perhaps. But Jonathan Edwards graduated from Yale College in 1720. Two and a half centuries, punctuated by a political revolution based on the Enlightenment, is a great enough distance to warn against leaps from colonial to contemporary America. And actually, the colonists were gentler on minor offenses than we are today: They would "forgive and forget, provided the offense was not too gross; if the sinner repented, he was reabsorbed into the community. . . . Today, a man or woman with 'a record' is stigmatized far more indelibly." *Id*. at 52.

[199] *See supra* note 197.

also with the ways in which social systems get away from us and come to be, not the outputs of our beliefs, but inputs into our beliefs, and not the products of our design, but the effects of multiple, intersecting lines of action taken for multiple purposes.

Finally, I would like to suggest that the concept of evil, or analogues to it, may be helpful in other comparative, European/American contexts as well. Consider comparative criminal procedure. America's tradition of aggressive cross-examination, which Germany forbids as a violation of the dignity of witnesses, assumes that witnesses often lie. America's adversarial process, in contrast to Germany's inquisitorial process, assumes that defendants may need protection against prosecutorial vindictiveness. America's singular commitment to dividing not only the governmental function between prosecutor and judge, but also the judicial function between judge and jury, is a device of restraint—like a molecular replication of the checks and balances in our constitutional system—which of course assumes the possibility of governmental excess. Throughout we see something that, while not appropriately called "evil," might be understood as a form of what was once called human *perversity*. Now consider another great issue in comparative law: the fact that Europe has a vast social welfare state and America, comparatively speaking, has a small one. Could this be seen as grounded in suspicions about human perversity as well, specifically about laziness and self-seeking? And what about Europe's faith in international law, while America debates whether international law should even, in the last analysis, count as law at all? America seems to believe in a perpetual and inevitable threat of aggression that can only be cowed and subdued by military strength, while Europe believes in the possibility of peace and justice through cooperation under law. It seems to me that disagreements about the moral nature of the human being—and above all about human evil—lie in many of the fissures between America and Europe, and indeed between Right and Left.

CONCLUSION: TWO FORMS OF MORAL FAILURE

What, normatively, are we to think of all this? The analysis thus far has been an exercise in descriptive moral philosophy; the aim has been to bring to light some of the immanent moral concepts—the Hegelian "Ideas," as it were—at work in American and European criminal law, not to praise or condemn. But seeing how deeply the two systems diverge, certain normative questions become irresistible. Which system has the right way of looking at a criminal? And (not quite the same question), which approach to criminal law is the better one?

Those, I think, are the natural questions to ask at this point, but they are also too vast to be answered. One would have at least to make one totalizing judgment about the existence or non-existence of human evil and a second totalizing judgment about the function of criminal law. The functional question is not a small one. Regardless of whether evil exists or not, it might make sense for criminal law to push that sort of ultimate moral question off to the side in favor of the practical business of controlling crime, or even to reject the view we take to be true if its effect were a higher crime rate. Perhaps "dangerous" matters more than "evil" for legal purposes. But does that mean recognizing the permanently dangerous for what they are and thus banishing them from our midst? Or

does it mean pretending away real moral horror in order to build a gentler or more solidaristic community, or in order to rehabilitate those criminals who can be rehabilitated? These are not only difficult questions but also "external" ones—questions of the fit between the content of criminal law and some external purpose or normative conception. The inquiry in this Article has been an "internal" one, concerned with uncovering the ideas in the criminal law itself. Answering the external questions would require a second and a different kind of analysis.

Yet there is an internalist form of normative critique, and it has a contribution to make here. The internalist question is whether a social practice or system stays true to its own ideals or whether it falls short of them, either because of hypocrisy or carelessness or because the ideals themselves are unreasonable in light of what the world has to give us. And from that standpoint, it is striking to note how often in the analysis above Europe was embarrassed in its attempt to maintain the denial of evil while yet managing the practical problems with which it, as a criminal system, has to deal. With the problem of major crime, for example, we saw something of a frantic effort to keep the most dangerous criminal offenders in prison while yet staying committed in principle to saying of no wrong and no person, "This is unforgiveable."[200] Thus German law held that no crime can give rise to a sentence of life imprisonment *but one*, and with that one, the sentence may be symbolically for life, but is almost always *actually* for less, and then again, it may actually be for life, but it cannot be *required* to be for life. The whole business felt like a game of dodging reality. Likewise, with regard to recidivism,[201] the German policy of preventive detention is basically a subterfuge—the subterfuge of claiming that permanent imprisonment of the most hated criminal offenders, child sex offenders, isn't really punishment at all. That sort of subterfuge is a clue that the law's ideals are too rigid for the requirements of real life. I think Europe's denial of the existence of evil is naive and self-indulgent, and its leniency so extreme as to be unjust. But what I can establish on the basis of the analysis in this paper is that Germany's denial of evil and leniency are unworkable on their own terms; the world serves up problems that just won't permit such idealism.

Yet on the American side, what is most striking in the analysis above is how little it takes to persuade the American criminal system that a wrongdoer is evil. Evil is supposed to be genuinely extreme; an immutable hostility or indifference to the good is obviously extraordinary, even among people who behave very badly. Yet America takes acts that could be grounded in deprivation, or outbursts of passion, or desperation, or dissipation, or indeed evil, lumps the offenders together, and treats them all alike. As Germany has lost the concept of evil, has America lost the concept of error? It is often said that American criminal punishment is too harsh. I think that claim, though true, is insufficiently specific. American criminal punishment is not simply too harsh; it is too careless about when and against whom to be harsh—too careless, that is, about when and against whom to level the accusation of evil. The moral ideas on which even our severity is based cannot support what we do. Our criminal punishment is not wrong for believing in evil; it is reckless in selecting those it treats as evil.

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[200] *See supra* Part II.A.

[201] *See supra* Part II.C.

Between the unjust leniency of the naive and the unjust harshness of the reckless, I'll take the naivete. But neither deserves to be admired. A pox on both their houses.