



ARTICLE

Two Cultures of Punishment

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Abstract. As American criminal punishment has become more severe and European more mild, the two systems of punishment have come to represent different cultural possibilities for the modern West. Implicit in American and European punishment are two visions of wrongdoing and wrongdoers, of the terms of the social contract, and of the foundations of rights. American punishment pictures serious offenders as morally deformed people rather than ordinary people who have committed crimes. Their criminality is thus both immutable and devaluing, a feature of the actor rather than merely the act. The forms of punishment deployed in response do not just exact retribution or exert social control, they expressively deny offenders' claims to membership in the community and to the moral humanity in virtue of which a human being is rights bearing. European criminal punishment expressively denies that any offense marks the offender as a morally deformed person. Criminality is always mutable and never devaluing, actors are kept at a distance from their acts, and the forms of punishment affirm even the worst offenders' claims to social membership and rights.

These conflicting moral visions are not only implicit or immanent in European and American punishment but likely played a role—albeit not an exclusive role—in causing European and American punishment to diverge. After an enormous mid-century crime wave, two very different groups took hold of America's politics of crime: moralists who viewed criminals as evil and instrumentalists who viewed criminals as dangerous beings. Different as the two groups were, they agreed on policy: for both, the *crime* problem was a *criminals* problem, and the solution was to get rid of criminals. Their alliance inscribed the ideas of immutability and devaluation into American law. Meanwhile, insulated by its relatively low crime rate, Europe's politics of crime were driven by reformers and officials who believed in the intrinsic goodness of all offenders or thought acting on such a belief to be required by human dignity. They inscribed into European law the idea that no crime reaches the roots of character.

* Associate Professor of Law and Philosophy (by courtesy), Northwestern University. My thanks to James Q. Whitman, whose work on comparative punishment inspired this Article, and to skeptical readers of a previous version of this Article, now abandoned, whose questions led me to a different thesis than the one I initially believed and a far better argument than the one I initially constructed. Thanks also to the Normative Orders Excellence Cluster and the Justitia Amplificata Centre for Advanced Studies, whose support during several years of life and study in Germany immeasurably enriched my understanding of European law and culture.

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Introduction: The Great Divergence

For most of its history, criminal punishment in the United States was milder than punishment in continental Europe—and therefore, it was thought, more humane than Europe’s, more enlightened, and more democratic. To American eyes in the Revolutionary era, European criminal law was “stain[ed]” and “disgraced” by its fixation on torture—a fixation that dated back to medieval times and would not be fully abandoned until the nineteenth century.¹ Blackstone captured the image of European punishment at the time: “[I]t will afford pleasure to an English reader, and do honour to the English law, to compare [English punishments] with that shocking apparatus of death and torment, to be met with in the criminal codes of almost every other nation in Europe.”² Immediately after the American Revolution and well into the nineteenth century, the United States undertook a wave of “republican” criminal law reforms aimed at abolishing or limiting capital punishment, abolishing corporal punishment and mutilation, making prisons places of rehabilitative penance, and codifying the common law in such a way as to limit pockets of harshness, arbitrariness, or undemocratic control.³

There was a political philosophy connected to this: it was a standard tenet of Enlightenment belief that democracy and penal mildness were linked, as Hobbes, Locke, Montesquieu, Rousseau, Beccaria, and Tocqueville all had argued.⁴ Enlightenment thinkers thought that democracies would tend to punish mildly because equal, rights-bearing citizens would object to the autocratic character of harsh punishment: “Severity in penalties suits despotic government, whose principle is terror,” Montesquieu wrote.⁵ They argued that a government grounded in a social contract, although it would defend itself, would never do so with cruelty or wantonness. Locke argued, for example (there are many examples), that the right to punish is “no absolute or arbitrary

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1. JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* 340-42 (2003). In fact, European torture had more to do with criminal procedure than criminal punishment. *Id.* at 339-41.
 2. 4 WILLIAM BLACKSTONE, *COMMENTARIES* *370-71.
 3. See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 63-82 (1993) (describing the early American ideal of “republican criminal justice” (emphasis omitted)); see also DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION* 36-37 (2010) (describing the largely successful effort to abolish the death penalty in Michigan, Rhode Island, and Wisconsin in the 1840s and 1850s); JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 171-73 (2003) (describing the “revolutionary history of American punishment that bridges the decades of the 1790s and the decades of the 1830s”).
 4. See Matthew A. Pauley, *The Jurisprudence of Crime and Punishment from Plato to Hegel*, 39 AM. J. JURIS. 97, 120-31 (1994).
 5. MONTESQUIEU, *THE SPIRIT OF THE LAWS* bk. VI, ch. IX, at 82 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748).

power to use a criminal,” but only to secure natural right and positive law against someone who “declares himself to live by another rule.”⁶ Tocqueville added a psychological dimension: that when people are organized into castes, as in feudal and aristocratic conditions, empathy stops at caste lines, while equality and democracy foster a “general compassion for all members of the human species.”⁷ Tocqueville suggested as well that democratic citizens of the modern world simply feel differently about suffering, about the infliction of pain on their fellow creatures, than people of earlier eras, and he wonders about it: “Why is that? Are we more sensitive than our fathers? I do not know, but of one thing I am certain: our sensibility extends to a wider range of objects.”⁸ Tocqueville was not wrong about that. A deep change in attitudes to suffering and violence—a softening, a sentimental humanism more vital and basic than any articulate position—is among the Enlightenment’s most mysterious and important legacies and one linked to democratic forms of life and government.⁹ There was good reason to predict that democracy would pull penal mildness behind it.

And it did, for nearly two centuries. When Tocqueville came to the United States in the early nineteenth century, the ostensible reason for his trip (and the basis for his funding from the French government) was to study America’s innovative experiments in rehabilitative imprisonment.¹⁰ He would later write: “In no country is criminal justice more benignly administered than in the United States.”¹¹ When the nations of Europe engaged in vast criminal law reforms in the nineteenth century, they did so “as part of the process that led to

6. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 8, at 10 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690); *see also id.* §§ 123-31, at 65-68. For the social contract theorists’ consensus on this point, *see* Pauley, *supra* note 4, at 120-31.

7. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 658 (Arthur Goldhammer trans., Library of Am. 2004) (1840).

8. *Id.*

9. *See* STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED 169, 180-84, 696 (2011) (linking Enlightenment ideas and emotions to “[t]he most sweeping change in everyday sensibilities left by the Humanitarian Revolution[:] . . . the reaction to suffering in other living things”).

10. *See* GEORGE WILSON PIERSON, TOCQUEVILLE AND BEAUMONT IN AMERICA 30-32, 704 (1938).

11. 2 TOCQUEVILLE, *supra* note 7, at 658. The American story even in Tocqueville’s time was by no means wholly one of mildness, as Tocqueville knew. Alongside these experiments in reform, America maintained forms of cruel and ignominious punishment—the pillory, branding, mutilation, floggings, and the like—that puzzled and troubled Tocqueville. *See* WHITMAN, *supra* note 3, at 124. Furthermore, the criminal punishment of slaves was profoundly cruel. The point is not that America in the nineteenth century had made punishment mild but that, inspired by democratic ideals, the country was engaging in reform on a scale startling to the contemporary eye.

the creation of the modern democratic states.”¹² When parts of Europe became fascist, criminal punishment in those countries became harsh, and in the democratic era that followed, criminal law became milder along with the form of government.¹³ By the middle of the twentieth century, a mild, rehabilitative, and individualizing penal philosophy prevailed in both Europe and America.¹⁴ From the late 1920s through the early 1970s, the incarceration rate in the United States was low, roughly stable, and roughly equal to what it is in Germany, France, Italy, and Spain today.¹⁵ Capital punishment in the United States was under a national moratorium and very nearly abolished between 1972 and 1976.¹⁶ By comparison, Spain abolished it in 1978 and France in 1981.¹⁷ America and Europe throughout most of the democratic era were pulling criminal justice in Western civilization along a certain track, and it was the same track.

But then something changed—changed in quite extreme and quite recent ways. Starting in the 1970s and picking up speed in the 1980s,¹⁸ 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 to which the United States would normally be compared.”¹⁹ James Whitman writes: “[B]y the measure of our punishment practices, we have edged into the company of troubled and violent places like Yemen and Nigeria[,] . . . China and Russia[,] . . . pre-2001

12. LANGBEIN, *supra* note 1, at 342.

13. *See* WHITMAN, *supra* note 3, at 99-100.

14. *Id.* at 49.

15. MARGARET WERNER CAHALAN, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850-1984, at 35 tbl.3-7 (1986), <http://www.bjs.gov/content/pub/pdf/hcsus5084.pdf>; *see also infra* notes 27-28 and accompanying text.

16. *See* *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion) (“We hold that the death penalty is not a form of punishment that may never be imposed . . .”); *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (per curiam) (“The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment . . .”).

17. Amnesty Int’l, *Constitutional Prohibitions of the Death Penalty* 5 tbl.1 (1996); *France and Death Penalty*, FR. DIPLOMATIE (last updated Feb. 20, 2015), <http://www.diplomatie.gouv.fr/en/french-foreign-policy/human-rights/death-penalty/france-and-death-penalty>.

18. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 525, 536 (2001) (describing harsher punishments, increased law enforcement budgets, and growing numbers of felony prosecutions during the 1970s and 1980s); *cf.* CAHALAN, *supra* note 15, at 35 tbl.3-7 (finding that the ratio of prisoners to the overall U.S. population nearly doubled between 1970 and 1982).

19. Michael Tonry, *Preface to THE HANDBOOK OF CRIME & PUNISHMENT*, at v (Michael Tonry ed., 1998).

Afghanistan[,] . . . and even Nazi Germany.”²⁰ Europe, meanwhile, has seen a series of successful political and legal movements in favor of greater mildness.²¹ The resulting European/American differences in law and practice are complex: they involve multiple, intersecting factors, including not only the doctrine and practice of sentencing but also issues of what is criminalized, the substantive criminal law doctrine expanding or contracting criminal liability, the procedural rules governing charging and plea bargaining, and more.²² But the various differences converge like spotlights on a stage to produce the most signal consequence of the divergence: American mass incarceration.

At its peak in 2007, 3.2% of the U.S. adult population—1 out of every 31 adults—was under some form of correctional control.²³ Per 100,000 residents, 756 adults were incarcerated (roughly 0.8% of the population or 1 adult per 132 people)²⁴ and another 2234 were on probation or parole (roughly 2.2% of the population or 1 adult per 45 people).²⁵ Among black men in 2007, the rate of incarceration was 3138 per 100,000 residents.²⁶ If ever it starts to seem as though the “crisis of American criminal justice” is exaggerated by alarmist or politicized academics, take a deep breath and think about those numbers. They are on a different scale than anything else in the Western world and anything

20. WHITMAN, *supra* note 3, at 4.

21. *See, e.g.*, Joachim J. Savelsberg, *Religion, Historical Contingencies, and Institutional Conditions of Criminal Punishment: The German Case and Beyond*, 29 LAW & SOC. INQUIRY 373, 392-93 (2004) (detailing the successful campaign by Germany’s churches to make German punishment more mild).

22. For example, America defines core criminal concepts (like negligence, complicity, conspiracy, and insanity) more inclusively than does Europe, with the result that a wider and more ambiguous array of people—the addicted, the mentally ill, the careless, the tangentially criminal—are swept into America’s criminal net. *See* Daniel Statman, *The Historical and Cultural Roots of Harsh Punishment*, 17 YALE J.L. & HUMAN. 299, 299-300 (2005) (reviewing WHITMAN, *supra* note 3). Plea bargaining is another example: America has developed a highly coercive and therefore highly efficient alternative to the trial and now uses it to move ninety-seven percent of federal defendants from charge to punishment without significant participation by the courts. *See* U.S. Sentencing Comm’n, *Guilty Pleas and Trial Rates: Fiscal Years 2010-2014* (2014), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/FigureC.pdf>. Europe has forms of plea bargaining but no equivalent in scale. *See* Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT’L L.J. 1, 3 (2004). Thus substantive criminal law and criminal procedure contribute to American severity; it is not just a matter of sentencing.

23. LAUREN E. GLAZE & THOMAS P. BONCZAR, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2007 STATISTICAL TABLES 1 tbl.1 (2009), <http://bjs.gov/content/pub/pdf/ppus07st.pdf>.

24. HEATHER C. WEST & WILLIAM J. SABOL, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2007, at 6 (2009), <http://www.bjs.gov/content/pub/pdf/p07.pdf>.

25. GLAZE & BONCZAR, *supra* note 23, at 11 app. tbl.1 (2009).

26. WEST & SABOL, *supra* note 24, at 4.

preceding them in the United States itself. In 2007, the adult incarceration rate per 100,000 residents in Germany was 95; in France, 100; in Italy, 77; and in Spain, 147.²⁷ Historically, the American rate in 1930 was 105; in 1940, 132; in 1950, 110; in 1960, 119; and in 1970, 97.²⁸ It is not too much to say that an incarceration rate of approximately 100 adults per 100,000 residents—0.1% of the population or one adult per thousand people—is the rough standard for the economically advanced contemporary Western world, including, until recently, the United States. The American incarceration rate actually fell in the early 1970s to 95 per 100,000 in 1972—one of the lowest points in the century.²⁹ It then rose virtually every year to 170 in 1982,³⁰ 329 in 1992,³¹ and 701 in 2002,³² on the way to that peak of 756 in 2007.³³

Since 2007, American punishment has been getting milder; the last decade has seen a clear downtick. But the incarceration rate in 2013 was 623 per 100,000,³⁴ which is, in historical and comparative perspective, just a drop from a dizzying height to a slightly less dizzying one. The divergence between American and European punishment, and with it the phenomenon of mass incarceration, is and remains a thing of our time—a thing of the 1970s to some extent, but mainly the 1980s, 1990s, 2000s, and the present. There is now arguably *no* respect—not even procedural—in which European and American law are more different, or more revealingly different, than in criminal punishment. As a matter of European/American comparative law and legal culture, nothing looms larger than this chasm, this great divergence.

The most natural question to ask about the great divergence is why it happened, what caused it. Scholars have generated a legion of explanations, which are, for the most part, not so very different from the explanations that come up in any intelligent living room conversation on the issue: they focus on

27. MARCELO F. AEBI & NATALIA DELGRANDE, COUNCIL FOR PENOLOGICAL COOPERATION OF THE COUNCIL OF EUR., COUNCIL OF EUROPE ANNUAL PENAL STATISTICS: SPACE I—PRISON POPULATIONS; SURVEY 2013, at 64-65 tbl.1.5 (2015), <http://wp.unil.ch/space/files/2015/02/SPACE-I-2013-English.pdf>.

28. CAHALAN, *supra* note 15, at 35 tbl.3-7.

29. *Id.*

30. STEPHANIE MINOR-HARPER, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 1982, at 1 (1983), <http://www.bjs.gov/content/pub/pdf/p82.pdf>. This number is slightly problematic, as it excludes sentences of less than one year.

31. DARRELL K. GILLIARD, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 1992, at 2 (1993), <http://www.bjs.gov/content/pub/pdf/p92.pdf>. Again, this number excludes sentences of less than one year.

32. PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2002, at 2 (2003), <http://www.bjs.gov/content/pub/pdf/p02.pdf>.

33. *See supra* note 24 and accompanying text.

34. E. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013, at 6 (2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

American racism, European fascism, American populism, European secularism, and so on. I will survey these possibilities in Part V and suggest a historical-causal proposal of my own—to add to the mix rather than to displace what is already there—but this Article does not aim primarily to explain what brought the great divergence about. The two most important facts about the historical-causal explanations presently on the table are how numerous they are and how exceedingly difficult they are to prove. The explanation one believes inevitably says more about oneself than about the world. And there is another, no less important question in the wings.

Criminal justice is not just a form of policy to be instrumentally perfected like any other form of policy. Criminal justice is culture-bearing. It is the site at which cultures negotiate certain kinds of issues connected to wrongdoing and community, social order and violence, identity, the power of the state, and the terms of collective ethical life.³⁵ That is why criminal law is the one area of law that is also a genre of literature, from Euripides's *Oresteia* to Dostoyevsky's *Crime and Punishment* to Kafka's *The Trial* to David Simon's *The Wire*. And if criminal law is culture-bearing in this sense, it follows that the great divergence represents a cultural dispute between two of the torchbearers for the modern Western world. European and American criminal justice today present two cultural visions, two possibilities for the modern West, and the question they present besides the historical-causal one is: *What are those two cultural visions?* Put another way: *How should we understand the ideas at work in American and European criminal punishment?* Put another way again: if one takes as a premise that law carries expressive content, European and American criminal punishment have come to carry starkly different expressive content. *What is that expressive content?*

The answer turns on the ideas implicit, embedded, or immanent in the law. To know them requires engaging interpretively with legal doctrine and practice. This Article thus interprets the doctrines and practices of punishment that characterize American severity and European mildness. As the following pages will show, American punishment is not just harsher than European but harsher in ways that suggest a distinctive constellation of ideas about crime and criminals, and European punishment is not just milder but milder in ways that suggest its own distinctive constellation of ideas about crime and criminals. There are patterns in the harshness and mildness, and this Article interprets those patterns. Part I explains the methodological premises behind this sort of comparative interpretation.

35. For a sustained examination of why criminal law has these culture-bearing features, see the theory of criminal law as a form of “normative reconstruction” presented in Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485 (2016).

The thesis is this: American and European criminal punishment express a conflict of moral visions. They represent two views of wrongdoers, of what wrongdoing means for participation in social life, and of what wrongdoing means for the moral humanity on which rights depend. Implicit in American punishment is the idea that serious or repeat offenses mark the offenders as morally deformed people rather than ordinary people who have committed crimes. Offenders' criminality is thus both immutable and devaluing: it is a feature of the actor, rather than merely the act, and, as such, it diminishes offenders' claim to membership in the community and loosens offenders' grip on certain basic rights. Implicit in European punishment is an insistence that no offense marks the offender as a morally deformed person. Criminality is always mutable and never devaluing, actors are kept at a distance from their acts, and even the worst offenders enjoy an undiminished claim to social membership and rights. Parts II through IV, below, advance this thesis.

Part II focuses on immutability and social membership. It makes, alongside the interpretation of European and American punishment, a theoretical point about the nature of punishment. Philosophers and social theorists have traditionally understood punishment by reference to two organizing concepts: *hard treatment* and *control*. Hard treatment in the philosophical tradition is part of punishment's definition,³⁶ and control, at least for utilitarians, is punishment's function. Social theorists in the Foucauldian tradition have doubled down on the concept of control: it was Foucault's insight to see more fully than anyone before him punishment's character as a technology of power over offenders' souls and therefore a form of control beyond hard treatment.³⁷ I would like to suggest a third organizing concept to add to this list. Punishment is not just about hard treatment or control; it is also about *social membership*. Punishment is among other things an instrument of communal self-definition and social exclusion, an element in an ongoing societal conversation about the terms of social life.³⁸ Serious crime presents questions of social membership because serious crime by its nature attacks the norms on which social life is based and thus raises questions about whether the offender can accept the social contract.³⁹ No society could permanently include someone who permanently refuses to abide by that society's most basic rules. Indeed, an offender who permanently refuses the social contract—whose

36. See DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 57 (2007).

37. See David Garland, *Foucault's Discipline and Punish: An Exposition and Critique*, 1986 AM. BAR FOUND. RES. J. 847, 848-52 (1987) (reviewing MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Pantheon Books 1977) (1975)).

38. For the roots of this communitarian understanding of criminal law, see the "reconstructive" theory of criminal law presented in Kleinfeld, *supra* note 35.

39. Again, "reconstructivism" is the theoretical backdrop to this claim. See *id.*

criminality is immutable, a settled feature of his lasting self—is in a certain sense necessarily a nonmember because accepting those terms is part of what membership means. At the same time, it is obvious that the vast majority of offenders are not permanent enemies of the social order; they are people who have *committed* crimes, not people who, in a totalizing sense, *are* criminals. Thus the dynamic of inclusion and exclusion is always linked to judgments that cross the act/actor divide, judgments about the criminal standing behind the crime.

Part III focuses on devaluation and the foundations of rights. Like Part II, it makes a theoretical point about punishment alongside the interpretive point about Europe and America. The theoretical point is this: criminal punishment is one of the locations at which a society demonstrates its conception of the foundation of rights because a criminal system has to decide—it cannot but decide—what to do about the people who commit the most inhuman crimes and exhibit the most depraved characters. If even the worst wrongdoers retain a moral humanity that prohibits subjecting them to extreme forms of hard treatment, then a society has chosen to base rights on humanity *simpliciter*, on the fact of being human. The worst offenders have rights against extreme hard treatment, the thought goes, because to be human is to be a thing of great value or worth; in religious terms (and these issues, as a cultural matter, are often religious), to be human is to be made in the image of God. Human beings therefore cannot be subjected to treatment inconsistent with being the bearer of great value or worth or being made in the image of God. By contrast, if the worst wrongdoers *are* subject to extreme forms of hard treatment—not just for reasons of necessity but as a claim of justice—then the society that so treats them does not ground rights in humanity *simpliciter*. If rights against extreme hard treatment are *forfeit* for wrongdoing, those rights' foundation must be something that wrongdoing can uproot. Such a society might still regard people in other contexts as having dignity, preciousness, and rights, but the dignity or preciousness in question is not *human* dignity or preciousness and the rights are not *human* rights. They are the rights of the citizen, of the morally upright or decent, or of the member of the social contract who upholds the bargain. Societies cannot avoid these philosophical positions: a society commits to a position, consciously or not, when it decides how to punish the worst offenders, and every society must make some choice in that regard. We decide on the foundations of rights when we punish. Part of the reason punishment is of such perennial interest in scholarship and culture, why it breaks the bounds of the academic subfield known as “the theory of punishment,” is because punishment speaks, as all can sense, to who has rights and why.

This analysis of extreme hard treatment suggests an interpretation of Europe's concept of “human dignity,” which is also presented in Part III. That concept is one of the mysteries of comparative law and politics: it is pervasive in Europe's constitutional culture but often puzzles American onlookers,

especially American lawyers, to whom it frequently seems vague and rhetorically overwrought. The above line of thought about extreme hard treatment and the foundations of rights suggests a way into the concept. “Human dignity” in Europe is a secularized version of the claim that human beings are made in the image of God. The claim is metaphysical insofar as it asserts a core of value, worth, preciousness, or moral importance possessed by all human beings by virtue of their humanity *simpliciter*. The claim is functional insofar as it grounds all other claims to basic rights. Every society needs some conception of the thing at the end of the moral road, of the reason why people *matter* from a moral point of view. “Human dignity” is the term Europe uses to name that reason. This raises the interesting question of what America’s parallel concept is. America clearly believes in rights, but it does not commonly identify its conception of the foundation of rights by name and does authorize extreme hard treatment for the worst wrongdoing. I suggest in Part III that the foundation may be something like “democratic dignity.” It is the quality of being a person who behaves decently enough and sufficiently abides by the terms of the social contract to participate in democratic community with others. Again, these conceptions of who morally matters and why are not merely speculative. Societies are compelled to stake out a position on them for reasons of action: criminal punishment will not let a society avoid the choice. A society might not be aware of its choice. It might even lie to itself. But the truth is what we do.

Part IV—the final part of this Article’s interpretive argument—claims that these ideas about immutability and devaluation can be integrated into larger, more comprehensive moral outlooks. On the American side, there are actually two such outlooks, both consistent with the evidence, both deeply rooted in American culture. One is moralistic: the criminal is *evil*; his criminality is immutable and devaluing *because* he is evil, because his crimes expose the truth about who he is. The other comprehensive American outlook is instrumentalist: the criminal is *dangerous*, and not merely dangerous for the moment, but pervasively dangerous—a *dangerous being*—who must therefore be put under pervasive control. The instrumental view does not directly claim that criminality is immutable or devaluing; immutability and devaluation are, as it were, a side effect of regarding the offender as someone properly subject to totalizing forms of control. (I characterize the instrumental view as a moral one because it has unstated moral premises. For example, it does not accept the idea that the criminal’s humanity stands in the way of efficiently exerting control over him. But its moral ideas are subsurface; its defining features are its welfarist goal and its instrumental rationality.) Meanwhile, European punishment does not let criminality penetrate so deeply. The serious or repeat offender is an *us*, not a *them*—a fellow student who is flunking the class and needs some extra tutoring, a musician who needs practice but is not tone-deaf. The European perspective also permits two versions, one instrumentalist, the other moralistic. On the instrumental view, the term “evil” is meaningless—

just a relic of primitive patterns of thought—and the idea of a “dangerous being” is, if not meaningless, an unhelpful and equally objectionable relic of fascist thought. Criminals are people with particular difficulties in need of effective treatments. On the moralistic view, “evil” is a meaningful concept but real criminals are not evil; they are fundamentally good.

Parts II through IV are interpretive; they make no claims as to what, causally, brought the great divergence about. Part V is a causal coda that suggests that the ideas developed in Parts II through IV—ideas of immutability, devaluation, evil, and dangerousness—*were* causal factors in bringing the great divergence about, though not the sole factors at work. The suggestion is that, confronted with a crime wave of unprecedented proportions, Americans in the second half of the twentieth century commonly reacted in one of two ways, which correspond to the two comprehensive moral outlooks discussed in Part IV. One reaction was stridently moralistic. The view was that the worst criminals are bad people, not normal people who commit a crime, and such criminals deserve to be condemned in totalizing ways. The other reaction was narrowly instrumental. The view was that criminals are predatory people who need, for the sake of safety, to be removed, surveilled, and controlled, and for the sake of efficiency, to be removed, surveilled, and controlled as cheaply as possible. These are very different outlooks, but they happen to agree on policy: the *crime* problem, both views hold, is a *criminals* problem, and the primary solution is to cage criminals. The alliance between these two groups, moralists and instrumentalists, inscribed the ideas of immutability and devaluation into American criminal law. Indeed, this toxic mixture of moralism and instrumentalism is, I submit, familiar to any observer of America’s politics of crime.

Europe, meanwhile, experienced an uptick in crime in the second half of the twentieth century, but the uptick was mild relative to the American crime wave; the experience of daily life never came to feel fraught and dangerous as it did in the United States. Thus Europe was insulated from the problems that made American moralists and instrumentalists so politically influential on matters of crime and punishment. Europe’s politics of crime were instead driven by religious reformers and professional civil servants acting on ideas of forgiveness, dignity, and solidarity. Their alliance inscribed into European law the idea that no crime reaches the roots of character.

I. Methodological Premises

Certain aspects of this Article’s argument—the European/American comparison, the distinction between interpreting a legal system and explaining it causally, etc.—might give rise to questions or objections that threaten to derail the argument before it gets started. Some methodological premises are therefore useful 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 difficult 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 all⁴⁰—has a sort of faux sophistication but is ultimately implausible. *American* law considered and rejected a blanket prohibition on the death penalty because the U.S. Supreme Court interpreting the U.S. Constitution considered and rejected that prohibition;⁴¹ *European* law (through both the Council of Europe and European Union) prohibits the death penalty as a matter of European constitutional law.⁴² Criminal law in continental Western Europe has common points of origin (such as the civil law tradition), is shaped by 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, and is brought together by the federal system and U.S. Constitution. Above all, America has a sufficiently shared national culture, and continental Europe, particularly continental Western Europe, has a more limited but still sufficiently shared supranational culture, to make the comparison illuminating. If that were not so, there could be no such thing as harsher “American” or milder “European” punishment at all. One could not speak of the European/American divergence but only, say, a France/Texas divergence or even a Paris/Dallas divergence. We would presumably be barred from other European/American contrasts as well—say, that “Europe” has a more substantial welfare state than “America.” Surely such hyper-specificity

40. Few comparative lawyers go so far, though Pierre Legrand probably does, and David Garland sees more virtue in splitting than in lumping. *See, e.g.,* GARLAND, *supra* note 3, at 38 (arguing that America’s combination of death penalty retention and abolition involves a distinctively “American narrative . . . of local democratic politics in all its varieties”); Pierre Legrand, *European Legal Systems Are Not Converging*, 45 INT’L & COMP. L.Q. 52, 81 (1996) (arguing that European legal systems, though they might appear to be converging, retain “irreducibly distinctive modes of legal perception and thinking”). To be clear, Legrand and Garland think of law as culturally expressive, just as I do. *See, e.g.,* Pierre Legrand, *The Impossibility of ‘Legal Transplants,’* 4 MAASTRICHT J. EUR. & COMP. L. 111, 124 (1997) (“Law is part of the symbolic apparatus through which entire communities try to understand themselves better. . . . [T]he law lives in a profound way within a culture-specific—and therefore contingent—discourse . . .”). They are just skeptical that the jurisdictions making up Europe and making up America have enough in common to make “Europe” and “America” useful nodes of cultural understanding. On this point, we simply disagree.

41. *See supra* note 16 and accompanying text.

42. Charter of Fundamental Rights of the European Union art. 2, ¶ 2, Oct. 26, 2012, 2012 O.J. (C 326) 396 (“No one shall be condemned to the death penalty, or executed.”); Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 13, art. 1, May 3, 2002, E.T.S. No. 187 (“The death penalty shall be abolished.”).

would be an affectation; anyone talking that way would be mentally substituting “Europe” and “America” for the particulars. At some point, greater exactitude detracts from more than it adds to knowledge.

A better approach is to acknowledge that European and American 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 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. As James Whitman writes: “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.”⁴³ Thus the points of comparison throughout this Article will be the various jurisdictions comprising continental Western Europe (which, for readability, I will typically refer to simply as “Europe”) and the various state and federal systems comprising the United States (which I will typically refer to as “America”). Germany and France take pride of place on the European side, as they are Europe’s most populous countries and by far the continent’s most influential legal systems, though I’ll touch on Italy, Spain, and other countries as well.⁴⁴ I leave out the United Kingdom, as its punishment policies are distinctive in ways that fit neither the European nor the American model.

Second, a further word is in order about the distinction drawn above between an *interpretation* of the great divergence and a *historical-causal* claim about how the great divergence came about. To get a grip on this distinction, consider a more familiar case: the philosophers of tort law who argue that “our current tort practices can be understood as expressing an ideal of justice,” because the doctrine and procedural structures of tort law “fundamentally implicate the notion of corrective justice.”⁴⁵ Is that a causal explanation? No; it is an interpretation designed to reconstruct the implicit or immanent logic of tort law from an internal point of view. The parallel, causal claim—which the

43. WHITMAN, *supra* note 3, at 16-17.

44. Continental Western Europe’s most populous countries are, in order: Germany (81 million), France (66 million), Italy (60 million), and Spain (47 million), after which there is a big dropoff (next is the Netherlands at 17 million). See AEBI & DELGRANDE, *supra* note 27, at 42 tbl.1. Those four are reasonably diverse and, collectively, almost as populous as the United States. Europe’s smaller states are often extremely mild—Denmark’s imprisonment rate, for example, is 73 per 100,000, Finland’s is 58, Norway’s is 72, and Sweden’s is 61, *see id.* at 64 tbl.1.5—but I mostly leave them to one side in this Article, as I am generally skeptical of comparisons between vast, diverse countries like the United States and small, wealthy, and relatively homogeneous ones like those in Scandinavia.

45. Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349, 349, 379 (1992).

tort theorists typically do not make—would be perhaps that those who created and sustained tort law’s doctrine and structures were *motivated* by the ideal of corrective justice and fashioned the tort system they did because they were guided by that ideal. That latter claim is extremely difficult to establish and to some extent does not matter. Perhaps the lawyers and judges who fashioned tort law were inspired by ideals of corrective justice and perhaps they had no more elevated motivation than lining their pockets. Either way, they fashioned a social system that, because it is consistent with certain ideas, has come over time to stand for those ideas. Interpreting the values at work in the law simply does not turn on the motives of the lawmakers. The same is true of nonlegal social practices and institutions. If some historian showed that jazz improvisation came from musicians trying to fill the time when they ran out of sheet music, it would nonetheless be the case that jazz improvisation today represents a set of values associated with individuality and spontaneity. The idea that to understand a social practice or institution is wholly or simply to understand the psychology of the people who brought it about is wrongheaded.

Third, my “two ways of looking at a criminal” thesis is meant to capture 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. The ideal type is “an attempt to capture what is essential about a social phenomenon through an analytical exaggeration of some of its aspects.”⁴⁶ 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 phenomena” to fashion “a unified analytical construct.”⁴⁷ 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 may be 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” contrast that is this Article’s thesis. The ideal types, if they are valid, are valid because they get at something important about American and European criminal punishment and because they are comparatively true, not because they are exceptionless.

46. RICHARD SWEDBERG, *THE MAX WEBER DICTIONARY: KEY WORDS AND CENTRAL CONCEPTS* 119 (2005).

47. MAX WEBER, “Objectivity” in *Social Science and Social Policy*, in *THE METHODOLOGY OF THE SOCIAL SCIENCES* 49, 90 (Edward A. Shils & Henry A. Finch eds. & trans., 1949) (emphasis omitted).

Fourth, my claim about the European/American conflict of moral visions is descriptive, not normative, despite the fact that the terms of discussion are moral ones. This Article aims to establish a descriptive claim about moral life as culturally lived. The interest is in “studying morality as a phenomenon or as a set of concepts, rather than in preaching.”⁴⁸ 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”⁴⁹ This Article is about the anterior problem. The goal is cultural excavation. Consequently, the methodology is not pure moral or political philosophy but rather philosophy as a tool with which to examine the character of social life—philosophy as social theory.

II. Immutable Criminality and Social Banishment

The thesis of this Article is that European and American criminal punishment express different pictures of the criminal standing behind the crime and thus different understandings of when, if ever, a person’s crimes deprive him of membership in the community and devalue him as a human being. This Part focuses on the immutability and social membership piece of this broader thesis. American punishment treats an offender who has committed a serious crime or engaged in a pattern of repeat offenses as having exposed the truth about who he is—about his enduring character. The criminal system thus crosses the line separating actor from act, and the crime or series of crimes is taken to justify, not just imposing hard treatment on the offender, but banishing him from social life. European punishment, by contrast, is structured quite precisely to deny that criminality is ever immutable and therefore to refuse ever to cut the ties that bind the offender to social life.

A. Four Formulas of Modern Banishment

Whatever happened to banishment? It is one of the fundamental forms punishment can take—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.”)⁵⁰ to Homer’s epics (“Just like you, I too have left my land—I because I killed a man”)⁵¹ to Great Britain’s penal colonies in America and then

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

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

50. *Genesis* 4:9-12 (King James).

51. HOMER, *THE ODYSSEY* 328 (Robert Fagles trans., Penguin 1996) (n.d.) (emphasis omitted).

Australia (where the last convicts set sail up the Swan River in 1868).⁵² The examples date from earliest antiquity to the nineteenth century, which shows banishment to be among the most basic instruments with which the law has responded to major crime—alongside execution, fines, violence, and shame, and far above loss of liberty. Did this ancient practice just fade away as the world filled up? It did not; it has simply taken modern forms.

To see this, consider a prior question. *Why* would a society banish its worst offenders? What would be the justification? Not rehabilitation, at least in a reintegrative sense: banishment is for people society has given up on. The reason *could* be merely retribution or deterrence: banishment does indeed take something of value from offenders, and that sort of deprivation or infliction is, conceptually, at the core of both retribution and deterrence. But banishment is quite rich in expressive content. It does not just inflict or deprive; it *excludes*. Exclusion is at least as much about what a community wants for itself as it is about imposing hard treatment on an offender. Perhaps, then, the reason for banishment is incapacitation? Yet banishment does not just prevent; it *removes*. It is indeed incapacitation, but incapacitation of a distinctive kind. The traditional accounts of punishment do not fully explain it. They leave a remainder.

The remainder is this: punishment is traditionally regarded as an instrument of hard treatment and control, but, as argued above,⁵³ what both hard treatment and control overlook is punishment's character as an instrument of communal self-definition and social exclusion. Punishment affirms shared values and creates taboos, and it says who, in virtue of seriously or persistently violating those values and taboos, is not merely errant but an enemy of the social order. Punishment draws lines, and the lines it draws are always connected to judgments about the person standing behind the crime. Banishment's significance is that it tracks this exclusionary aspect of punishment. It draws a line between the offender and the community, a "him" and an "us," and says to all: "There is something wrong with this offender—not just with what he has done but with the kind of person he is—that makes him morally unfit or simply too dangerous to live among law-abiding people." The reason banishment's meaning outruns retribution, deterrence, rehabilitation, and even incapacitation is that those justifications all turn on hard treatment or control, while banishment is the sign that a system of punishment has decided that the offender is an "other" who must be excluded.

The claim below is that American criminal punishment routinely banishes serious and repeat criminal offenders while European criminal punishment never wholly does. To defend this claim, I propose four formulas of modern banishment: life in prison without parole, sentences lengthy enough to

52. SEAN O'TOOLE, *THE HISTORY OF AUSTRALIAN CORRECTIONS* 11, 22 (2006).

53. *See supra* notes 36-39 and accompanying text.

constitute a stage of an offender's life, collateral consequences systematic and substantial enough to constitute an analogue to civil death, and capital punishment.⁵⁴ All four, I argue, have an exclusionary nature (they remove the offender permanently or semipermanently from social life), are major parts of American punishment, and are as nearly as possible eradicated in Europe. I doubt any society could do wholly away with banishment, but Europe has come close.

1. Life in prison without parole

The function and meaning of imprisonment is flexible. Holmes argues that in legal history "[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."⁵⁵ To speak of "rules or formulas" is to speak of legal doctrine, which is too small a container for Holmes's insight: the point holds for practices and institutions no less than for legal doctrine. The prison finally is just a persistent institutional fact about modern societies, faithful to no one function or meaning; it is a shell or vase into which a variety of different ideas can be poured. Some prisons are meant to inflict suffering. Some are simply cages meant to hold. During America's progressive experiments of the nineteenth century, prisons were reconceptualized as *penitentiaries*—places of penance—geared toward saving souls.⁵⁶ Insofar as prisons take something of value from offenders, they are well suited to the functions of retribution and deterrence, both of which turn on deprivation or infliction. Insofar as prisons surveil and control, they are, as Foucault showed, well suited to rehabilitation and incapacitation, both of which turn on control.⁵⁷

An additional function for which prisons are exceedingly well suited is that of banishment within territorial limits, and the paradigmatic example of such banishment is a sentence of life in prison without parole (LWOP). Even its name captures the banishment idea: "life in prison" accomplishes nothing that "one hundred years in prison" would not but articulates the idea that the

54. The list may not be exhaustive. It would be interesting in particular to examine the deportation of offenders who are immigrants. I table that issue here, however, because deportation of immigrants seems 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."

55. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 5 (Dover Publ'ns, Inc. 1991) (1881).

56. See, e.g., FRIEDMAN, *supra* note 3, at 77-82.

57. FOUCAULT, *supra* note 37, at 231-34.

whole of a life, whatever its term of years, is to be spent apart from ordinary people. This function or meaning is intuitive and culturally intelligible. As defense counsel in a California capital case argued to the jury:

Mr. Bradford will die in prison. That is no longer an issue. . . . In chapter 4 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.⁵⁸

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 a built wilderness—a modern banishment.⁵⁹

Europe and America’s disagreement over the death penalty sucks so much air out of the room that the depth of the European/American disagreement over LWOP is comparatively overlooked. But the countries of Europe have been working their way toward LWOP’s elimination for decades and, in 2013, it was banned on a constitutional basis throughout virtually the whole continent. The process began with the German Federal Constitutional Court, which ruled in 1977 that sentences of life without parole violate the constitutional principle of human dignity.⁶⁰ That same year, a Council of Europe committee opinion declared that “it is inhuman to imprison a person for life without any hope of release.”⁶¹ 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.⁶² An idea was on the move in Europe, and it culminated in the European Court of Human Rights’s (ECHR) 2013 case, *Vinter v. United Kingdom*.⁶³ *Vinter* held that LWOP violates the prohibition on “inhuman or degrading treatment or punishment” in Article Three of the European Convention on Human

58. *People v. Bradford*, 929 P.2d 544, 579-80 (Cal. 1997) (first alteration in original).

59. Sharon Dolovich develops this point in *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 263, 268 (2011), and *Creating the Permanent Prisoner*, in LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY? 96, 96-100 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012).

60. Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court] 1977, 45 BVerfGE 187 (Ger.).

61. Catherine Appleton & Bent Grøver, *The Pros and Cons of Life Without Parole*, 47 BRIT. J. CRIMINOLOGY 597, 609 (2007).

62. *Id.* at 610 & nn.48-49.

63. 2013-III Eur. Ct. H.R. 317.

Rights.⁶⁴ The ECHR's rulings are not advisory⁶⁵: they are binding upon the parties to the case, constitute an authoritative interpretation of what the Convention requires, and have some legal effect throughout the forty-seven member states of the Council of Europe.⁶⁶ Thus LWOP has been essentially unconstitutional throughout virtually the whole of Europe for the last three years.

The *Vinter* opinion says a great deal about how Europe looks at criminals, but its arguments are initially puzzling. Holding a life-sentenced offender

64. *Id.* at 339, 349-50, 353. In the procedural run-up to the ECHR's 2013 *Vinter* ruling, an intermediate chamber of the court came to a different holding in 2012, which led to a secondary literature that correctly represents the 2012 opinion but not the final, 2013 opinion and risks confusion about what *Vinter* really stands for. *See, e.g.,* Marek Szydło, *Vinter v. United Kingdom*, 106 AM. J. INT'L LAW 624 (2012). The 2013 opinion is also terminologically complex (introducing distinctions between, for example, life sentences and whole life orders, mandatory and discretionary life sentences, forms of review that are like parole in substance but not termed "parole," etc.), which can compound the confusion. The key to the case, expressed most clearly in paragraphs 106-14 and 119-21, is the court's insistence that every state provide a mechanism by which to review life sentences after a term of years and release the prisoners if they are sufficiently rehabilitated. *Vinter*, 2013-III Eur. Ct. H.R. at 345-47, 349-50. When I say that *Vinter* holds LWOP unconstitutional, all I mean by LWOP is the absence of such a mechanism.

65. Note a jurisprudential distinction: there is a difference between rulings that cannot be enforced (because a court lacks the power to compel compliance) and rulings that are juridically or formally nonbinding (because they are designated by law to be advisory). Enforcement is sometimes a problem for the ECHR because it is an international human rights court (though its record of securing compliance is surprisingly good), but its rulings are nonetheless binding as a matter of law on parties to the case. *See infra* note 66.

66. Some background is in order here. The Council of Europe is a separate body from the European Union. It is older, having been in operation since 1949, and larger, including forty-seven member states (eight hundred million people) to the EU's twenty-eight. And whereas the EU's founding purpose was economic, the Council of Europe's was human rights. The European Convention on Human Rights, besides laying out certain rights in substance, creates a court—the ECHR—to adjudicate rights issues among Convention signatories. Amendments in 1998 gave the court compulsory jurisdiction such that those eight hundred million individuals residing in Council of Europe states can petition the court directly alleging a human rights abuse and, if the court decides to take the case, the state-defendant is legally bound to comply with the court's ruling. This has led the court to claim that its rulings should be treated as *erga omnes*—binding on all Convention signatories, like U.S. Supreme Court rulings are binding throughout the United States—even if those rulings are formally only binding on the parties to the case, and many Council of Europe states agree, treating the court's rulings in cases involving other states as binding precedents and adjusting domestic law accordingly. Perhaps the most striking feature of the ECHR and the human rights regime it presides over is that, within its jurisdiction, it is substantially effective and enforced. *See* Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 GLOBAL CONSTITUTIONALISM 53, 59, 61, 63, 66, 76-79 (2012); *see also* Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. 77, 77-80 (2014).

“without any prospect of release and without the possibility of having his life sentence reviewed” creates “the risk that he can never atone,” no matter how “exceptional his progress towards rehabilitation.”⁶⁷ “Atone” here seems to mean “be forgiven”: what the court sees as problematic is that a rehabilitated offender cannot be forgiven. But what is wrong with that? The court states that such a sentence could not possibly be “just” or “proportionate,”⁶⁸ but what concept of justice or proportionality does the court have in mind (obviously not an eye for an eye)? The court’s key move turns on the concept of human dignity: imprisoning a person “without at least providing him with the chance to regain that freedom one day” violates the “dignity” that is the “very essence” of the European human rights system.⁶⁹ But (to ask the routine American question in these contexts) what does this concept of “dignity” mean? It does not seem to explain why LWOP is wrong so much as shift the question to another rhetorical ground. Europe’s dignitary tradition is often associated with Immanuel Kant, but Kant would never have supported a decision like *Vinter*. For Kant, “dignity” is not about soft treatment but about human beings’ capacity for reason and freedom, in virtue of which a human being must always be treated as a person rather than a thing, “as an end, never merely as a means.”⁷⁰ To have the capacity for reason and freedom—to have agency—is to be responsible as well as rights-bearing: rights and responsibility flow from the same well. Thus, Kant argued, holding people responsible for their actions is part of treating them with dignity, and to punish wrongdoing to the extent of the wrongdoing is a moral imperative.⁷¹ It is morally imperative, for example, to put a murderer to death.⁷² European law’s concept of dignity might have some genealogical connection with Kant’s, but it has drifted far away from Kant’s in substance.

There is, then, a principle at work in *Vinter* that falls under what the court calls “dignity,” that makes LWOP qualify as “inhuman or degrading,” but the

67. *Vinter*, 2013-III Eur. Ct. H.R. at 346.

68. *Id.* at 346-47.

69. *Id.* at 347.

70. These ideas are at work throughout Kant’s corpus, but the most intuitive articulation of them is probably the quoted language, which comes from Kant’s second formulation of the Categorical Imperative: “So act that you use humanity, in your own person as well as in the person of any other, always at the same time as an end, never merely as a means.” IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 41 (Mary Gregor & Jens Timmermann eds. & trans., Cambridge Univ. Press rev. ed. 2012) (1785) (italics omitted).

71. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 140-42 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797).

72. See *id.* at 142 (“Even if a civil society were to be dissolved by the consent of all its members . . . the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve . . .”).

substance of which is not clear from the majority opinion. Consider, then, 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" 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.⁷³

There are three ideas at work in this passage. First is that every human being, no matter what he has done or who he has been, retains a core of goodness and the potential for goodness. This "fundamental humanity" in virtue of which all people "carry within themselves the capacity to change"⁷⁴ represents a direct denial of the idea that criminality might be immutable, a settled fact about the criminal's enduring self. Second is that taking away an offender's hope of release is cruel; hard treatment should never be that hard. This is the "right to hope,"⁷⁵ and it is connected to the previous denial of immutability: the cruelty lies in treating someone who is fundamentally good (whatever wrongs he may have committed) as if he were immutably criminal. Third is that rehabilitation is always possible and is so much the point of punishment that punishment must end when rehabilitation is achieved. As the majority puts 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."⁷⁶ Given the ECHR's authority over the meaning of the European Convention on Human Rights, it is not too much to say that rehabilitation is now part of the binding constitutional law of Europe. By the same token, banishment is effectively unconstitutional. If every offender is potentially rehabilitable and it is a constitutional right to be released upon rehabilitation, then the threads that bind the offender to the community can never wholly be cut.

What this amounts to in sum is that Europe's constitutional order requires nothing less than faith in the potential goodness of all human beings and treatment of criminal offenders in ways consistent with that faith. "Dignity" in this context means that no action, no matter how wrongful, marks the actor as

73. *Vinter*, 2013-III Eur. Ct. H.R. at 358 (Power-Forde, J., concurring).

74. *Id.*

75. *Id.*

76. *Id.* at 347 (majority opinion).

a morally ruined human being. And as no one is a morally ruined human being, no one may be permanently barred from social membership. Notice that the claim is not that the community can accommodate those who incorrigibly attack the foundations on which the social order is based. No community could accommodate that. The claim is that *there are no such people*. Or at least, Europe is determined to act as if there were no such people, in a show of faith that seems at once naive and valiant. Criminality, Europe insists, is never immutable. And note that the court did not impose these ideas on Europe purely from above: *Vinter* echoes principles articulated in the 1977, 1987, and 1994 rulings of the German, Italian, and French high courts, respectively.⁷⁷ These are principles that Europe has been collectively working through for thirty-five years.

Now the American side: Approximately 50,000 prisoners are currently serving LWOP sentences.⁷⁸ Forty-nine states and the federal government provide for LWOP sentences (Alaska is the only exception), and forty-eight states and the federal government actually impose LWOP sentences (Alaska and New Mexico are the exceptions).⁷⁹ Juveniles are not immune: approximately 2500 of those 50,000 prisoners received LWOP for a crime committed while they were juveniles, and although the Supreme Court has recently struck down some of those sentences, it remains possible to sentence a juvenile to LWOP.⁸⁰ Offenders also get LWOP for a wide variety of reasons. Homicide is one major reason—about two-thirds of LWOP sentences are for homicide—but most of the remaining third are for other crimes of violence, and six percent are for drug or property crimes.⁸¹ Recidivism is another reason (three-strikes laws are a major cause of LWOP sentences, especially for nonhomicide offenses), but people can and do get LWOP on a first offense.⁸² In other words, America cuts ties of social membership with a *lot* of people for a *lot* of reasons.

Two elements of this European/American contrast—besides the sheer scale of it—are particularly striking. First, the very existence of parole is controversial in the United States and has been eliminated or curtailed under federal law and in twenty-seven states. The federal government substantially eliminated parole with the Comprehensive Crime Control Act of 1984.⁸³

77. *See supra* notes 60-62.

78. ASHLEY NELLIS, THE SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 1 (2013).

79. *Id.* at 3, 6; *see also* *Baze v. Rees*, 553 U.S. 35, 78 n.10 (2008) (Stevens, J., concurring).

80. NELLIS, *supra* note 78, at 11.

81. *Id.* at 7.

82. *Id.* at 7, 15-16.

83. Pub. L. No. 98-473, tit. II, § 214, 98 Stat. 1976, 2013 (repealing 18 U.S.C. § 5041 and removing language about parole from 18 U.S.C. § 5042); *see also* Note, *A Matter of Life* footnote continued on next page

Supervised release remained, but it is different, and different in a philosophically significant way. “Parole” typically refers to the discretionary release of prisoners prior to the end of their sentences because some decisionmaker (usually a parole board) finds them to be sufficiently rehabilitated as to make further imprisonment unwarranted.⁸⁴ “Supervised release” is part of the original sentence and simply splits the sentence into a term of imprisonment and a term of post-imprisonment supervision.⁸⁵ Parole implies that rehabilitation is the point or part of the point of punishment; supervised release does not carry that implication and if anything suggests the opposite: that even after release, offenders must be watched. The federal government acted again in 1994 with the Violent Offender Incarceration and Truth-in-Sentencing Incentive Grants program, which provided incentive grants to the states to build or expand jails and prisons on condition that violent offenders serve no less than eighty-five percent of their prison sentence.⁸⁶ Essentially the federal government requested that the states curtail parole and offered to pay for the extra jails and prisons the curtailment would require. By 1999, twenty-seven states qualified for the federal grants and at least fourteen had essentially eliminated discretionary parole altogether.⁸⁷

The political forces at work in these developments were complex; the story isn’t wholly one of punitive emotions or the explicit belief that serious criminals are unsalvageable people. Some of those opposed to parole were skeptical of rehabilitation and opposed to leniency (parole was seen as making prisons a “revolving door” and parole boards were seen as soft on crime), but some parole opponents were motivated by values of horizontal equity and governance by rules—the values that helped give birth to the determinate sentencing movement and, through it, state and federal sentencing guidelines.⁸⁸ Indeed, the 1984 Act is remembered today not mainly for eliminating parole but for creating the Federal Sentencing Guidelines.⁸⁹ Parole had to give way, not necessarily for the sake of harsh punishment, but for the

and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment, 119 HARV. L. REV. 1838, 1842 (2006). Some instances of federal parole remain because the Act only applies to federal prisoners sentenced after the Act took effect.

84. See U.S. PAROLE COMM’N, U.S. DEP’T OF JUSTICE, HISTORY OF THE FEDERAL PAROLE SYSTEM 1-2, 26-27 (2003) (describing the shift from parole to supervised release).

85. *Id.*

86. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 20101-09, 108 Stat. 1796, 1815-19 (codified as amended at 42 U.S.C. §§ 13701-09 (2014)).

87. PAULA M. DITTON & DORIS JAMES WILSON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, TRUTH IN SENTENCING IN STATE PRISONS 3 (1999), <http://www.bjs.gov/content/pub/pdf/tssp.pdf>; Fox Butterfield, *Eliminating Parole Boards Isn’t a Cure-All, Experts Say*, N.Y. TIMES (Jan. 10, 1999), <http://nyti.ms/186bomx>.

88. See WHITMAN, *supra* note 3, at 51-54.

89. U.S. PAROLE COMM’N, *supra* note 84, at 1-2, 26.

sake of rule-governed punishment—that is, determinate sentencing. And the determinate-sentencing movement was highly diverse: some supporters were law-and-order conservatives, but others were rule-oriented lawyers acting on a certain conception of the rule of law, and some were liberals who thought determinate sentencing would make punishment milder and more equal (i.e., less influenced by race and class).⁹⁰ Thus, ironically enough, law-and-order conservatives, rule-of-law lawyers, and some racial-justice or soft-on-crime liberals all had a hand in parole's demise.

There is a large conceptual reason for these complex politics. Although parole historically has been associated with *leniency*, its deeper link is to *individualization*, which might be lenient or severe, rehabilitative or incapacitative, as the case may be. Parole's opponents therefore included both those who wanted more severity and those who wanted more control by rules.⁹¹ Yet diverse as these political forces were, their combined effect was to destroy the most important rehabilitative element in the criminal justice system and thus to build a system expressive of the idea that serious or repeat offenders are ruined people. The whole affair is a lesson in how political action can get away from us and the intentions in our minds fall to the wayside in understanding what we wrought with our hands. Hegel called all this the "cunning of reason," and it is part of why a socio-theoretic, interpretative approach to questions of social life can sometimes produce more insight than one focused on causes or motives.⁹²

The other striking aspect of Europe and America's positions on LWOP is the division over constitutional law. The idea that LWOP might be unconstitutional is almost totally off the radar screen in contemporary American law. True, the Supreme Court has issued three decisions since 2010 limiting (although not eliminating) LWOP for juveniles, but the decisions are recent and cautious, and juvenile crime is a special case.⁹³ The idea that the Constitution might prohibit LWOP altogether is not on the American constitutional table. The difference is a matter of culture, not constitutions.

90. See WHITMAN, *supra* note 3, at 53-54.

91. *Id.* at 51-54.

92. G.W.F. HEGEL, INTRODUCTION TO THE PHILOSOPHY OF HISTORY 35 (Leo Rauch trans., Hackett Publ'g Co. 1988) (1837) (emphasis omitted); see *infra* notes 351-55 and accompanying text.

93. Chronologically, the cases are *Graham v. Florida*, 560 U.S. 48, 82 (2010) (prohibiting LWOP for juveniles who did not commit homicide); *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012) (prohibiting mandatory LWOP for juveniles); and *Montgomery v. Louisiana*, 136 S. Ct. 718, 732 (2016) (holding that *Miller* applies retroactively). Really, what the decisions demonstrate is how extreme the great divergence was before the recent softening. It is amazing that America was once so committed to the idea that criminals have ruined characters that it not only tried juveniles as adults—a practice Europeans find "little less than shocking," WHITMAN, *supra* note 3, at 3—but imposed LWOP on them despite their youth.

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,⁹⁴ unless one makes a fetish of the word "unusual" (and thinks everyone else does too). 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. We are not different because we have different constitutions; we have different constitutions because we are different.

Seen in comparative perspective, parole in general and LWOP in particular turn out to be chock-full of symbolic meaning. They do not attract the kind of political or scholarly attention in the United States that, for example, capital punishment and three-strikes laws do, but they should. The cultural and moral stakes at issue with parole and LWOP are as high as almost anything else in the criminal justice system. The insistence on parole and the elimination of LWOP stand for the belief (or better, the commitment to believing—the faith) that all offenders are capable of leaving their criminality behind, nothing is unforgiveable, no one past saving, and no one forever excluded from the social world—that, in a word, criminality is mutable. The elimination of parole and insistence on LWOP stand for the belief or faith that some offenders are permanent criminals, that some wrongs are unforgiveable, and that some people who cannot be saved must be banished from the social world—that, in a word, criminality is potentially immutable. These organizing faiths reach even into the constitutions of both Europe and America.

2. Stage-of-life sentences

We ordinarily think of prison sentences as punishment along a smooth slope: to send someone to prison for three years imposes a measure of hardship and for twenty years simply a greater measure 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," one might think, "but a rather different person than I was ten years ago and a substantially different person than I was twenty years ago." A three-year prison sentence for a twenty-year-old represents simple deprivation; a twenty-year sentence for a twenty-year-old represents the remainder of his or her youth. It says, "This hot-blooded

94. Compare U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."), with Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, art. 3, Nov. 4, 1950, E.T.S. No. 5 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

young person is banished; the middle-aged version may rejoin society.” There are, in other words, prison sentences that constitute partial banishments, stage-of-life banishments. While of course it is impossible to specify precisely how long a sentence must be to constitute a stage-of-life banishment, ten years or longer without or before parole seems like a reasonable minimum. Sentences of such length are a second formula of modern banishment.

Part of the great divergence is a European/American disagreement over stage-of-life banishments. On the European side, German law is a useful model: it provides for sentences of ten years or longer, but they are exceedingly rare. The German penal code opens its section on “Imprisonment” by establishing fifteen years as the maximum allowable sentence for all crimes (including repeat offenses) except aggravated murder, for which a life sentence with the possibility of parole is available.⁹⁵ German law, then, provides for two stage-of-life sentences: ten to fifteen years and life with parole. The twenty-year and other multi-decade sentences that feature so prominently in American criminal punishment are missing, but Germany nonetheless authorizes stage-of-life banishments to some extent. The extent, however, is smaller than it might seem. As of 2013, out of a population of 81 million and a prison population of 56,000, there were only 691 prisoners serving sentences of ten to fifteen years and another 1994 serving sentences of life with parole for aggravated murder—about 2700 people total.⁹⁶ Now, 2700 people out of 81 million is a tiny group, but to understand how tiny—to understand how exceptional those stage-of-life prisoners are—some context is necessary.

In 1969, Germany began a process of massive penal reform oriented to making punishment milder, and it has been German policy ever since to reduce incarceration as much as possible.⁹⁷ Indeed, as a leading German criminal law 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.”⁹⁸ As a result, 82% of all German offenders are only fined and another 12% receive suspended sentences (prison sentences under two

95. STRAFGESETZBUCH [STGB] [PENAL CODE], §§ 38, 211-12, *translation at* http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf. I am using the term “aggravated” slightly more broadly than the German penal code does. Technically, German law makes life-with-parole sentences available not only for aggravated murder (defined as, e.g., killing for “pleasure,” “greed,” or “sexual gratification”) but also for “especially serious cases” of what is formally defined as non-aggravated murder. *Id.*

96. AEBI & DELGRANDE, *supra* note 27, at 110 tbl.7, 116 tbl.7.1.

97. Thomas Weigend, *Sentencing and Punishment in Germany*, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 188, 190-93 (Michael Tonry & Richard S. Frase eds., 2001).

98. *Id.* at 195.

years are suspended two-thirds to three-fourths of the time).⁹⁹ Only 6% of convicted offenders actually serve time. Of that 6%, almost half serve less than one year; they are the leftovers from the group that did not get suspended sentences.¹⁰⁰ The remainder—3% of all offenders or slightly over 30,000 people—actually spend at least one year in prison.¹⁰¹

It takes a *lot* to get into that 3%. European imprisonment has “generally restricted itself to targeting violent offenders, and indeed only a proportion of those. In place of the broad-gauged harshness of the American kind, these northern European societies have seen a narrowly crafted harshness aimed at a relatively restricted class: violent offenders, terrorists, certain sex offenders, [and] drug dealers.”¹⁰² In Germany, that group is narrower still: to get a sentence of one year or more, generally the violent offenders must be highly violent and the sexual offenders must be rapists.¹⁰³ This was emphatically true between 1969 and 1998, when German law displayed what even by German standards was considered a “lenient attitude toward crimes against the person.”¹⁰⁴ Attempted battery was not punishable, for example, where attempted property destruction was; simple battery was subject to a maximum of three years imprisonment, simple larceny to five; and even “a rapist could get off with six months in prison if there were extenuating circumstances.”¹⁰⁵

99. *Id.* at 191, 196 tbl.5.5.

100. *See* AEBI & DELGRANDE, *supra* note 27, at 110 tbl.7, 116 tbl.7.1.

101. *Id.* at 116 tbl.7.1.

102. WHITMAN, *supra* note 3, at 71. Anecdotally, my sense is that the group serving over one year also includes significant recidivists convicted of serious but somewhat lesser offenses than those on Whitman’s list.

103. Reliable statistical information on the offenses and criminal records of inmates serving exclusively a year or more is not available; the available information encompasses both those serving less and more than one year. However, among the entire population of German inmates—and note that half of them serve less than one year—6% committed rape (virtually no other sexual offenses lead to prison terms); 7% committed homicide or attempted homicide; 13% committed robbery; 13% committed assault and battery; 14% committed drug offenses; 14% committed financial offenses; 22% committed theft; and the remainder falls into an “other” category, which presumably includes Whitman’s last category of terrorism. AEBI & DELGRANDE, *supra* note 27, at 104 tbl.6, 105 tbl.6.1. One study—which does focus exclusively on sentences of one year or more, but may have methodological problems—indicates that only 6% of Germans convicted of aggravated assault go to prison for longer than one year, versus 32% of Americans. RICHARD S. FRASE, SENTENCING IN GERMANY AND THE UNITED STATES: COMPARING ÄPFEL WITH APPLES 12 (2001), <http://www.mpicc.de/shared/data/pdf/frase-endausdruck.pdf> (discussing work by Floyd Feeney). Another study—which does not distinguish between those serving less and more than one year—reports that, among those convicted for burglary, 34% of Germans go to prison versus 71% of Americans; for serious forms of theft, 26% versus 63%; for fraud or embezzlement, 3% versus 47%; and for dealing drugs, 21% versus 74%. *Id.* at 18 tbl.2.

104. Weigend, *supra* note 97, at 210.

105. *Id.* Note that, despite the tone of the quoted text, Weigend favors this more lenient, pre-1998 regime. *See id.* at 206, 212.

When Günter Parche stabbed tennis star Monica Seles in 1993, he received a sentence of probation and did no time, “[f]ollowing normal German practice.”¹⁰⁶ In 1998, Germany toughened sentences for violent offenders, but substantial prison time for crimes against the person, including sexual offenses, still requires major violence or rape.¹⁰⁷ Indeed, the minimum penalties even for rape are still quite short. The minimum for sexual compulsion by force but without penetration is generally one year (six months in “less serious cases”), and the minimum for sexual compulsion by force and with penetration is generally two years.¹⁰⁸ Both sentences are short enough that the offender is theoretically eligible for a suspended sentence.¹⁰⁹ Only where the sexual compulsion involves a weapon or the risk of serious bodily injury to the victim does the minimum rise above the suspended sentence mark to three years.¹¹⁰

In short, the 3% of German offenders who serve prison sentences of one year or longer are a select group of very serious criminals. And most of them nonetheless get paroled. German prisoners are entitled to be considered for parole after two-thirds of their sentence is served, and German courts “shall” grant parole provided certain conditions are met (including public safety but not including the seriousness of the original offense).¹¹¹ Even for those aggravated murderers putatively sentenced to life, the German penal code requires parole after fifteen years provided “the particular seriousness of the convicted person’s guilt does not require [the punishment’s] continued execution.”¹¹²

So which offenders in Germany really serve stage-of-life banishments? Of the small group of about 30,000 very serious criminals who actually spend a year or more in prison, only the most extreme core—about 2700 people—serve even a putative sentence of ten years or more.¹¹³ About 2000 of them face a life sentence specifically for aggravated murder and are eligible for parole after fifteen years. The remaining 700 face a ten- to fifteen-year sentence for other extraordinary crimes and are eligible for parole after roughly seven to ten

106. WHITMAN, *supra* note 3, at 72. Günter Parche was adjudged mentally ill, which makes him a problematic, if quite vivid, example of Whitman’s point.

107. *See* Weigend, *supra* note 97, at 210.

108. STRAFGESETZBUCH [STGB] [PENAL CODE], § 177, *translation at* http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf.

109. *See supra* note 99 and accompanying text.

110. STGB § 177.

111. STGB § 57(1)-(2); *see also* Weigend, *supra* note 97, at 211-12. Parole is also possible after half the sentence is served, but it is very rare. Weigend, *supra* note 97, at 211.

112. STGB § 57a.

113. Preventive detention is discussed below in notes 220-27 and accompanying text.

years. In essence, Germany imposes stage-of-life banishments only on a tiny sliver of utterly extreme offenders.

This pattern of relatively short sentences even for significant crimes, sentences above ten years only in rare cases, and parole rules that undercut even those rare cases, holds throughout much of Europe. No Council of Europe country has LWOP, as discussed above.¹¹⁴ Seven European countries—including Spain—do not allow for life sentences even with parole, and another six have zero prisoners serving a life sentence.¹¹⁵ France is an interesting case study, as it is the continent's second-largest country and has one of its more severe systems of punishment. Like Germany, France generally metes out significant imprisonment only for “violent offenders, terrorists, certain sex offenders, [and] drug dealers,” and to get into that group, the violent offenders have to do major violence; examples of extraordinary leniency toward violence like that of Günter Parche can be easily multiplied in France as well as Germany.¹¹⁶ Out of 67 million French people, approximately 5000 are serving sentences of 10-20 years, 2000 are serving sentences of 20-30 years, and 500 are serving sentences of life with parole (available in France only for crimes like leading a drug trafficking group, certain types of murder, torture, and kidnapping, and crimes against humanity).¹¹⁷ Offenders in each group are ordinarily eligible for parole after serving half or two-thirds of their sentence or, for the lifers, fifteen years;¹¹⁸ the standard for parole is their progress toward “social reintegration.”¹¹⁹ Italy is also one of Europe's larger and harsher jurisdictions. Out of 61 million people, about 5500 are serving sentences of 10-20 years, 2000 are serving sentences of 20 years or more, 1500 are serving life sentences, and parole is generally available.¹²⁰ In sum, then, Germany, France, and Italy do issue sentences that amount to stage-of-life banishments, but only for exceptional cases of very serious crimes and criminals, amounting to less than 2700 people in Germany, 7500 in France, and 9000 in Italy (“less than” based on whatever number in each country gets paroled before the ten-year mark).¹²¹

114. *See supra* notes 64-66 and accompanying text.

115. AEBI & DELGRANDE, *supra* note 27, at 116 tbl.7.1.

116. *See supra* notes 102-06 and accompanying text.

117. AEBI & DELGRANDE, *supra* note 27, at 110 tbl.7; *see also* CODE PÉNALE [C. PÉN.] [PENAL CODE] arts. 211-1, 212-1, 221-3, 221-4, 222-2, 222-34, 224-2 (Fr.); Appleton & Grøver, *supra* note 61, at 610 & nn.48-49.

118. CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 729 (Fr.).

119. *Id.*

120. AEBI & DELGRANDE, *supra* note 27, at 110 tbl.7; *see also* ASTOLFO DI AMATO, CRIMINAL LAW IN ITALY 127 (2011) (describing the availability of parole in Italy).

121. *See supra* notes 96, 117, 120 and accompanying text.

Now the stark contrast: in the United States—even focusing on federal prisoners alone, a small minority of prisoners overall—approximately 47% or 87,000 people are serving sentences of at least ten years.¹²² Provided they were sentenced after the Comprehensive Crime Control Act of 1984 took effect, they cannot be paroled.¹²³ Some of these sentences are for repeat offenses,¹²⁴ but even on a first offense, federal law imposes stage-of-life banishments for a much wider variety of crimes than does European law. Under the Guidelines, any crime that classifies as an offense level of thirty-two or higher carries at least a ten-year minimum, including: murder and aggravated forms of attempted murder, rape and aggravated forms of sexual abuse, kidnapping and related crimes, aggravated carjacking, aggravated forms of embezzlement, and a raft of drug crimes.¹²⁵ A crucial procedural point must also be taken into account: where a defendant has engaged in a single course of criminal conduct, prosecutors can charge multiple overlapping offenses so long as none is identical to or a subcategory of any other, and prosecutors can charge multiple counts of the same offense based on the number of victims or violations.¹²⁶ The effect is to lengthen the sentence for even minor crimes to major levels: someone who, say, illegally shares an album of music online might be charged with multiple counts based on the number of songs shared; if the offender then lies about it to investigators, the same lie might be charged as both a false statement and an obstruction of justice. To my mind, perhaps the most morally troubling feature in all of American punishment is that the people sentenced to stage-of-life banishments and other forms of social exclusion are *not* necessarily serious criminals.

Before closing this discussion, it is worth pausing over one European/American *nondivergence*, one similarity that arises in the context of stage-of-life imprisonment, in order to dispel a common misconception. Some people suppose that America's war on drugs is the chief cause of its harshness relative to Europe, or in expressive terms, that American criminal punishment demonstrates a puritanical attitude toward drugs, where Europe demonstrates liberal toleration. This may be a myth. It takes a great deal even to land in prison in Europe, but in Germany, 14% of all prisoners are there for drug

122. See *BOP Statistics: Sentences Imposed*, FED. BUREAU PRISONS (last updated Mar. 26, 2016), http://www.bop.gov/about/statistics/statistics_inmate_sentences.jsp.

123. See U.S. PAROLE COMM'N, *supra* note 84, at 1-2, 26; see also *supra* notes 83-92 and accompanying text.

124. For more on repeat offenses, see Part II.B below.

125. See U.S. SENTENCING GUIDELINES MANUAL §§ 2A2.1, 2A3.1, 2A4.1, 2B1.1, 2B3.1, 2D1.1 (2015).

126. Stuntz, *supra* note 18, at 507, 517-19, 531, 594-95 (describing how "lax double jeopardy doctrine," nonconstitutional joinder law, and charge stacking increase harshness and induce guilty pleas).

offenses; in France, that number is also 14%; in Spain, 25%; and in Italy, 38%.¹²⁷ In U.S. state jurisdictions, which include the vast majority of all offenders, about 16% of prisoners are there for drug offenses (4% for possession, 12% for everything else).¹²⁸ That number rises to 50% for federal prisoners, but the reason is largely the federal government's special role in drug enforcement and the smaller overall number of federal prisoners.¹²⁹ Some suggest that Europe is tough with drug dealers but, unlike the United States, lenient with drug users. A deeper dive into the data would be necessary to confirm or disconfirm that contention. But at least with respect to drug dealers, America and Europe are arguably comparable in severity relative to their own baselines (Europe is more lenient across the board). I stressed above, for example, that only a small group of very serious criminals spend a year or more in prison in Germany. An even smaller group spends more than two years in a German prison, but of that group, drug dealers comprise almost 25%.¹³⁰ In a country that regularly gives no prison time or short sentences even to violent offenders, drug dealers who work in a gang context face a five-year minimum.¹³¹ As a leading German criminal law scholar writes: "Because drug offenses carry heavy prison sentences under German law and courts do not hesitate to implement the mandate of the law, the rise in drug convictions goes a long way to explain why German prisons are (again) filled to capacity and beyond."¹³² In France as well, drug dealers stand alongside aggravated murderers and terrorists as some of the only criminals subject to stage-of-life banishments.¹³³ The great divergence is not about drugs.

In the final analysis, European countries do engage in stage-of-life banishment and most though not all engage in conditional permanent banishment (that is, life with the possibility of parole). Again, I doubt any society in the world could do without banishment altogether. But Europe imposes these banishments as an extraordinary measure in response to a small group of extremely dangerous offenders. America imposes them as an ordinary measure in response to a wide variety of different kinds and degrees of offender.

127. AEBI & DELGRANDE, *supra* note 27, at 105 tbl.6.1.

128. E. ANN CARSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2014, at 16 tbl.11, 17 tbl.12 (2014), <http://www.bjs.gov/content/pub/pdf/p14.pdf>.

129. *Id.*

130. Weigend, *supra* note 97, at 213 n.16.

131. *Id.* at 213 n.15.

132. *Id.* at 194.

133. *See supra* note 116-117 and accompanying text.

3. Analogues to civil death

To deprive a wrongdoer of legal personality or civil rights is a type of banishment, an eviction from the community or polity. Punishments of this sort are extremely common historically: outlawry, infamy, exile, excommunication, attainder, and civil death form a chain of exclusionary punishments across the centuries. They are, to adapt a term of Hegel's, *recognitional* punishments: their nature is to deprive the offender of recognition in the social world.¹³⁴ They are so clearly about one's standing in the community as to make my core theoretical claim—that punishment is about membership, not just hard treatment or control—almost obvious. It only seems otherwise because the contemporary world focuses so much on incarceration.

"Outlawry" among early Germanic tribes "implied the ousting of the offender from the community and the deprivation of all rights," such that he "lost all his possessions," "anybody could kill him with impunity," and his "children were considered as orphans, and his wife a widow."¹³⁵ Early Rome also used this device,¹³⁶ as did Iceland at its founding.¹³⁷ A later development of ancient Athens and the Roman republic was "infamy," entailing "the loss of all rights which enabled a citizen to influence public affairs," including "the right to attend assemblies, vote, make speeches," hold public offices, serve in the army, and appear in court.¹³⁸ Later still, in imperial Rome, "[e]xile, previously a means of escaping punishment, now became a penalty," sometimes carrying with it loss of Roman citizenship.¹³⁹ Early medieval Europe made use of these various devices in modified form,¹⁴⁰ and a new one appeared through the Church: excommunication. "Minor excommunication," as it was termed in canon law, denied the sacraments to the person excommunicated; he could not

134. Recognition as Hegel conceived it is an intersubjective good whereby a person or community accords another respect and affirms that other's moral, social, or legal status; it is "familiar from such expressions as 'The PLO has agreed to recognize the state of Israel.'" Joel Anderson, *Translator's Note to AXEL HONNETH, THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS*, at viii, viii (Joel Anderson trans., Polity Press 1995) (1992). Hegel put the concept front and center in his early work. See HONNETH, *supra*, at 5 ("[I]n the years that he spent in Jena as a young philosophy lecturer[,] . . . Hegel was convinced that a struggle among subjects for the mutual recognition of their identity generated inner-societal pressure toward the practical, political establishment of institutions that would guarantee freedom.").

135. Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 347, 350 (1968).

136. *Id.*

137. Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 287-88 (2011).

138. Damaska, *supra* note 135, at 351.

139. *Id.*

140. *Id.*

marry, confess his sins, receive the Eucharist, etc.¹⁴¹ “Major excommunication entailed a complete separation from the Christian community. Those subject to major excommunication were shunned from their neighbors; no one was permitted to talk, eat, or do business with them.”¹⁴² Canon law influenced continental European civil law, which developed the sanction of “civil death”: the convicted person lost his political rights, his family rights, his rights of succession (he could not give or receive inheritance), and some of his property rights (what he had was confiscated).¹⁴³ The common law form of civil death was “attainder”; Lord Coke called the “attainted” offender “*civiliter mortuus*”¹⁴⁴ (civilly dead) and Blackstone called him “dead in law.”¹⁴⁵ Attainder had three principal incidents: forfeiture (the offender lost his property), “corruption of blood” (which meant among other things that the offender could not give or receive inheritance), and the extinction of most or all of the offender’s civil rights (including rights incident to having a legally recognized identity, like the right to sue or serve as a witness).¹⁴⁶

These recognitional punishments are, like banishment itself, among the standard ways by which communities have responded to major crime. (All of the examples above were used within their respective legal cultures only for major crime, sometimes as collateral consequences for sentences of death.) And also like banishment, they seem more anachronistic than they really are. With the exception of excommunication, civil death and its analogues were formally eliminated from European law by the nineteenth century and in many ways formally eliminated from American law in the twentieth.¹⁴⁷ But the network of collateral consequences American law imposes on offenders is so extensive as to constitute a functional equivalent.¹⁴⁸ The collateral consequences taken together work a permanent loss of equal citizenship and social standing.

There are, I submit, two kinds of collateral consequence. The first is directly state imposed: it takes place when the law eliminates or diminishes an offender’s rights apart from and after the offender completes his prison sentence or pays his fine. Under contemporary American law, ex-convicts can

141. Hathaway & Shapiro, *supra* note 137, at 296.

142. *Id.*

143. Damaska, *supra* note 135, at 351.

144. EDWARD COKE, COMMENTARY UPON LITTLETON *386 (1628).

145. 4 BLACKSTONE, *supra* note 2, at *373-74.

146. 13 C.J.S. *Convicts* §§ 2-5 (1917).

147. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1796-98 (2012); Damaska, *supra* note 135, at 352.

148. I am by no means the only one to draw the connection between current U.S. collateral consequences and civil death. Mirjan Damaska anticipated the argument as early as 1968, and Gabriel Chin, among others, has made it with respect to contemporary collateral consequences. *See, e.g.*, Chin, *supra* note 147, at 1790; Damaska, *supra* note 135, at 347.

lose the right to vote; the right to hold public office; the right to serve on a jury; the right to give testimony in court unimpeached (only a partial rights deprivation, to be sure, but one that has some significance because it goes to the ex-convict's status as a person who is presumptively truthful); the right to keep and bear arms; the right to keep custody of their children or adopt children; the right to certain kinds of state employment; the right to certain licenses, clearances, or permits given by the state; the right to a network of public benefits (including welfare, pension benefits, public housing, and social security); and, for child sex offenders, the right to live where they want, to physically be near places where children congregate, to work in professions involving children, and to steer clear of certain types of publicity and surveillance (due to sex offender registries and registration requirements).¹⁴⁹

The theme of all this is citizenship. Note that the first five entries on that long list are all but *identical* to the consequences of infamy in ancient Athens and republican Rome: the right to vote; the right to hold public office; the right to serve on juries (because juries were assemblies and the infamed lost the right to participate in assemblies); the right to give testimony in court; and the right to serve in the army (which runs close to the right to bear arms, especially if the right to bear arms is associated, as it would have been in Athens and Rome, less with personal self-defense than with military service).¹⁵⁰ In all three cases, societies with a republican form of government respond to major wrongdoing by taking away the political rights associated with democratic participation—with being a full citizen. Indeed, some of the extra deprivations imposed by American law (e.g., bars to public benefits) also have to do with citizenship. They just reflect the fact that the modern welfare state has more rights of citizenship to cut off than did Athens or Rome.¹⁵¹ In addition, note that many of these consequences have no direct connection to the crime: denying a child sex offender the right to live near schools makes sense, but why deny felons social security? In part, the answer is just a surfeit of punitivity, but the denial also has a very specific logic of its own: social security is a privilege of membership. It makes sense to deny it to felons if felons are regarded as nonmembers, as having forfeited the privileges of membership. In other words, the set of collateral consequences imposed directly by the state collectively expresses the idea that the ex-convict is not a full citizen.

The second kind of collateral consequence is imposed with state permission by the major institutions that comprise civil society—banks, employers, and the like. These institutions routinely ask ex-convicts about

149. Chin, *supra* note 147, at 1800, 1810. Again, I leave aside the deportation of noncitizens for the reasons mentioned above in note 54.

150. *See supra* note 138 and accompanying text.

151. The transformation of civil death under the regulatory state is one of Gabriel Chin's themes. *See* Chin, *supra* note 147, at 1799-1803.

their criminal history and, on that basis, commonly deny them employment, credit, and entrance to professions (e.g., the legal profession).¹⁵² Of these, the employment-related consequences are paramount; they are of both greater practical significance than the others and are more significant for the idea of banishment from social life. While public institutions like the jury are important symbols of our shared citizenship, the workplace is by far the most important site in which modern people join together in common cause, engage in collective action for shared purposes, and interface with people outside of their immediate social networks. Home and work define the two basic spheres of many or most modern adult lives, partitioning the modern life in an almost physical sense between the private and what is effectively the public sphere. To be faced with job application after job application inquiring into one's criminal history, and to be denied job after job after giving one, is to experience the social world as someone branded an outsider. Exclusion from the workplace also has more serious practical effects on how one's life unfolds than any other collateral consequence. Most of us can live without voting, let alone jury service. Exclusion from the workplace is the most important collateral consequence there is.

Some legal traditionalists may object that this second set of collateral consequences—consequences imposed by nonstate institutions—cannot be seen as a form of punishment because they are “private,” as if they were no different from the sort of purely social shunning that individuals impose by private decision.¹⁵³ This objection, in my view, not only misunderstands the public/private distinction but misunderstands it in ways lawyers and philosophers should have overcome decades ago. A rigid or reflexive approach to the public/private distinction is a kind of legal formalism; legal realists were attacking that sort of formalism—indeed, were specifically attacking the rigidity of the public/private distinction—as early as the 1930s.¹⁵⁴ It was in 1964 that the Civil Rights Act recognized that political equality requires a category of “public accommodations” between the purely public and purely private. It was in 1971 that John Rawls recentered political philosophy on the justice of the “basic structure,” including not only “the political constitution” but generally a society’s “principal economic and social arrangements,” because he recognized that “[t]aken together,” those institutional structures “define men’s rights and duties and influence their life prospects, what they can expect

152. Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 492-93 (2010).

153. I think Gabriel Chin mistakenly gives aid and succor to this view, if not exactly endorsing it, when he writes: “Exclusively at issue in this Article are legal consequences imposed by state action, not social stigma or status in the sense of reputation or esteem.” Chin, *supra* note 147, at 1792.

154. AMERICAN LEGAL REALISM, at xi, 49, 98-99 (William W. Fisher III et al. eds., 1993).

to be and how well they can hope to do.”¹⁵⁵ This recentering of the subject of justice has proved to be as influential as the substance of Rawls’s theory. Why should it be any less true for criminal justice than for other forms of justice? Furthermore, these so-called “private” institutional arrangements *do* implicate the legal system: employers may deny prospective employees jobs because of their criminal histories, but not their religions, because we have collectively decided by law to allow the former and not the latter. The public/private distinction in the criminal context is not a dichotomy between the state and the individuals comprising the general public, but a *trichotomy* involving the state, the public, and the institutions comprising civil society. Indeed, in my view there may be good reason to count even the purely social consequences imposed by the general public as a form of quasi-criminal punishment,¹⁵⁶ but one need not agree with that more extreme position to see that criminal law includes the penalties exacted by the principal non-state institutions comprising social and economic life. Denying ex-convicts jobs is punishment.

How does Europe handle these matters? Superficially, there is not much to say: European countries simply do not impose collateral consequences at all in the vast majority of cases and never impose them on anything like the American scale.¹⁵⁷ But at a deeper level, the issue is not just whether Europe imposes some analogue to civil death, but how Europe handles the terms of prisoner reentry. And when that is the question, the answer turns out to be that Europe engages in various measures that amount to the *opposite* of civil death—measures designed affirmatively to restore offenders to full social membership.

Germany is a good example. The German Code of Punishment Practice has a statutory requirement of *Angleichungsgrundsatz*—“the principle of approximation”—which “holds that prison life must resemble as closely as possible life in the outside world.”¹⁵⁸ The German prisoner has a right to a job, as well as the duty to take a job.¹⁵⁹ He earns wages on par with those outside of prison, cannot be terminated without cause, and is entitled to four weeks paid

155. JOHN RAWLS, A THEORY OF JUSTICE 6-7 (rev. ed. 1999).

156. The reconstructive view of criminal law tends to emphasize the ways in which wrongdoing is continuous with crime and social punishment with legal punishment, although it acknowledges discontinuities as well. See generally Kleinfeld, *supra* note 35, at 1503 (“The wrongdoing-redress structure . . . is a basic feature of human social organization. It is not even in the first place a matter of law or the state, though it acquires new and interesting features when it becomes a form of law enforced by the state.”).

157. For example, German law provides for some civil deprivations, including the right to vote, but German judges rarely impose them and they are temporary. See STRAFGESETZBUCH [STGB] [PENAL CODE], § 45, *translation at* http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf; WHITMAN, *supra* note 3, at 9.

158. WHITMAN, *supra* note 3, at 86-87.

159. *Id.* at 88.

vacation (albeit within the prison walls).¹⁶⁰ 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.¹⁶¹ In political life, far from losing their right to vote, Germany has programs that “encourage offenders to exercise their (almost always unimpaired) right to vote.”¹⁶² After release, German criminals have a network of rights meant to promote their integration with and membership in ordinary German society. Perhaps most astonishing from an American perspective is the right to have their criminal file destroyed, fingerprints and all.¹⁶³ They also have substantial rights not to have their crimes publicized. Whitman contrasts the two 1970s cases of *Paul v. Davis*¹⁶⁴ and *Lebach*.¹⁶⁵ 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.¹⁶⁶ 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.”¹⁶⁷ 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.¹⁶⁸ 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.¹⁶⁹ France, like Germany, has programs designed to encourage offenders to vote.¹⁷⁰ The French penal code provides for “[r]ehabilitation . . . as of right” when an offender sentenced to ten years imprisonment or less does not commit any new offense for a sufficient

160. *Id.* at 88-89.

161. *Id.* at 89-90.

162. *Id.* at 9.

163. *Id.* at 92.

164. 424 U.S. 693 (1976).

165. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 5, 1973, 35 BVerfGE 202, 1973 (Ger.).

166. WHITMAN, *supra* note 3, at 91.

167. *Id.* at 91-92.

168. ADELMO MANNA & ENRICO INFANTE, THE EUR. INST. FOR CRIME PREVENTION & CONTROL, CRIMINAL JUSTICE SYSTEMS IN EUROPE AND NORTH AMERICA: ITALY 51 (2000).

169. *Id.* at 50.

170. WHITMAN, *supra* note 3, at 9.

period of time;¹⁷¹ the effect of this right is to “erase[] any incapacity or forfeiture resulting from a sentence.”¹⁷² Twenty-eight European countries allow either all or all but a handful of prisoners to vote.¹⁷³ And in terms of prison conditions, where many of America’s prisons are essentially cages rife with gang violence and prison rape—a place to house those whom we hate or do not care about—European jurisdictions generally insist that their prisons be humane, and some actively aim to make prison personally enriching in a way designed to bring out the best in the prisoners.¹⁷⁴

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.” The conceptual difference between forgiveness and residual criminality reflects two ways of looking at the imprisoned and then released offender. The criminal pictured in European practices is not a *them*, but one of us. 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. The criminal is not mismade but just poorly socialized. The criminal pictured in American practices is a person whose crime exposes the truth about his character: he *is* a criminal, and efforts to change that fact are so likely to fail that they are not worth bothering about in the first place.

4. Capital punishment

To say capital punishment is a form of banishment—an existential banishment, as it were—risks sounding far-fetched or overly conceptual. Capital punishment seems like hard treatment in its purest form, not a matter of social membership in any important way. But both the history and contemporary politics of capital punishment reveal that issues of membership and exclusion are central to its meaning. Banishment is not the whole story; I

171. CODE PÉNAL [C. PÉN.] [PENAL CODE] art. 133-13 (Fr.).

172. *Id.* art. 133-16.

173. 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).

174. Compare Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601(2) (2014) (“[E]xperts have conservatively estimated that at least 13 percent of the inmates in the United States have been sexually assaulted in prison.”), and NAT’L PRISON RAPE ELIMINATION COMM’N, REPORT 25 (2009) (“Many still consider sexual abuse an expected consequence of incarceration, part of the penalty and the basis for jokes . . .”), with Matt Johnson, *The Super-Lux Super Max*, FOREIGN POL’Y (July 26, 2011), <http://foreignpolicy.com/slideshow/the-super-lux-super-max> (chronicling with photographs the comforts of Norwegian prisons). See generally *infra* Part III.B.

discuss the hard treatment aspect of capital punishment in Part III. But banishment is part of the capital punishment story.

One of the celebrated and surprising findings of legal history is that capital punishment in early modern England declined precipitously when 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”¹⁷⁵ Executions and transportation turned out to be substantially fungible, which makes good sense, for the two contend with the same problem—the problem of what to do with people who cannot be lived with—and address that problem with what is functionally the same solution: removal.¹⁷⁶ Indeed, the historical connection goes deeper still. When Virginia, Pennsylvania, and Kentucky drastically limited capital punishment in the 1790s (responding to an influential American anti-death-penalty movement in the immediate aftermath of the Revolution), they also started building prisons, with the legislature in some cases simultaneously limiting capital punishment and appropriating funds for prison construction.¹⁷⁷ Prisons were quite literally banishment substitutes.¹⁷⁸

This pattern of thought remains true today: considerations of banishment play an important part in contemporary death penalty politics. Voters and capital jurors want to be certain that the worst offenders will never reenter society. When polled, Americans’ positions on the death penalty prove to be unusually resistant to different ways of asking or reframing the question, with one exception: when given a choice between “death” and “life without the slightest possibility of parole,” a substantial portion of those who formerly supported the death penalty change their answer.¹⁷⁹ Capital jurors’ thinking

175. J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND, 1660-1800*, at 619-20 (1986); *see also* LANGBEIN, *supra* note 1, at 101 (discussing the English Crown’s effort to “develop[] transportation as an alternative to capital punishment”).

176. Others have made this connection as well. “Of course,” Lawrence Friedman remarks, “the ultimate form of banishment was death; from this, there was no danger of return.” FRIEDMAN, *supra* note 3, at 41. “In mandatory life sentences, and in the return of the death penalty,” Whitman writes, “we see a program of permanent incapacitation.” WHITMAN, *supra* note 3, at 53.

177. STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 98-99 (2002).

178. *See* LANGBEIN, *supra* note 1, at 17 (“In the eighteenth century the use of capital punishment declined precipitously, as the alternative sanctions of transportation and imprisonment took hold.”).

179. Damla Ergun, *New Low in Preference for the Death Penalty*, ABC NEWS (June 5, 2014), <http://abcnews.go.com/blogs/politics/2014/06/new-low-in-preference-for-the-death-penalty> (“Given a choice between the two options, 52 percent pick life in prison as the preferred punishment, while 42 percent favor the death penalty”); *see also* Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans’ Views on the Death Penalty*, J. SOC. ISSUES, Summer 1994, at 19, 25, 30-31 (confirming that “most Americans know whether they ‘favor’ or ‘oppose’ the death penalty, and say so in response to any

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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. Prosecutors in capital cases emphasize the risk of parole in closing statements and studies show that capital juries respond to that risk.¹⁸⁰ The contemporary anti-death penalty movement has deliberately promoted LWOP as an alternative to death: “Abolitionists have blitzed both legislatures and the media with pleas to adopt life-without-parole statutes . . .”¹⁸¹ This is not to say that contemporary death penalty supporters are thinking exclusively about banishment; capital punishment has more to it than that, as discussed at length below.¹⁸² But capital punishment reflects, among other things, a desire to banish.

The European/American contrast here is familiar. Every country in Europe but Belarus prohibits capital punishment.¹⁸³ The European Union and the Council of Europe have both written the prohibition into the treaties that constitute their constitutions and conditions for membership.¹⁸⁴ The United States imposed a constitutional moratorium on capital punishment in 1972 but, on the verge of abolition, lifted the moratorium in 1976.¹⁸⁵ Since then, thirty-eight states and the federal government have reintroduced the punishment. Thirty-four states and the federal government have executed at least one person.¹⁸⁶ Since 2007, seven states have joined the abolitionist side, to bring the total numbers to thirty-one states and the federal government in favor of capital punishment, nineteen states against it.¹⁸⁷ But despite this recent softening on the American side, capital punishment is and has been another

question that can reasonably be interpreted as addressing that issue” but that the possibility of a life sentence “with absolutely no chance of ever being released on parole or returning to society” swings some respondents’ views); Samuel R. Gross, *Update: American Public Opinion on the Death Penalty—It’s Getting Personal*, 83 CORNELL L. REV. 1448, 1452, 1455-56 (1998) (confirming that virtually the only reframing of the question that changes levels of support for capital punishment is offering respondents the option of “life imprisonment with absolutely no possibility of parole”).

180. See Note, *supra* note 83, at 1838.

181. *Id.*

182. See *infra* Part IIIA.

183. See AMNESTY INT’L, DEATH SENTENCES AND EXECUTIONS IN 2014, at 41-43 (2015).

184. See *supra* note 42 and accompanying text.

185. See *supra* note 16 and accompanying text.

186. Death Penalty Info. Ctr., Facts About the Death Penalty (2015), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>; Andrew D. Moran, *Evolving Standards of Decency?: The Death Penalty in the USA in 2008*, DEATH PENALTY INFO. CTR. (Jan. 11, 2009), <http://www.deathpenaltyinfo.org/evolving-standards-decency-death-penalty-usa-2008>.

187. Death Penalty Info. Ctr., *supra* note 186.

important respect in which America has embraced and Europe rejected exclusionary forms of punishment.

B. Banishment and Recidivism

We turn now from the four formulas of modern banishment to a different issue of immutability and banishment: recidivism. Recidivism is not a “formula of modern banishment”; it is a *reason* for banishment. There are essentially two contexts in which a modern criminal system might employ one of the four banishment formulas above: a single instance of a major offense or an apparently incorrigible recidivist. As this Subpart argues, a major part of the great divergence turns on European/American differences regarding recidivism.

Why should a criminal system care about repeat offenses? That the offender committed the crime before changes nothing about the instant offense: a stolen wallet is still a stolen wallet, the loss or harm no greater and the formal violation of law no different than if the offender had taken none or dozens in the past. The reason to care about repeat offenses is that they tell us something about the person standing behind the crime. One might think the repeat offender needs an extra modicum of deterrence or rehabilitation because she is an especially hard case. One might think repeat offenses are retributively more blameworthy because the offender previously refused correction or otherwise exhibited a particularly wrongful character or mental state. One might think the repeat offender is incorrigible and needs to be incapacitated. One might think the expressive content of the crime and the example of the criminal particularly threatening to the social order because of the contempt the repeat offender shows for that order.¹⁸⁸ Whatever the theory of punishment, repeat offenses matter to a criminal system to the extent the system cares about *actors* rather than just acts. A criminal system that took the act/actor 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. By contrast, a system highly interested in offenders’ past crimes is one disposed to crossing the act/actor line, formally punishing the act but actually punishing the person in light of his patterns of action. Harshly punishing recidivists expresses the idea that the person standing behind the repeated crime is enduringly dangerous, wicked, or damaged.

The most determined recidivists, the ones traditionally given the somewhat sinister label “incorrigible[s],”¹⁸⁹ present a particularly revealing

188. This understanding of crime as expressively attacking the social order and punishment as responding to that attack is part of reconstructive criminal theory. *See generally* Kleinfeld, *supra* note 35.

189. WHITMAN, *supra* note 3, at 52.

challenge to criminal systems because they raise in acute form the question of membership versus banishment, of whether the offender can accept the social contract and what to do if he cannot. If the repeated offense is itself a major one, like serial rape, it becomes pragmatically impossible to live with the offender, and even a criminal system ideologically committed to punishing acts rather than actors must give way to some extent. Yet the act is serious enough that the system can at least present itself as punishing the act rather than the actor. A criminal system's response to repeat minor offenders, such as a serial bad check writer, is potentially even more revealing because it is possible to live with such offenders. The decision to punish them harshly, and certainly the decision to banish them, cannot reasonably be based on the act alone. It reveals a criminal system *oriented* to persons. The act is not the true ground of punishment; it is *evidence* that the person standing behind the crime is someone who will not obey the social contract.

On that note, consider something so obvious it can pass beneath notice: American criminal sentencing is extremely interested in offenders' criminal history. There are three great examples of this interest. 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).¹⁹⁰ The orientation to persons is all but explicit: act and actor each determine one axis of a sentence. While the Guidelines spend many pages explaining how to assign criminal history categories,¹⁹¹ in broad strokes, each past serious crime moves an offender one step along the horizontal axis, increasing his or her minimum sentence for major crimes typically by about eleven percent.¹⁹² The Guidelines also encourage upward and discourage downward departures on the basis of criminal history: 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"¹⁹³ and should not depart downwards for an "armed career criminal" or a "repeat and dangerous sex offender."¹⁹⁴ The Guidelines were part of a turn toward determinate sentencing in the 1970s and 1980s. One might have expected determinate sentencing to be very different. One of the objections to indeterminate sentencing was that judges were too concerned with offender characteristics;¹⁹⁵ the shift to determinate sentencing

190. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (2015).

191. *Id.* § 4A1.1.

192. 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. *Id.* §§ 2B3.1(b)(2), 4A1.1.

193. *Id.* § 4A1.3(a).

194. *Id.* § 4A1.3(b).

195. WHITMAN, *supra* note 3, at 53-54.

might have heralded an act-oriented system. But American determinate sentencing is, if anything, an insistence that like *acts* be punished differently based on unlike *actors*. It *requires* judges to focus on offender characteristics, or at least, on one particular offender characteristic.

The next example of America's interest in and severity toward offenders' criminal history are three-strikes laws. One interesting feature of these laws is that they began with referenda, first in the state of Washington in 1993¹⁹⁶ and then in California in 1994.¹⁹⁷ The citizens intervened directly in criminal punishment with ferocious unity—72% in favor, 28% against in California¹⁹⁸—and within ten years, twenty-four states and the federal government had adopted similar measures.¹⁹⁹ The statutes typically provide that a third felony conviction carries a sentence of life without parole or without parole until some lengthy period (usually twenty-five years) is served.²⁰⁰ A fair number of the statutes count drug and even nonviolent property offenses among the relevant felonies; sometimes those offenses even “interact with enhancement statutes, which regrade prior misdemeanors as more serious felonies.”²⁰¹ California's version of the statute is particularly harsh: any third felony merits LWOP so long as the first two felonies were either “violent” or “serious.”²⁰² This has led to astonishing sentences: in one case, twenty-five years to life for a defendant who shoplifted golf clubs and had never been convicted of an act of violence;²⁰³ in another, fifty years to life for a defendant who shoplifted videotapes and had also never been convicted of an act of violence.²⁰⁴ 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.”²⁰⁵

196. Persistent Offender Accountability Act, Initiative Measure No. 593 (1993) (codified as amended at WASH. REV. CODE § 9.94A.555 (2015)).

197. Three Strikes Initiative, Proposition 184 (1994) (codified as amended at CAL. PENAL CODE § 1170.12 (West 2015)).

198. BILL JONES, STATEMENT OF VOTE: NOVEMBER 8, 1994, GENERAL ELECTION 107 (1994), <http://elections.cdn.sos.ca.gov/sov/1994-general/sov-complete.pdf>.

199. Michael Vitiello, *Three Strikes Laws: A Real or Imagined Deterrent to Crime?*, 29 HUMAN RTS. MAG., Spring 2002, at 3, http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol29_2002/spring2002/hr_spring02_vitiello.html.

200. *See id.*

201. WHITMAN, *supra* note 3, at 56-57.

202. Three Strikes Initiative, Proposition 184 (1994) (codified as amended at CAL. PENAL CODE § 1170.12 (West 2015)).

203. *Ewing v. California*, 538 U.S. 11, 17-20 (2003).

204. *Lockyer v. Andrade*, 538 U.S. 63, 66-68 (2003).

205. *Ewing*, 538 U.S. at 30.

Misdemeanor justice is not the sort of potent symbol of America's focus on recidivism that the Guidelines and three-strikes laws are, but recent work by Issa Kohler-Hausmann has revealed that the misdemeanor context may represent the apex of American criminal punishment's actor-orientation with respect to repeat offenses.²⁰⁶ Examining the flood of misdemeanor arrests in New York City in the wake of broken-windows policing, she notes that arrests went up, but convictions went down, and the reason is that the criminal process in such cases is not primarily trying to punish blameworthy conduct nor even to determine guilt or innocence.²⁰⁷ The point of the criminal process in such cases is to create a record of the offender's encounter with police and thus "to determine over time the type of person the defendant is and to build records on his general rule-abiding propensity."²⁰⁸ Those "marks of past encounters are perceived as a reliable signal of the defendant's overall governability" and "speak to what has emerged as the animating moral question of misdemeanor punishment: whether this person is a persistent or occasional rule breaker."²⁰⁹ Criminal justice thus becomes a species of population management fundamentally concerned with who people are, rather than the blameworthiness of what they have done.

America, then, has a massive apparatus for identifying and banishing those who reveal themselves by means of repeat offenses to be incorrigible. On the surface, our state and federal penal codes consist in lists of forbidden acts, not forbidden character traits, and it is commonplace to say that American criminal law punishes acts not people. But the creed is false: an act is only the trigger for the criminal process. In certain misdemeanor contexts, the entire criminal process focuses on who the person is rather than what he did. In the felony context, the guilt phase *is* about the act—we want to be sure the defendant did the thing of which he is accused—but that done, the sentencing phase is as much about the person as it is about the act. In the sentencing phase every past crime is evidence that the criminal standing behind the crime is permanently criminal. In America, we *prosecute* crimes, but we *sentence* criminals.²¹⁰

206. See Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 614-16 (2014).

207. *Id.* at 614-17, 656-58.

208. *Id.* at 616.

209. *Id.* at 654.

210. In a recent article, James Whitman makes an argument that all but exactly reverses my argument here—indeed, my argument throughout this Article. America *does* have an act-oriented system, Whitman claims; in fact, American punishment is harsh *because* it is oriented to acts instead of persons. Whitman essentially argues that American punishment became harsh at the same time it moved from indeterminate to determinate sentencing, which is no coincidence: indeterminate sentencing tends toward mildness, Whitman thinks, because it takes into account the person behind the crime, while determinate sentencing tends toward harshness because it rigidly

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What does Europe do about repeat offenders? Recidivism poses a challenge to any criminal system that insists upon criminality's mutability because recidivism suggests an offender whose criminality is part of his character. In a sense, the act/actor distinction is always unnatural. 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 delink them any more than it would be rational or possible to attend to effects without ever thinking about causes. What the delinking of criminal law does or purports to do is to some extent procedural in nature: we make an effort to keep the sentencing function from corrupting the guilt-determination function, thus proceduralizing the commitment to not blaming until all the facts are in. But to some extent, criminal law's effort to delink acts and actors is an act of deliberate and even noble moral naivete: an

punishes acts. See James Q. Whitman, *The Case for Penal Modernism: Beyond Utility and Desert*, 1 CRITICAL ANALYSIS L. 143, 143-46, 151 (2014). Unsurprisingly, I consider this argument profoundly mistaken. The error is to think that determinate sentencing, an act-orientation, and harsh punishment are a linked set, and that indeterminate sentencing, an actor-orientation, and mild punishment are another linked set. Those links do not consistently hold—not conceptually and not historically. True, as Whitman argues, American punishment in the mid-twentieth century era of “penal modernism,” was indeterminate, actor-oriented, and mild. But determinate sentencing can be actor-oriented: for example, punishment may be totally fixed at the time of sentencing based on rigid rules that focus on offender characteristics. (That, in my view, is basically what the Federal Sentencing Guidelines do.) Determinate sentencing can also be mild: just have fixed but short sentences. (In fact, many liberals favored determinate sentencing in the early years of the movement precisely because they expected that result. See *supra* note 90 and accompanying text.) Act-oriented punishment can be harsh: for example, the common law once punished a wide variety of felonies with automatic sentences of death. Act-oriented punishment can also be mild: Beccaria thought punishment should couple an act-orientation with “a lenient code of laws,” and that, in my view, is largely what contemporary Europe does. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 63 (Richard Bellamy ed., & Richard Davies, ed. & trans., Cambridge Univ. Press 1995) (1764). Actor-oriented punishment can also be either harsh or mild, as Whitman himself wrote in *Harsh Justice*: “[T]he theory of individualization gave birth, in effect, to two different strains in the earlier twentieth century: one a systematically merciful strain, but the other a very harsh one indeed. Adherents of the second, harsher strain viewed certain offenders as incorrigible, and even congenitally incorrigible.” WHITMAN, *supra* note 3, at 52. In other words, there are three oppositions in play here: determinacy/indeterminacy, act/actor, and harshness/mildness. Whitman wants to treat some of them as independent variables and others as dependent variables—e.g., if the criminal system is act-oriented, it will also be harsh, or if it adopts determinate sentencing, it will also be harsh. But none of them are really dependent variables. They are factors in an overall punishment ideology, and the factors can be variously combined.

effort to live according to the principle of hating the sin while loving the sinner. That moral attitude only makes sense if the sin does not reveal the truth of who the sinner really is. Repeat offenses put that moral stance under enormous pressure. An isolated crime may be seen as an aberration, but when the offender commits many crimes over time, the compartmentalization of act and actor becomes difficult or unreasonable to maintain.

Furthermore, a criminal system cannot *afford* to be truly memoryless. The focus of this Article is generally on ideas—indeed on *ideologies*—but it is important to remember that a criminal system is not just a matter of ideology. A criminal system has practical problems to address and facts about the world to deal with. One such fact is that some criminal offenders *are* incorrigible, or at least, if there is any way to change their patterns of behavior, no one knows what it is. The most serious of these repeat offenders are a reality no polity could endure—the countries of Europe included. Such offenders are indeed a reality that embarrasses the very idea on which the European system is based: the idea that criminality never reaches the roots of character. Recidivism thus puts Europe’s mutability thesis not only under enormous conceptual pressure but under enormous practical pressure as well.

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 gone as far as they reasonably can toward being memoryless, purely act-oriented systems. Second, European jurisdictions have made artful use of discretion to *allow* judges to detain serious recidivists without *requiring* them to do so (and therefore without having to establish special statutes imposing long sentences on recidivists). And third, European jurisdictions have found ways to detain recidivists without characterizing the detention as punishment.

In Germany, France, and Italy, for example, recidivism generally carries no mandatory consequences; it is an optional aggravator for judges to consider.²¹¹ Furthermore, this policy is not a passive, background feature of law but something actively maintained. In France, President Sarkozy’s government passed legislation establishing mandatory minimums for recidivists around 2007, but President Hollande’s government repealed those minimums in 2014.²¹² Germany at mid-century had a mandatory minimum for recidivists (albeit a mild one), but it was repealed in 1986.²¹³

211. CODE PÉNAL [C. PÉN.] [PENAL CODE] arts. 132-5, 132-8 to 132-16-2 (Fr.); MANNA & INFANTE, *supra* note 168, at 5; Hans-Jörg Albrecht, *Sentencing in Germany: Explaining Long-Term Stability in the Structure of Criminal Sanctions and Sentencing*, 76 LAW & CONTEMP. PROBS., no. 1 (2013), at 211, 214-15.

212. *See France: Tougher Punishments for Repeat Offenders, Including Children*, CHILD RTS. INT’L NETWORK (July 9, 2007), <https://www.crin.org/en/library/news-archive/france-tougher-punishments-repeat-offenders-including-children>; Mathilde Hamel, *Les*
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Germany's basic sentencing concept today 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 act alone.²¹⁴ Within that retributive, act-specific frame, judges are authorized to take account of past crimes for a variety of reasons, including deterrence and rehabilitation.²¹⁵ 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 German law is punishable by imprisonment not to exceed five years or a fine;²¹⁶ 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. But if it were the thief's hundredth theft, still the punishment could never exceed five years. To do otherwise would be viewed by German lawyers as violating both the principle of proportionality, which "holds that sentences, though indeterminate, cannot be disproportionate to the gravity of the [individual] offense,"²¹⁷ and the act requirement, which holds that only acts, not people, may be punished.²¹⁸ Bearing in mind that the statutory maximum for all offenses other than aggravated murder is fifteen years,²¹⁹ this means that, apart from aggravated murderers, repeat offenders who commit even terrible crimes again and again can never be sentenced to a punishment longer than fifteen years.

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

Misérables: French Prisons Bursting at the Seams, INT'L BUS. TIMES (June 14, 2013, 5:48 AM EDT), <http://www.ibtimes.com/les-miserables-french-prisons-bursting-seams-1306761>; Emile Picy et al., *French Parliament Passes Reform to Ease Prison Overcrowding*, REUTERS (July 17, 2014, 12:42 PM BST), <http://reut.rs/1mXtaff>.

213. Albrecht, *supra* note 211, at 214-15.

214. Weigend, *supra* note 97, at 204-05.

215. *Id.*; see also STRAFGESETZBUCH [STGB] [PENAL CODE], § 46, translation at http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf (Ger.) (listing past offenses as aggravating elements in sentencing).

216. STGB § 242.

217. WHITMAN, *supra* note 3, at 57. The proportionality principle is also part of E.U. human rights law. See Charter of Fundamental Rights of the European Union art. 49, Oct. 26, 2012, 2012 O.J. (C 326) 405.

218. See George P. Fletcher, *From Rethinking to Internationalizing Criminal Law*, 39 TULSA L. REV. 979, 984 (2004) ("The German theorists insist that a liberal criminal law must be based on actions (*Tatstrafrecht*) rather than actors (*Täterstrafrecht*). This issue is not even on the radar screen of American scholarship. The Germans treat the focus on actors as an expression of Fascist thinking, yet the commentaries to the [Model Penal Code] take it for granted that actor-oriented thinking is a sensible way to justify criminal liability.").

219. See *supra* note 95 and accompanying text.

lead to criminal detention. We have so far been discussing what the penal code labels the “Penalties” track, but there is a second, entitled “Measures of Rehabilitation and Incapacitation,” which provides for indefinite preventive detention of three-time offenders whose two prior sentences were for a year or more and whom the court judges to be a serious danger to the community.²²⁰ That sounds like a strong recidivism law, even a three-strikes law. Is it one? The answer is no; in fact, it is the exception that proves the rule.

First, until a public outcry over sex offenders in the late 1990s led to statutory reform, the recidivism provisions were exceedingly narrow; there was almost nothing in the German system even to create the appearance of long-term imprisonment for habitual offenders.²²¹ Second, the grand total of detainees under Germany’s preventive detention law, out of a population of 81 million, is 491—a significant increase from Germany’s two-digit totals in the late 1990s, but still an exception so tiny as to show, if anything, how very reluctant Germany is to incapacitate any but the most serious recidivists.²²² Third, what is most striking about these provisions is the agility with which they avoid implying that recidivism might indicate something either blameworthy or permanent about the offender. The Measures of Rehabilitation and Incapacitation target three groups: the criminally insane, drug addicts, and chronic recidivists.²²³ That is not a grouping one sees in American law, for it conceptually assembles recidivists with the blamelessly or semi-blamelessly ill. Like the insane or addicted, recidivists are pictured by the statute as standing in need of treatment—they are sick and the symptom is recurrent criminal impulses—and the German Constitutional Court has ruled that they have a right to treatment.²²⁴ (America also has involuntary-

220. STGB §§ 61, 66; *see also* Albrecht, *supra* note 211, at 213 (“Germany has adopted a two-track system of criminal sanctions: one track for criminal punishment (which requires a finding of guilt and the determination of a fine or a prison sentence) and another providing for so-called measures for rehabilitation and protection of public security. . . . This two-track approach is based on the belief that proportional punishment limited by the principle of personal guilt may not be sufficient to respond effectively (in terms of public protection) to habitual offenders”); Weigend, *supra* note 97, at 202 (“Germans are purists with respect to the proportionality of guilt and punishment and strongly disapprove of any penalty that exceeds—even for reasonable preventive purposes—what the individual offender deserves; yet they concede that there exist offenders who are not insane but are nevertheless eminently dangerous. It is for this group that the hybrid security detention has been designed”).

221. *See* Albrecht, *supra* note 211, at 213-14.

222. AEBI & DELGRANDE, *supra* note 27, at 95 tbl.5, 96, 101 tbl.5.2; *see also* BERND-DIETER MEIER, STRAFRECHTLICHE SANKTIONEN [CRIMINAL PENALTIES] 227 (2001) (placing the number at 61 in 1998); Weigend, *supra* note 97, at 203 (placing the number at 57 in 1996).

223. *See* STGB §§ 61, 63, 64, 66.

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

commitment statutes for certain sex offenders, but the statutes are not general measures implying that all recidivism—recidivism as such—is mental illness. The American version implies at most that pedophilia and related sexual disorders are mental illnesses.²²⁵ In addition, the German statutory scheme allows judges to take measures to assure the detainee’s “resocialisation”; the detainee has a right to have his detention reviewed every two years; and after ten years there is a rebuttable presumption that the defendant will be released.²²⁶ Finally, it is a standard tenet of German criminal law doctrine that the Measures of Rehabilitation and Incapacitation do not imply blame.²²⁷ That is why they are classified under a separate track from “Penalties.”

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 U.S. federal law, his first offense would see him imprisoned for five or six years without parole.²²⁸ His sentence in Germany is harder to determine, but the penal code gives a floor of five years and a ceiling of fifteen years;²²⁹ the general rule in Germany is that the sentences of first-time offenders hew to the minimum, and he would likely be paroled in three years and four months.²³⁰ His second offense would lead to about a six-year sentence in the United States.²³¹ Germany is again more open-ended (the offender would qualify again for the same five- to fifteen-year range), but let us guess, for the sake of argument, that the aggravating factor of a second offense would lead to a seven-year sentence, four years and eight

225. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346, 350 (1997) (upholding Kansas’s Sexually Violent Predator Act, which provides for the “civil commitment of persons who, due to a ‘mental abnormality’ or a ‘personality disorder,’ are likely to engage in ‘predatory acts of sexual violence’” (quoting KAN. STAT. ANN. § 59-29a01 (1994))).

226. STGB §§ 67a, 67d, 67e.

227. Albrecht, *supra* note 211, at 213 (“These second-track measures do not depend on personal responsibility; they are not considered to carry blame. Instead, they are the consequence of a finding of dangerousness (based on assessments of risks presented to the court by forensic psychologists or psychiatrists) and a corresponding need for treatment or preventive detention.”). While German law does characterize the Measures of Rehabilitation and Incapacitation as criminal rather than civil, it does so even for the plainly insane and only because “their imposition invariably presupposes the commission of a criminal offense.” Weigend, *supra* note 97, at 202.

228. U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b)(2) (2015). Parole has been largely eliminated from the federal system. *See supra* notes 83-92 and accompanying text.

229. STGB §§ 38(2), 250(2).

230. Recall that prisoners have a right to be considered for parole after serving two-thirds of their sentence. *See supra* note 111 and accompanying text. In addition, German judges typically sentence in the bottom third of the permitted range. GERHARD SCHÄFER, PRAXIS DER STRAFZUMESSUNG [THE SENTENCING PRACTICE] 290-92 (3d ed. 2001).

231. U.S. SENTENCING GUIDELINES MANUAL § 4A1.1.

months to serve. Thus far, the terms of imprisonment in America are roughly 30-80% higher than 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,” carrying a sentence of twenty-five years (and life in California and many other states).²³² In Germany, his sentence could not rise above fifteen years, with parole consideration in ten; given that fifteen years is the absolute maximum for all crimes other than aggravated murder, it seems unlikely that an armed robber who never actually caused injury would get the maximum.²³³ Imagine, then, that he got a sentence of nine years, six to serve. Suddenly, on the third offense, America’s punishment goes from being 30-80% harsher to over four times harsher (and more under California law).

Let us 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 five years and a maximum of twenty-five years.²³⁴ In Germany, it would carry a two-year minimum and a fifteen-year maximum.²³⁵ Now, these are large discretionary windows, and it is difficult to know how different the average sentences and time served in the two jurisdictions actually would be (both permit parole).²³⁶ 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 impossible before the minimum of at least ten years had expired.²³⁷ Germany would simply trend upwards within the same two- to fifteen-year window, with the usual expectations of parole.²³⁸ 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.

232. CAL. PENAL CODE § 667(e)(2)(A) (West 2015); U.S. SENTENCING GUIDELINES MANUAL § 4B1.4.

233. See *supra* notes 95, 112 and accompanying text.

234. N.Y. PENAL LAW §§ 70.02(1)(a), 70.02(3)(a), 130.35 (McKinney 2015).

235. STRAFGESETZBUCH [STGB] [PENAL CODE], §§ 38(2), 177(2), translation at http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf.

236. See Philip M. Genty, *Changes to Parole Laws Signal Potentially Sweeping Policy Shift*, N.Y. L.J. (Sept. 1, 2011), <http://www.newyorklawjournal.com/id=1202512975791/Changes-to-Parole-Laws-Signal-Potentially-Sweeping-Policy-Shift?>; see also *supra* note 111 and accompanying text.

237. N.Y. PENAL LAW §§ 70.00, 70.80, 130.95.3.

238. See *supra* notes 111-12, 214-15 and accompanying text.

A detailed empirical study is beyond the scope of this Article, 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.²³⁹ America's relative harshness swells as repeat offenses mount. If what is true of Germany is true as well of 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 reveals a great deal about the pictures of the criminal at work in the great divergence. 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 constitutes a condemnation of the criminal's enduring character, while Europe refuses to let condemnation take so totalizing a form.

* * *

Taking the four formulas of modern banishment and the treatment of recidivism together, we find ourselves in a landscape of symbolic practices. On one side is capital punishment, LWOP, decade-plus imprisonment, the analogues to civil death, the sentencing guidelines insofar as they focus on offender characteristics, and three-strikes laws—all variations on a common theme of immutable criminality and its associated strategy of banishment. On the other side is a series of “Nos” 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 does more than just not share in the American belief in immutable criminality. It actively, insistently *denies* the existence of immutable criminality.

III. Devaluation and Rights Forfeiture

The arguments thus far have tracked one node of the European/American contrast: immutability. We turn now to the second node of contrast: *devaluation*. American criminal punishment at its most severe implies that the worst criminal offenders are people of diminished value or worth. Their criminality is devaluing for the same reason it is immutable: because it reveals a fundamentally deformed character, a ruined self. The offenders as pictured by the law are alien, “other,” inhuman, or demonic, and their basic rights are

239. 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.

forfeit along with their moral humanity. The pattern of thought is this: to be ruined is to be worthless; to be worthless is to be rightless. European punishment is again structured quite precisely to deny these claims. The criminal system resists devaluing offenders, who therefore substantially retain in punishment the rights-bearing status of ordinary citizenship. While these ideas are at work in a variety of American and European contexts, they are most visible in the context of capital punishment and prison conditions.

As I argue at length below, the key to understanding what capital punishment means is to see that it is not just killing but killing *as a penalty for wrongdoing*. It is best interpreted as an expressive claim to the effect that the very worst wrongs are so serious as to forfeit one's moral humanity and, with it, the rights grounded in one's moral humanity, including the right to life. Likewise, caging people in extremely harsh conditions as, again, a *penalty* for the worst crimes is best interpreted as an expressive claim to the same effect: the worst offenders may acceptably be subjected to such conditions because they have forfeited their moral humanity. By contrast, refusing ever to execute or harshly imprison, no matter what the crime, is an expressive claim to the effect that even the worst wrongdoers' basic rights are intact because their moral humanity is immune from their deeds. To be clear, the claim here is not that capital punishment and harsh imprisonment *always* carry this expressive content. An impoverished society might execute or harshly imprison for lack of other options; an autocratic society might do so to impress the public with the terror and majesty of state power.²⁴⁰ But in wealthy Western democracies like those of Europe and the United States, the expressive content of capital punishment and extreme imprisonment is rights forfeiture on grounds of devaluation.

There is something about the nature of punishment to understand here. Philosophers have traditionally regarded hard treatment as part of the definition of punishment and an instrument in the service of retributive justice and social control.²⁴¹ But extreme forms of hard treatment are not necessarily just more of the same. Extreme hard treatment is linked to

240. This claim about state power was Foucault's interpretation of capital punishment. See FOUCAULT, *supra* note 37, at 48-49 ("The public execution, then, has a juridico-political function. It is a ceremonial by which a momentarily injured sovereignty is reconstituted. It restores that sovereignty by manifesting it at its most spectacular. . . . Its aim is not so much to re-establish a balance as to bring into play, as its extreme point, the dissymmetry between the subject who has dared to violate the law and the all powerful sovereign who displays his strength."). David Garland argues that Foucault's interpretation is inapplicable in contemporary democracies, particularly the contemporary United States, and I wholeheartedly agree. See GARLAND, *supra* note 3, at 24-27. I also think there are more interesting ideas at play in Foucault's famous book than this increasingly anachronistic thesis about punishment and the display of sovereign power. See, e.g., *supra* note 37 and accompanying text.

241. See *supra* note 36 and accompanying text.

devaluation and thus punishment at its most severe speaks to the grounds on which we value other human beings and accord them rights. In part, the connection is psychological and sociological: demonization is a well-studied part of the psychology of group conflict.²⁴² People devalue those they are about to brutalize or kill because by doing so they cut the ties of empathy that would otherwise stand in the way of such treatment and also because of a certain moral logic: the less someone matters, the less his or her suffering matters. In part, the connection is philosophical and conceptual: in order to deprive a person of what would otherwise be his or her basic rights, an individual or society must see that person as having forfeited his or her basic rights, and the rights are forfeit when the grounds on which those rights are based—what I am calling a person’s “moral humanity”—is forfeit. The psychology and the logic go the other way as well: to refuse ever to engage in extreme hard treatment is to cultivate emotions of identification and sympathy with even the worst offenders, and to insist that their basic rights are never forfeit no matter what they do is either to deny that their rights rest on the foundation of their moral character, or that their moral character is wholly bad, or both. Their crimes never penetrate so deep as to touch the core of value on which all rights are based.

A. Capital Punishment

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 empirical 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, as if the only kind of argument to have about capital punishment is a normative one. But capital punishment is a matter of symbolic politics, and alongside the purely normative question of whether we should execute is the socio-theoretic question of *what the symbols mean*.²⁴³ There is a tendency in academic argument to speak of symbolic politics with an implicit “merely” in front of the term: symbolic politics are *merely* symbolic. But as a matter of

242. See, e.g., JAMES WALLER, *BECOMING EVIL: HOW ORDINARY PEOPLE COMMIT GENOCIDE AND MASS KILLING* 20 (2002) (arguing on the basis of research in social psychology that part of motivating ordinary people to engage in mass killing involves “the social death of the victims: *us-them thinking*, *dehumanization of the victims* (for example, the use of language in defining the victims as less than human), and *blaming the victims* (a legitimization of the victim as the enemy and, thus, deserving of their victimization)”).

243. David Garland has made a similar argument, as have Carol and Jordan Steiker, among others. See, e.g., GARLAND, *supra* note 3, at 9-14; Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in “Executing” Versus “Symbolic” States in the United States*, 84 TEX. L. REV. 1869, 1870 (2006).

cultural understanding, there is no “merely.” Symbols matter. The number of people sentenced to death in America is so tiny relative to other causes of death (even other causes of death in which state power plays a role, like treating disease or using military force) that the controversy over capital punishment would be incoherent but for its importance as a cultural symbol. Capital punishment *says* something about where a culture stands on matters of violence, evil, wrongdoing, and rights—something we feel intuitively but that is extremely difficult to identify and articulate. The scholarly challenge of capital punishment is in part to provide that identification and articulation. No feature of the great divergence is more visible. But what does capital punishment represent?

To understand the symbols—and to see the degree to which a purely normative approach shrinks the issue—some historical context is in order. Cultural conflict over capital punishment is an Enlightenment legacy. Cesare Beccaria’s 1764 *Essay on Crimes and Punishments* put the issue on the table: capital punishment was before then a nonissue and became within just a few years of the book’s appearance one of the major controversies of its time.²⁴⁴ Enlightenment intellectuals were not all abolitionists. Kant, for example, railed against Beccaria’s position, labeling it (with his characteristically weird but percipient rhetoric) the “overly compassionate feelings of an affected humanity.”²⁴⁵ The issue captured the Enlightenment imagination. The controversy was particularly intense in America during the Founding period, when law was in flux and Enlightenment ideas in the air. The Founders staked out positions on it (James Madison favored abolition; Thomas Jefferson and Benjamin Franklin favored restricting capital punishment to murder).²⁴⁶ An influential anti-death penalty movement swept the country, producing legislation that restricted capital punishment to murder in 5 out of 13 states and, in 3 of those states, invented the distinction between first- and second-degree murder in order to further restrict capital punishment to first-degree murder.²⁴⁷ (This is part of a larger historical pattern. The pressure of capital punishment led common law England to subdivide homicide between murder and manslaughter, early America to subdivide murder into first and second degree, and twentieth-century America to subdivide first-degree murder into aggravated and nonaggravated.)²⁴⁸ The controversy burned so hot so fast that

244. BANNER, *supra* note 177, at 88-92.

245. KANT, *supra* note 71, at 143.

246. BANNER, *supra* note 177, at 88.

247. *Id.* at 98.

248. *Gregg v. Georgia*, 428 U.S. 153, 192-99, 206-07 (1976) (permitting capital punishment given adequate controls on arbitrary sentencing, among them statutory aggravating factors); BANNER, *supra* note 177, at 98 (describing the historical process in early America); Jonathan Simon, *How Should We Punish Murder?*, 94 MARQ. L. REV. 1241, 1257-62 (2011) (describing the historical process in common law England).

in the archives of Columbia University, one can find a 1793 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 [c]apital punishment.”²⁴⁹

That is a lot of change for thirty years. 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 no engaged person could fail to have thought about (and, as with capital punishment, clearly representing something beyond itself). In historical perspective, the present conflict over capital punishment is best seen as an intense period in an old fight. The question is *why* capital punishment so captured the Enlightenment imagination. There was nothing new about the practice. Why did it carry such high stakes as to rise from something irrelevant to something epochal in just thirty years?

The plot thickens. Old and deep-rooted as the controversy is, and passionately felt as it is today, the European/American divergence over capital punishment is both recent and contingent. Germany abolished capital punishment in its constitution of 1949, and the abolition is commonly believed to represent a collective “never again” to the horrors of the Third Reich.²⁵⁰ But in fact, the prohibition was sponsored by a political alliance between left-wing German politicians who had opposed capital punishment long before the Third Reich and right-wing German politicians who were attempting to save Nazi war criminals from execution by the Allies.²⁵¹ None of the major political actors involved in crafting the prohibition were responding to the lessons of the Third Reich. Nor were the people: polls showed that 74% of the West German population supported capital punishment just before it was abolished.²⁵² Depending on how the question was framed, support for capital punishment stayed high—above 50% and arguably above 70%—into the 1960s, at which point the “generation of 1968”—not knowing the true origins of abolition—reinterpreted the constitutional prohibition as a rejection of Nazism and made it part of their moral ideology.²⁵³ Public support for capital punishment did not truly dissipate until the late 1960s and 1970s;²⁵⁴ it was a matter of generational politics, not individual learning. Meanwhile, France

249. BANNER, *supra* note 177, at 88.

250. See RICHARD J. EVANS, *RITUALS OF RETRIBUTION: CAPITAL PUNISHMENT IN GERMANY, 1600-1987*, at 786 (1996).

251. *Id.* at 774-86.

252. M. Mohrenschlager, *The Abolition of Capital Punishment in the Federal Republic of Germany: German Experiences*, 58 *REVUE INTERNATIONALE DE DROITE PÉNAL* 509, 513 (1987) (Fr.).

253. *Id.*; see also EVANS, *supra* note 250, at 798.

254. See EVANS, *supra* note 250, at 801-04.

had its last execution in 1977 and abolished the penalty legally in 1981, despite the fact that 62% of the French people expressed support for capital punishment the very month it was abolished.²⁵⁵ Spain abolished it in 1978.²⁵⁶

Yet Europe over the last few decades has come to regard capital punishment as a human rights abuse of the first order. Its abolition is written into the basic human rights law and membership requirements of both the European Union and the Council of Europe²⁵⁷ and apart from those unions is commanded by the national (often constitutional) law of every European state but Russia (where it is under a moratorium) and Belarus.²⁵⁸ It is, like slavery or torture, the kind of thing that to the European mind falls outside the pale of civilized state conduct. In a film interpreting the commandment, “Thou shalt not kill,” by the great Polish director Krzysztof Kieslowski, the protagonist, a defense lawyer, tries and fails to prevent the execution of a young man who committed murder. The episode ends with the lawyer crying out into the empty sky, “I abhor it! I abhor it! I abhor it!”²⁵⁹ That cry is the very emblem of European opposition to the death penalty. But it is strange to abhor on Tuesday something one regarded with equanimity on Monday. Societally speaking, the gap of time between European approval of capital punishment and passionate opposition to it was very short. The European story is one of recent and rapid change from approving capital punishment to disapproving it to seeing it as abhorrent, with elite opinion in the lead and popular opinion following after some lag time.

The American story is no less recent, contingent, and passionate; it just moves in the opposite direction. American support for capital punishment declined throughout the 1950s and early- to mid-1960s, from about 68% in favor in 1953 to a historic low of 42% in 1966 (versus 47% opposed—the first and last year death penalty opponents outnumbered supporters).²⁶⁰ A fundamental difference between American and European social life—a difference that affects everything from high politics to slang and fashion—is that, in Europe, elite opinion tends to lead, to determine culture and politics,

255. Michel Forst, *The Abolition of the Death Penalty in France*, in *THE DEATH PENALTY: ABOLITION IN EUROPE* 105, 113 (1999); *International Polls and Studies*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/international-polls-and-studies#France> (last visited May 5, 2016).

256. See also Amnesty Int'l, *supra* note 17.

257. *Abolition of the Death Penalty*, COUNCIL EUR., http://www.coe.int/t/dghl/standardsetting/hrpolicy/Others_issues/Death_Penalty/default_en.asp (last visited May 5, 2016); *supra* note 42 and accompanying text.

258. AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS: 2012, at 26-28 (2013).

259. *The Decalogue: V* (Warner Bros. Dec. 10, 1989).

260. See *Gallup Historical Trends: Death Penalty*, GALLUP, <http://www.gallup.com/poll/1606/death-penalty.aspx> (last visited May 5, 2016).

and finally to revise popular opinion, while in the United States, popular opinion tends to lead, to determine culture and politics, and finally to revise elite opinion. True to form, after public opinion had largely turned against capital punishment, the Supreme Court imposed a constitutional moratorium on it in 1972.²⁶¹ Most commentators understood the moratorium as a prelude to abolition, and it is important to appreciate that those commentators easily could have been right: the moratorium of 1972 could have slid into abolition and the story of the great divergence might then have been very different.

But Americans' views changed. Support for capital punishment rose to roughly 50-65% in the 1970s,²⁶² the Supreme Court lifted the moratorium in 1976,²⁶³ and thirty-eight states restored capital punishment as a legal option (though fewer actually exercised that option).²⁶⁴ Support for capital punishment became overwhelming in the 1980s and 1990s: 70-80% of Americans supported it; those polled consistently said the issue was one they felt "very strongly about"; respondents largely stuck to their responses no matter how the question was framed (an unusual thing); and only 5-10% of respondents declared themselves "undecided."²⁶⁵ As one leading researcher put it at the time, "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."²⁶⁶ The one reframing of the question that mattered was giving respondents the choice between death and life "with absolutely no possibility of parole," which swung 15-20% of the support.²⁶⁷ To some extent, that shows banishment thinking at work in views of capital punishment, as discussed above.²⁶⁸ But it also shows that the remaining 50-65% of Americans, who did not change their answer even given the possibility of life with absolutely no possibility of parole, viewed capital punishment as an imperative of justice. Even the 15-20% who changed their answer when given the "absolutely no possibility of parole" option viewed capital punishment as acceptable from the standpoint of justice.

Indeed, the issue was so strongly felt that it affected elections. In 1986, it determined California's Supreme Court elections, causing the unprecedented

261. *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (per curiam).

262. *Gallup Historical Trends: Death Penalty*, *supra* note 260.

263. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion).

264. *See States with and Without the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited May 5, 2016); *see also* *Death Penalty Info. Ctr.*, *supra* note 186.

265. *See Gallup Historical Trends: Death Penalty*, *supra* note 260; *see also* Ellsworth & Gross, *supra* note 179, at 19-21; Gross, *supra* note 179, at 1448-52.

266. Ellsworth & Gross, *supra* note 179, at 25.

267. Gross, *supra* note 179, at 1455-56.

268. *See supra* Part II.A.4.

defeat of Chief Justice Rose Bird and two of her colleagues.²⁶⁹ In 1994, it played a significant role in New York's gubernatorial election, where Mario Cuomo's opposition to the death penalty contributed to his defeat.²⁷⁰ And in 1988, it strongly affected the presidential election: Michael Dukakis's refusal to endorse capital punishment, when asked in a debate whether he would favor capital punishment were his own wife to be raped and murdered, became one of the seminal moments of the campaign. Exit polls on the day of voting indicated that Dukakis's position on capital punishment was the second most important consideration in determining whom voters chose, ahead even of party affiliation.²⁷¹ The American presidency has, as a legal matter, very little to do with capital punishment; 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 Barack Obama and Bill Clinton) has gone on record to declare support for capital punishment.²⁷² Support for the death penalty is sometimes characterized as an aberration of the American South, but at the height of the great divergence, support was much, much too widespread for that. America in the period that produced the great divergence believed capital punishment to be morally right just as passionately as Europeans believed it to be morally wrong.

What this historical context shows is twofold. First, the history of European/American capital punishment tracks the story of the great divergence itself. The story of capital punishment is the story of the great divergence writ small, and it has something to teach us about the great divergence writ large. Second, the European/American disagreement about capital punishment is not just an instrumental or practical disagreement about policy but a clash between two visions of justice. Europe and America do not disagree about, say, whether or not the death penalty deters; rationalistic forms of policy analysis utterly miss the cultural point. Something fundamental about how an Enlightenment society conceives of right and wrong is at stake in capital punishment. But what?

To interpret capital punishment, it is crucial to see that the issue is not just killing, nor even killing by the state, but killing as a *penalty*—killing in response to wrongdoing, and, indeed, in response only to the very worst

269. Robert Lindsey, *The Elections: The Story in Some Key States; Deukmejian and Cranston Win as 3 Judges Are Ousted*, N.Y. TIMES (Nov. 6, 1986), <http://nyti.ms/1SzGCos>.

270. E.J. Dionne Jr., *Afterword: Lifting New Voices Against the Death Penalty: Religious Americans and the Debate on Capital Punishment*, in RELIGION AND THE DEATH PENALTY: A CALL FOR RECKONING 277, 277-78 (Erik C. Owens et al. eds., 2004).

271. Only abortion scored higher. Ellsworth & Gross, *supra* note 179, at 23; *see also* BANNER, *supra* note 177, at 276.

272. BARACK OBAMA, THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM 57-58 (2006); Gross, *supra* note 179, at 1452 (detailing Clinton's support for capital punishment).

wrongdoing. Also crucial is that the right in question—the right to life—is a defining one for the Enlightenment. Part of what it means to live in an Enlightenment society is to see each individual human being’s life as valuable, as *mattering*. The form of words with which our culture teaches us to express that conviction is to say that each individual has a *right* to life, but prior to that claim of right is the recognition of some feature of a human being in virtue of which he or she has rights at all. Those premises in place, the following claim is necessarily true: if capital punishment 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* (the mere biological fact of being human), 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 converse—if capital punishment is never just, then the right to life must be such as to never be forfeit, whatever the wrongdoing—does not follow as a matter of logical necessity. One sometimes hears arguments against capital punishment on the ground that, say, the state can never be trusted with the power to kill, or the punishment is applied in a racist way, or the risk of executing innocents is always too great—arguments, in other words, that absolutely reject killing but do not deny that some people deserve to die. But the yield of the historical context above is 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 never forfeit for any wrong. Europe generally trusts the state *more* than does the United States, including in the context of crime and punishment.²⁷³ And the blazing passion behind Europe’s rejection of the death penalty—the fact that Europe has written that rejection into its basic charters as a political community²⁷⁴—suggests something more

273. The most obvious example of Europe’s greater belief in the state is the continent’s comprehensive welfare systems, but in the criminal context the best example is Europe’s inquisitorial systems of procedure, whose very foundation is a grant of trust to state officials. See LANGBEIN, *supra* note 1, at 1 (“What distinguishes criminal adjudication in the Anglo-American world from the European and European-derived systems is . . . that we remit to the lawyer-partisans the responsibility for gathering, selecting, presenting, and probing the evidence. . . . In the European systems, by contrast, evidence is gathered by judges or judge-like investigators, public officers who operate under a duty to seek the truth.”); PEW RESEARCH CTR., THE AMERICAN-WESTERN EUROPEAN VALUES GAP: AMERICAN EXCEPTIONALISM SUBSIDES 1 (2011), <http://www.pewglobal.org/files/2011/11/Pew-Global-Attitudes-Values-Report-FINAL-November-17-2011-10AM-EST1.pdf> (reporting that, when asked whether “[f]reedom to pursue life’s goals without state interference” or “[s]tate guarantees nobody is in need” is more important, roughly 60% of Americans favor individual freedom and 55-70% of Europeans favor state guarantees).

274. See *supra* note 42 and accompanying text.

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 wrong in itself and a violation of the person killed. The right to life is understood in Europe to be a genuinely inalienable human right.

Thus I suggest a stark contrast and a new question. On one side of the European/American division is the belief that the right to life is, as a matter of justice, forfeit for the worst wrongdoing; on the other is the belief that the right to life is, as a matter of justice, inalienable no matter the wrongdoing. So the question is, why would one think the right to life forfeit for the worst wrongdoing? What are the foundations for the right such that it would or would not be? Now, philosophers have proposed various theories as to the ground of rights, but we must tread carefully: a philosophical theory without roots in the culture will not do. We need an account of the foundations of rights capable of making sense of a widely and passionately felt public controversy. It must be simple, indeed intuitive. And it must have roots in the body of materials from which Western civilization is built. The ideas have to *move* people on a societal scale and they cannot be moving if they are inaccessible.

Jeremy Waldron makes the following argument:

Imago Dei—the doctrine that men and women are created in the image of God—is enormously attractive for those of us who are open to the idea of religious foundations for human rights. It offers a powerful account of the sanctity of the human person, and it seems to give theological substance to a conviction that informs all foundational thinking about human rights—that there is something about our sheer humanity that commands respect and is to be treated as inviolable, irrespective of or prior to any positive law or social convention.²⁷⁵

Waldron's thought is this: our humanity connects us to God; that connection endows us with value; that value grounds our rights.

Let us focus on the last of those steps: that rights are grounded in value or worth—in the ways in which human beings are characteristically or distinctively precious, valuable, or sacred. The philosopher Nicholas Wolterstorff puts the point with uncommon clarity and force: “[R]ights and obligations, in general, are constituted of what respect for worth requires.”²⁷⁶ Wolterstorff's version of the point is accessible to the religious and the nonreligious: secular human rights advocates can and do embrace the idea that rights are what respect for worth requires. Waldron's version is wholly religious:

275. See Jeremy Waldron, *The Image of God: Rights, Reason, and Order*, in *CHRISTIANITY AND HUMAN RIGHTS: AN INTRODUCTION* 216, 216 (John Witte, Jr. & Frank S. Alexander eds., 2010).

276. NICHOLAS WOLTERSTORFF, *JUSTICE: RIGHTS AND WRONGS* 373 (2008).

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One idea behind human rights is an emphasis on the value to be accorded each person. This seems straightforward enough in the light of *imago Dei*. That doctrine seems to imply that there is something precious, even sacred, in each human being—something which commands respect of the kind that is commanded by the very being of God.²⁷⁷

As our goal is to understand a cultural conflict over capital punishment, Waldron's biblically grounded version of the thought has special value; it builds the humanity-value-rights triad on a civilizational foundation stone. But whether religious or secular, what underlies claims of right on this theory is the idea that the rights-bearer is precious. To accord someone a right is to value him. It is this line of thought that enables claims of the form, "Human beings have rights because human beings are precious. To give due recognition to that worth is to give due protection to those rights."

Let us return to the interpretation of capital punishment with this humanity-value-rights pattern of thought in place. (It has always been connected to killing: "Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man."²⁷⁸) A person's right to life on this line of thought rests on that person's worth. To say as a claim of justice, then, that a person's right to life is forfeit for wrongdoing is to say that the person's wrongdoing has deprived him or her of worth. To say as a claim of justice that wrongdoing can never deprive a person of the right to life is to say that wrongdoing can never deprive a person of worth. One side holds that some people, by virtue of terrible wrongdoing and a character disposed to such wrongdoing, have rendered themselves morally inhuman, monstrous, a blight upon the land. As such they have lost—in a certain sense they have renounced—their claim on human worth and thus on the right to life. The other side holds that there are no inhuman humans, no monsters. The sadistic sexual predator, the mass killer, and the Nazi death camp guard are all morally precious.

Consider two passages. The first is from Blackstone:

When sentence of death, the most terrible and highest judgment in the laws of England, is pronounced, the immediate inseparable consequence by the common law is attainder. For when it is now clear beyond all dispute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets a note of infamy upon him, puts him out of [its] protection, and takes no farther care of him than barely to see him executed.²⁷⁹

The second is from Waldron:

The foundational work that *imago Dei* does for dignity is, in my opinion, indispensable for generating the sort of strong moral constraint associated with

277. Waldron, *supra* note 275, at 222.

278. *Genesis* 9:6 (King James).

279. 4 BLACKSTONE, *supra* note 2, at *380.

rights—and for overriding the temptation to demonize or bestialize “the worst of the worst.” . . . Our status even as wrong-doers is to be understood in relation to this.

....

The first and most obvious relation between *imago Dei* and particular human rights derives from the doctrine’s use in the Noahide law to express the basic right to life—the sacredness of human life—and the seriousness with which the taboo on killing must be taken.²⁸⁰

Two-hundred-fifty years separate these two passages, yet the two display precisely the same insight about the interlinking of rights, worth, wrongdoing, and killing. Notice that, although capital punishment is often portrayed as purely retributive, neither of these passages is about the idea of like-for-like. Retribution does not exhaust the meaning of capital punishment in the Enlightenment era. Capital punishment is chiefly about whether the worst wrongdoers retain their moral sacredness. It is about whether they have, in virtue of their wrongs, shown themselves to be worthless. Indeed, to fully capture the religious roots of the idea, we need the concept of human evil. One side of the dispute over capital punishment holds that when a person’s disposition to wrongdoing goes so deep as to be part of her immutable character, so deep as to make the wrongdoer *evil*, she no longer bears the impress of the image of God—for what it means to be evil, religiously speaking, is to have sheared away one’s link to God. The other side holds that everyone is always made in the image of God, because no person’s wrongdoing goes so deep as to be part of his or her immutable character. No one is truly evil.

Thus American capital punishment represents the belief that ultimate wrongdoing deprives wrongdoers of worth. Europe’s rejection of capital punishment represents an insistence that everyone always has worth no matter what they have done. One can hold these views from either a secular or religious perspective. From a religious standpoint, the American position is that some people are evil; the European position is that no one is evil, for there is no such thing as an evil person, or no such thing as evil at all. From a secular standpoint, the American position is that some people are so bad as to be worthless; the European position is that no one is so bad as to be worthless. In either case, a certain logic takes hold: as a person’s worth is diminished, his or her claim on rights is diminished, until eventually the right to life itself is forfeit. As wrongdoing goes up, worth goes down, and with worth goes rights.

A virtue of this account of capital punishment is that it provides a frame big enough to hold a debate that has sounded for two and a half centuries on a civilizational scale. We care so much about capital punishment because we care about the ideas that capital punishment represents. Capital punishment grips American and European culture and has gripped the Western world since the

280. Waldron, *supra* note 275, at 226.

Enlightenment because the decision to permit or prohibit capital punishment represents a position about the foundations of all rights. The argument about capital punishment is an argument about the roots of human worth.

B. Prison Conditions

Like the history of capital punishment, the history of American and European prison conditions parallels the broader story of the great divergence. Both America and Germany launched reform programs in order to make prisons more humane in the 1960s, which France had already begun in the 1940s; all three were actively engaged in parallel reform efforts throughout the 1970s; and then, in the 1980s, America veered off in a new direction while France and Germany continued along their former course.²⁸¹ My argument about these developments is structurally identical to the previous one about capital punishment: harsh prison conditions represent devaluation because, in order to subject offenders to conditions that would otherwise violate basic human rights, we have to think of the offenders as having forfeited their rights as penalty for their wrongs. Because those rights are based on human worth, to regard the offenders as having forfeited their rights is to regard them as devalued. If a society were to enslave criminal offenders and work them to death, the point would be obvious: surely such a system of punishment would express the idea that criminal offenders' lives do not matter. American punishment is nowhere near that extreme, but it presents, I argue, the same structure. My argument turns in part on prison violence (sexual and otherwise), in part on norms of courtesy and related indications of respect toward prisoners, and in part on funding decisions connected to prison conditions and overcrowding.

Four forms of violence dominate popular imagery of American prisons: male-on-male rape, domination by racial gangs, assault by sadistic guards, and assault by other prisoners. It is exceedingly difficult to know whether and to what degree the popular imagery exaggerates the problem: governmental and scholarly estimates of nonsexual prison assault vary by a factor of roughly ten

281. WHITMAN, *supra* note 3, at 74-75. Whitman heavily influences this discussion of prison conditions. *See id.* at 59-62, 71-80. A difference in the philosophical structure of our arguments is worth noting, however. My argument focuses on the ways in which American prison conditions, contrary to European conditions, imply that offenders are *devalued* and therefore rightless. Whitman's argument focuses on the ways in which American prison conditions, contrary to European conditions, *degrade* offenders and therefore illustrate their position at the bottom of the social hierarchy. The two accounts do not conflict—both can be true at once—but the differences between devaluation and degradation are interesting. Degradation is a sociological phenomenon; it has to do primarily with social status. Devaluation is more philosophical; it has to do primarily with one's moral and metaphysical status. Thus the differences between my account and Whitman's speak to larger issues of philosophical versus sociological forms of understanding.

(though almost everyone agrees that governmental estimates are far too low), and estimates of the prevalence of male-on-male sexual assault range from 1% to 26% of prisoners.²⁸² Furthermore, a crucial issue is variance: prisons differ a great deal and it seems likely that some will be high-violence and others low-violence. Finally, there is violence, including rape, in European prisons as well—and, again, it is difficult to determine either the rates or the variance (although we know that French prisons are much rougher than German prisons).²⁸³ That said, there is substantial evidence confirming in broad strokes Americans' popular image of their prisons. One leading study of nonsexual violence, for example, found that approximately 21% of male inmates reported being (nonsexually) assaulted by other inmates within the previous six months (ranging from 13 to 35% across thirteen facilities) and approximately 25% reported being assaulted by staff within the previous six months (ranging from 10 to 32% across thirteen facilities).²⁸⁴ According to a leading study of sexual violence, approximately 4% of male inmates reported being sexually victimized by other inmates within the previous six months (ranging from 3 to 6% across twelve facilities) and 8% reported being sexually victimized by staff within the previous six months (ranging from 4 to 12% across twelve facilities).²⁸⁵ We do not know whether the same prisoners who are victimized by other inmates are also victimized by guards; the more overlap, the fewer total number of prisoners affected. But even if we assume perfect overlap, the average prisoner has a one in four chance of being violently assaulted and a one in twelve chance of being sexually coerced every six months he spends in prison. Those numbers describe an environment of systemic and extreme violence.

In terms of assessing cultural attitudes toward offenders, the popular imagery itself is important. Americans regard their prisons as places of brutal violence. Unknown or hidden problems may not teach us much about a culture, but every society, like every person, has its monsters in the closet, the nightmares it has trouble not thinking about, and those fears teach us something about the culture. Ancient Romans, James Whitman writes, “used to have nightmares about being crucified,” which tells us something “peculiarly intimate and revealing about how omnipresent harsh punishment was in

282. GERALD G. GAES & ANDREW L. GOLDBERG, U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, PRISON RAPE: A CRITICAL REVIEW OF THE LITERATURE 55 tbl.1 (2004), <https://ncjrs.gov/pdffiles1/nij/grants/213365.pdf>.

283. WHITMAN, *supra* note 3, at 59.

284. See Nancy Wolff et al., *Physical Violence Inside Prisons: Rates of Victimization*, 34 CRIM. JUST. & BEHAV. 588, 594 tbl.2 (2007).

285. See Nancy Wolff et al., *Sexual Violence Inside Prisons: Rates of Victimization*, 83 J. URB. HEALTH 835, 842 tbl.3 (2006); see also Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601(2) (2014) (“[E]xperts have conservatively estimated that at least 13 percent of the inmates in the United States have been sexually assaulted in prison.”).

ancient lives. People in the United States watch movies and read novels about beatings, stabbings, and violent homosexual rape in prison. This also seems to tell us something intimate and revealing about an American culture of harsh punishment.²⁸⁶ Anyone who has seen *Oz*, *Sleepers*, or *The Shawshank Redemption* knows that Americans are frightened of their prisons and that the fear has almost nothing to do with the mere deprivation of liberty that, formally speaking, constitutes the sentence.

So Americans think their prisons are brutal, and they are right. Do they care? Does the public and do political officials value offenders enough to think the brutality matters? Does the legal system grant prisoners a substantial enough network of rights to affirm their value? What public outrage there is certainly appears to be muted. Rhetorical tropes to the effect that prison conditions *should* be harsh are familiar features of the American political landscape (for example, jokes about prison rape, objections to “country club prisons,” polls indicating that prison conditions are believed to be harsh but should be harsher still, an unwillingness to spend money to make prisons less crowded or more humane, and arguments to the effect that violence and sexual coercion are appropriately part of the sentence).²⁸⁷ The jokes are especially interesting. Humor is a complicated thing and might indicate critique as much as indifference, but surely it was callousness that led 7UP to run a commercial joking about not bending over to pick up a can of soda in prison.²⁸⁸ The American public and its political officials are by and large not exorcised about prisoners’ rights. Prisoners just do not matter that much.

As to the legal system, pure indifference cannot be sustained: so long as prisoners are formally entitled to be free of violence and sexual coercion, they have a legal claim against such treatment. But the case law related to prison conditions, until the recent downtick in American harshness, has been as unfavorable to prisoners as the formal structure of law allowed it to be. In a key 1994 case, the U.S. Supreme Court held that prison rape and assault give

286. WHITMAN, *supra* note 3, at 59.

287. See, e.g., NAT’L PRISON RAPE ELIMINATION COMM’N, *supra* note 174, at 25 (“Many still consider sexual abuse an expected consequence of incarceration, part of the penalty and the basis for jokes”); Kevin H. Wozniak, *American Public Opinion About Prisons*, 39 CRIM. JUST. REV. 305, 320 (2014) (discussing the “country club” rhetoric, testing American attitudes, and finding that a plurality of respondents both perceive life in prison to be unpleasant and voice the opinion that life in prison should be harsher still); YouGov, Prison Abuse, 1 fig.1, 4 fig.4 (2014), http://cdn.yougov.com/cumulus_uploads/document/yd3t6uy3ug/tabs_OPI_prison_abuse_20140716.pdf (indicating that, although 74% of Americans think prisoners are “frequently” or “very frequently” assaulted, 43% of Americans think prison conditions are too easy and another 22% think prison conditions are about right).

288. See Christopher Hitchens, *The Scandalous Brutality of U.S. Prisons*, VANITY FAIR (Aug. 31, 2005, 8:00 PM), <http://www.vanityfair.com/news/2005/09/hitchens200509>.

rise to a constitutional violation only if prison officials show “deliberate indifference” to the attack, which means that litigants must prove that a prison official was “aware of facts from which the inference could be drawn that a substantial risk of serious harm exists” and also that the official in fact “dr[e]w the inference.”²⁸⁹ That evidentiary standard is so high as to take away the very right it pretends to give: it is not enough to show that the prison was systematically brutal; one must show that a particular prison official had what amounts to mens rea with respect to a particular incident of inmate violence. Even if the evidentiary requirement were more moderate, what is the right in view here? It is not a right to safe prisons. It is not even a right to *reasonably* safe prisons (thus putting prison officials under a duty to make conditions reasonably safe). It is a right against prison officials giving tacit permission to inmate violence. That is not the right we apply in other situations of care—in boarding schools, in nursing homes, in hospitals. It is a right that starts from the premise that prisoners are devalued.

The European side of the picture is not one of prisons wholly free of sexual and other violence. But European prisons do not appear to be anywhere near as violent as their American counterparts.²⁹⁰ And culturally, what is even more important than the *level* of prison violence is the *response*, from the public, political officials, and the legal system, when violence takes place: it is the response that shows what values the culture and legal system is willing to accept. Europe and America dramatically diverge in this respect. For example, an exposé of prison violence and sexual abuse in France led to a major scandal, during which “French politicians of all major tendencies, and in every branch of French government, vied with each other over the issue of prison reform . . . in[] a contest to show who had the deeper commitment to making punishment more *humane*.”²⁹¹ Politicians denounced opponents “for failing to care enough about the rights and dignity of convicts.”²⁹² Meanwhile, the European Court of Human Rights has held that prison officials have a “positive obligation to adequately secure the physical and psychological integrity and well-being” of prisoners, which means “respond[ing] promptly, diligently and effectively” to mistreatment by cellmates and staff.²⁹³ In a series of cases, the European Court has held that violence or sexual assault of inmates by other inmates or prison staff constitutes torture, inhuman treatment, or degradation

289. *Farmer v. Brennan*, 511 U.S. 825, 828, 837 (1994).

290. *WHITMAN*, *supra* note 3, at 59, 74-77.

291. *Id.* at 76.

292. *Id.*

293. *Premininy v. Russia*, App. No. 44973/04, 2011 Eur. Ct. H.R. 26 (Feb. 10, 2011), <http://hudoc.echr.coe.int/eng?i=001-103350>.

contrary to the Convention.²⁹⁴ As I argued in discussing LWOP earlier, there is no good reason American courts interpreting the Eighth Amendment's prohibition on "cruel and unusual punishment" should define such different rights than the ECHR interpreting "inhuman or degrading . . . punishment."²⁹⁵ Culture drove constitutional interpretation, not the other way around.

Violence looms so large that it can seem like the only issue, but that focus itself is an Americanism: much of what differentiates European and American prisons, as Whitman has shown, has to do with norms of personal dignity or respect. In Germany, a major issue of legal controversy was whether "respect for [the prisoner's] human dignity" requires guards to *knock* before entering prisoners' cells.²⁹⁶ (It was finally decided that they are advised but not constitutionally required to knock.²⁹⁷) German guards must address prisoners with the respectful "Sie" rather than the informal "Du," and prisoners can and have successfully sued guards for addressing them disrespectfully.²⁹⁸ In both Germany and France, guards may not insult prisoners (and prisoners may not insult each other).²⁹⁹ In both Germany and France, prison uniforms are a preoccupying issue: French prisoners generally enjoy a right against them; German prisoners are generally not required to wear them and, to the extent uniforms are worn, they are designed to look like ordinary clothes.³⁰⁰ German and French prisoners' interest in physical privacy—in not being exposed to view—is also protected. Both countries, for example, avoid barred cell doors and often provide doors without peepholes (in Germany, even in maximum-security prisons).³⁰¹ The European Court of Human Rights has extended the ideas underlying these practices throughout Europe. The court, for example, has voiced concern for toilet facilities requiring inmates to go to the bathroom

294. *See, e.g.,* D.F. v. Latvia, App. No. 11160/07, 2013 Eur. Ct. H.R. 2, 20 (Oct. 29, 2013), <http://hudoc.echr.coe.int/eng?i=001-127393> (holding that prison officials' failure to transfer the inmate, a sex offender and former police informant, to a safer place of detention violated their obligation to secure him against the fear and risk of ill-treatment); *Premininy v. Russia*, App. No. 44973/04, 2011 Eur. Ct. H.R. 26 (Feb. 10, 2011), <http://hudoc.echr.coe.int/eng?i=001-103350> (holding that prison officials' failure to adequately investigate the inmate's complaints of ill-treatment violated their obligation to secure his physical and psychological well-being).

295. *See supra* note 94 and accompanying text.

296. WHITMAN, *supra* note 3, at 84, 90 (quoting KLAUS LAUBENTHAL, STRAFVOLLZUG [PENITENTIARY] 72-73 (2d ed. 1998)).

297. *Id.* at 90.

298. *See id.*

299. *See id.* at 85, 89.

300. *Id.* at 86-87.

301. *Id.* at 90-91.

in view of others or to witness others going to the bathroom.³⁰² In a number of cases, the court has prohibited strip searches found to impose unjustified humiliation; of particular concern to the court was that the prisoner's body was exposed to the view of the guards.³⁰³

Europeans regard these dignitary issues with as much or almost as much concern as they regard issues of violence, which can strike even Americans sympathetic to prisoners' rights as strange. "[T]here are ideas coursing under the surface of the continental idea of dignity," Whitman suggests, "that are alien to any we can find in America."³⁰⁴ His explanation is historical and sociological: the "dignity" in question in these examples "is much like the 'dignity' that prevails in other corners of European legal culture: it is a dignity that blends concepts of entitlement in the modern social state with much older ideas of personal honor."³⁰⁵ If Americans, lacking both the encompassing welfare state and the tradition of aristocratic honor, "find these dignitary issues to be minor matters," that "only shows that they are American readers."³⁰⁶ Yet this explanation, though true in part, leaves something out. Americans understand what it means to be treated with respect just as surely as Europeans do, and all of the practices above—knocking, being addressed respectfully, not being insulted, not being exposed naked or seen going to the bathroom, etc.—are intelligible within American culture.³⁰⁷ The difference is not in the main that these ideas of personal dignity are alien; it is that American law and culture do not much care about prisoners' dignity.

302. *Ananyev v. Russia*, App. No. 42525/07, 2012 Eur. Ct. H.R. 49 (Jan. 10, 2012), <http://hudoc.echr.coe.int/eng?i=001-108465>; *Peers v. Greece*, 2001-III Eur. Ct. H.R. 275, 298 (2001).

303. *El Shennawy v. France*, App. No. 51246/08, 2011 Eur. Ct. H.R. 21 (Jan. 20, 2011), <http://hudoc.echr.coe.int/eng?i=001-102951>; *Frerot v. France*, App. No. 70204/01, 2007 Eur. Ct. H.R. 25-26 (June 12, 2007), <http://hudoc.echr.int/eng?i=001-81008>; *Iwańczuk v. Poland*, App. No. 25196/94, 2001 Eur. Ct. H.R. 9-10 (Nov. 15, 2001), <http://hudoc.echr.coe.int/eng?i=001-598884>; *Valašinas v. Lithuania*, 2001-VIII Eur. Ct. H.R. 385, 417 (2001). *But see* *S.J. v. Luxembourg* (No. 2), App. No. 47229/12, 2013 Eur. Ct. H.R. 18 (Oct. 31, 2013), <http://hudoc.echr.coe.int/eng?i=001-127413>.

304. WHITMAN, *supra* note 3, at 86.

305. *Id.* at 85.

306. *Id.* at 87.

307. The television show *Rectify*, for example, begins with a scene in which the protagonist—having been exonerated of rape and murder after spending nineteen years on death row—is given his old clothes back on his way out of prison. As he begins to take off his prison uniform, the camera pauses over the prison guard, who, in a show of humanity, turns to face away from the exonerated man as he strips. Scenes like that in popular culture are revealing: they illustrate what the show's writers and producers think audiences will understand. *Rectify: 1.1, Always There* (Sundance TV broadcast Apr. 22, 2013).

Prison uniforms are a striking example: Europeans care about them, Whitman argues, because they are a form of branding.³⁰⁸ But he overlooks the fact that American law shows concern about prison uniforms too: prisoners have a constitutional right against being compelled to wear them at trial.³⁰⁹ Consider Justice Brennan's explanation of the right: "Identifiable prison garb robs an accused of the respect and dignity accorded other participants in a trial and constitutionally due the accused as an element of the presumption of innocence, and surely tends to brand him in the eyes of the jurors with an unmistakable mark of guilt."³¹⁰ To some extent, concerns about branding are mixed together with concerns about a fair trial here; the mixture itself is interesting. But the issue is not alien to American eyes. It just makes a very large difference whether the person claiming the right is a defendant, who may be innocent, or an offender, who, being guilty, has no such right. The difference is that offenders are devalued.

The last issue of prison conditions has to do with prison funding and overcrowding. One mark of valuing something is being willing to spend money on it. Europe invests in making prisons humane. French and German prison guards receive six to eighteen months of training. They are regarded as civil servants, and money is spent to give them the skill sets and attitudes of penal professionals.³¹¹ European prison systems spend on rehabilitative programming³¹² and spend more to provide decent food, living quarters, and other conditions of life.³¹³ American prisons are chronically underresourced and, above all, overcrowded, because elected officials are not willing to spend money on prisoners' behalf and because American judges have typically been unwilling to recognize rights that would force politicians' hands.

One may object to this and to all of the arguments above that American prison conditions are harsh more for practical reasons than ideological ones. America does not subject prisoners to harsh conditions because Americans regard prisoners as a lesser form of humanity, the argument goes; America subjects prisoners to harsh conditions because there is too little money chasing too many prisoners. But there is a critical elision here. To engage in pure cost-benefit analysis with respect to prisoners' interests, one must first regard prisoners' interests as the proper object of pure cost-benefit analysis. One must think of prisoners as locations for cost saving. That just *is* devaluation. When we spend money on ourselves or our families, a certain kind of cost-benefit

308. WHITMAN, *supra* note 3, at 86-87.

309. *Estelle v. Williams*, 425 U.S. 501, 512-13 (1976).

310. *Id.* at 518 (Brennan, J., dissenting).

311. WHITMAN, *supra* note 3, at 77.

312. *See supra* notes 158-74 and accompanying text.

313. Dirk van Zyl Smit, *Regulation of Prison Conditions*, 39 CRIME & JUST. 503, 519-24, 537-44 (2010).

analysis is inevitable, of course, but the question is framed differently. With people we value, the question is, “How can I meet this person’s needs and interests to the extent possible and in a cost-effective way?” With people we do not value, the question is, “Are these people’s needs and interests worth meeting?” which then becomes, “Should ‘need’ for people like this be redefined?” That form of devaluation may not be conscious, and it may not be based on hatred or anger, but it is devaluation nonetheless. The issue is not the motives in lawmakers’ hearts. The law’s expressive content is a collective product—the combination of its own doctrines and practices and the backdrop of cultural assumptions against which those doctrines and practices make sense. The American legal system in effect attaches a fractional multiplier to prisoners’ interests, such that those interests are worth less, all else equal, than the equivalent interests of nonprisoners. That is in a very literal sense what devaluation means.

C. Human Dignity and Democratic Dignity

The preceding discussion of capital punishment and prison conditions sheds light on one of the most perplexing divisions between European and American legal culture, this one less a disagreement than a source of mutual puzzlement: the variance over the concept of “human dignity.” Europeans commonly think of dignity as nothing less than the foundation of the legal order,³¹⁴ while Americans wonder what such an abstract, seemingly philosophical concept could possibly mean—particularly when invoked as a term of law. The leading explanation in the literature is probably James Whitman’s, who argues that Europe’s concept of dignity can only be understood against the backdrop of Europe’s aristocratic history, its traditions of according dignified treatment to the high-born and high-status: “Everybody is now supposed to be treated in ways that only highly placed and wealthy people were treated a couple of centuries ago. Germany and France have been the theater of a leveling-up, of an extension of historically high-status norms throughout the population.”³¹⁵ Americans find European “dignity” so puzzling, Whitman argues, because Americans never had the aristocratic backdrop against which the concept of “dignity” makes sense.

Extending this argument to the great punishment divergence, Whitman writes:

In continental Europe . . . old high-status norms of punishment have gradually, though incompletely, been generalized. Equality in modern continental Europe has meant conferring on all, to the extent possible, what were once the exclusive privileges of high status. . . . A yearning for “aristocratic equality” is indeed a

314. *See supra* note 69 and accompanying text.

315. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1166 (2004) (emphasis omitted).

constant in continental Europe. One of the most famous claims of Montesquieu deserves to be remembered here too: the claim that the “principle” of monarchical-aristocratic societies is *honor*. Continental societies are by no means “aristocratic” in the Montesquieuian sense today. But the 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.³¹⁶

By contrast, the root of American harshness in punishment, Whitman argues, is the extension of low-status norms of punishment throughout society. In punishment—and in a wide variety of other contexts as well—Europe levels up, America levels down. There are “simply two different roads, to two different forms of equality.”³¹⁷

This understanding of European/American cultural, legal, and political differences is in my view one of the most illuminating insights in the whole of the comparative literature—not just the comparative legal literature but all European/American comparative scholarship. Yet it can be a profound insight and, at the same time, an inadequate explanation. As an account of either the roots of the great divergence or the meaning of “human dignity,” Whitman’s status-oriented thesis overlooks a central dimension of European culture. On Whitman’s view, “dignity” is purely a sociological thing, a claim about social status. But dignity also has a philosophical—indeed, a moral, metaphysical, and religious—dimension in European culture. Dignity does not just say that human beings are high-status; it says that they are *sacred*. It says something very much like what Waldron is saying when he speaks of “*Imago Dei*—the doctrine that men and women are created in the image of God.”³¹⁸

To understand these philosophical dimensions of “human dignity,” I submit that we think of the concept as a claim about *value* or *worth*, directly opposed to the concept of *devaluation*. European human dignity is the insistence that every human being, in virtue of his or her humanity *simpliciter*, is precious. That is first a moral and metaphysical claim about the roots and degree of human value. It is also a functional claim about rights: “dignity” is the name Europe gives for the quality in virtue of which human beings have rights. It answers the question of why human beings *matter* from a moral point of view and provides a form of words to invoke where some political or legal challenge makes it necessary to decide who should get rights and how far those rights should extend. In other words, the function of “human dignity” in Europe is to serve as the ultimate foundation for all claims of right. The concept plays precisely the role for twentieth century human rights discourse that the *imago Dei* played in the ancient Judaeo-Christian tradition. The most direct way to grasp the moral, metaphysical, and functional aspects of human

316. WHITMAN, *supra* note 3, at 192.

317. *Id.*

318. Waldron, *supra* note 275, at 216.

dignity—perhaps historically the very root of the concept itself—is indeed through the *imago Dei*. The concept of human dignity is a secular substitute for the claim that human beings are made in the image of God.

This raises the interesting question of what concept, if not being human as such, lies at the foundation of rights in America. America does not commonly identify the philosophical root of its conception of rights as Europe does, but there is some sort of foundation to be uncovered: America even more than Europe conducts its moral, political, and legal discourse in terms of rights, takes rights enormously seriously, and accords them to most people most of the time. Importantly, America does not, like ancient Rome, think of rights as mere privileges of citizenship: both within the country and on a global stage, America's general stance is that noncitizens are rights-holders too. Criminal offenders are an *exception*, and the question is what conception of the foundation of rights can make sense of that exception.

I am frankly uncertain of the answer, but consider the following line of thought. Hobbes regarded the social contract as merely an instrument by which to subdue the violence of the state of nature. But what if one thinks of the social contract—of democratic society—as something morally precious, something demanded by and infused with justice? Monarchical societies have sometimes claimed that the structure of government is divine, approved by God. Imagine regarding democratic political or social arrangements in similarly elevated or even religious terms: democracy is God's or justice's way of ordering the world. From the democracy flows a network of legal and social arrangements whose legitimacy is not merely a matter of positive law but derives from the divine or righteous status of the democracy itself. What then does it mean to transgress the democratic social order, and not merely to do so once, as an aberration, but to be an enemy of that social order?

A passage from John Locke—who did think the democratic social contract derived from the law of nature and from God—sheds light on the answer: “In transgressing the law of nature, the offender declares himself to live by another rule than that of reason and common equity, which is that measure God has set to the actions of men, for their mutual security”³¹⁹ The offender is thus “dangerous to mankind”; the tie that secures all people “from injury and violence” is “slighted and broken by him.”³²⁰ He enters into a “state of war” with society, and another man may “destroy” him “for the same reason that he may kill a wolf or a lion; because such men are not under the ties of the commonlaw of reason, have no other rule, but that of force and violence, and so may be treated as beasts of prey, those dangerous and noxious creatures.”³²¹ If establishing a democratic social order is the first principle of justice and the

319. LOCKE, *supra* note 6, § 8, at 10.

320. *Id.*

321. *Id.* § 16, at 14 (emphasis omitted).

first right, then living in accord with a democratic social order is the first requirement of justice and the condition of rights, or, in other words: the foundation of rights is behaving decently enough and abiding sufficiently by the terms of the social contract to participate in democratic society. Call this “democratic dignity.” It is the condition of being willing to live within a just social order. Those who declare themselves to “live by another rule” are enemies of justice, at war with all, and dangerous to all; they are “noxious creatures” and, as such, rightless creatures who may properly be destroyed. Tocqueville, notwithstanding the links he saw between democracy and penal mildness, recognized this side of democratic criminal law as well: “In Europe, the criminal is an unfortunate who is fighting to save his head from agents of the government. The people are merely onlookers in the contest. In America, he is an enemy of the human race and has all humanity against him.”³²²

Enlightenment thinkers widely believed that democracy would pull penal mildness in its train, and they were probably right: democracies probably do *tend* to punish more mildly than do other forms of government.³²³ But it is only a tendency; it is not a law of penal evolution. What the Enlightenment thinkers who associated democracy with penal mildness did not understand is that democratic communities treasure their social contracts no less and probably more than undemocratic communities and will fight tooth and nail to defend their form of life when they feel the social contract is truly threatened.

IV. Evil and Dangerousness

Immutability and devaluation are independent and potentially separable ideas. One could, for example, regard a serious criminal as someone with a medical problem, like a personality disorder, that might be permanent but not morally freighted. One could, given moralistic condemnatory attitudes but strong forgiveness norms, regard a serious criminal as someone wicked but salvageable—thus mutably or temporarily devalued. The New England Puritans, for example, engaged in forms of punishment designed to humiliate and degrade on the idea that the offender’s crime reflected the condition of his or her soul but afterwards often welcomed offenders back into the community in full.³²⁴ American criminal punishment today treats the worst offenders as *both* immutably criminal and devalued, and European criminal punishment denies *both* claims. This suggests the possibility of a unifying interpretation, of integrating the two pieces into larger, more comprehensive moral outlooks on both the American and European side. But what are those integrated outlooks?

322. 2 TOCQUEVILLE, *supra* note 7, at 108; *see also supra* notes 7, 8, 11 and accompanying text.

323. *See supra* notes 4-17 and accompanying text.

324. FRIEDMAN, *supra* note 3, at 105-06.

If American and European punishment today treat immutability and devaluation as two sides of one coin, what is the coin?

That question brings us to an inelegant if interesting theoretical complexity. In interpreting a social practice or institution, the available evidence is sometimes consistent with multiple interpretations, just as a piece of literature may be consistent with multiple interpretations. Hamlet may have been insane or canny; Shakespeare's text supports either view. Legal education may be training for hierarchy³²⁵ or training to overcome hierarchy; there is evidence for both. American criminal punishment, with its patterns of treating criminal offenders as immutably criminal and devalued, is likewise subject to two very different but equally supported unifying interpretations, and so is its European counterpart.

The inelegant result is that American and European criminal punishment each support two comprehensive outlooks—one moralistic (which then subdivides between American moralism and European moralism) and the other instrumental (which then subdivides between American instrumentalism and European instrumentalism). In other words, there are moralistic grounds for regarding the worst criminal offenders as permanently criminal and devalued, and there are moralistic grounds for denying that view. There are likewise instrumental grounds for treating the worst criminal offenders as permanently criminal and devalued and instrumental grounds for doing the opposite. This bifurcation should come as no surprise. As I have elsewhere written, "Criminal law is a Janus-faced thing," for it has historically performed and must perform "two functions: a *condemnation function* and a *control function*. The condemnation function has to do with criminal law's character as an instrument of *punishment* directed against *wrongdoing* The control function has to do with criminal law's character . . . as an instrument of social control."³²⁶ Neither function ever completely displaces the other, partly because societies need both functions to be performed, and partly because the citizenry and criminal authorities within any society have diverse normative tastes, some preferring the condemnation function, some the control function, and some both. Thus European and American criminal law will *tend* to be amenable to moralistic and instrumental interpretations. There are too many moralists and instrumentalists influencing the law on both sides of the Atlantic for the law to develop in any other way.

The American moralistic view turns on a claim about the ultimate grounds of serious criminality. On this view, the worst criminals behave as they do because they are morally deformed or ruined—because they are *evil*.

325. See Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 591 (1982) (arguing that law school is "ideological training for willing service" in society's structures of "hierarchy and domination").

326. Kleinfeld, *supra* note 35, at 1541-42.

Their crimes expose the truth about their soul, and the appropriate response is totalizing condemnation. The European moralistic view denies that any human being is truly evil. Whatever his or her errors or failings, every human being is fundamentally and potentially good.

The American instrumental view is agnostic about the ultimate reasons why the worst criminals behave as they do and confused or put off by moralistic terms like “evil.” The dominant concept is not *evil* but *dangerousness*. The claim is that, empirically, for whatever reason, some people are dangerous in ways that cannot be lived with, cannot be fixed by any available technique, and endure for all or large chunks of an offender’s life. The offenders, in other words, are not just dangerous in an adjectival sense but *dangerous beings*, and the only reasonable response is to remove them from society in some reliable and cost-effective way. This view does not directly *assert* that such offenders are devalued, but the instrumentalism itself tends to devalue offenders because it conceives of them as a problem to be solved—by getting rid of them as cheaply as possible—rather than as persons bearing inviolable rights. Meanwhile, the European instrumental view regards the term “evil” as meaningless—just a relic of primitive patterns of thought—and the idea of a “dangerous being” as an equally objectionable relic of fascist thought. The specter of fascism makes European instrumentalists unwilling to accept that some people are “incorrigibles.” The European instrumentalist insists on a “scientific” point of view in which criminals are just ordinary people with particular mental or social difficulties in need of effective medical treatments or social interventions.

Thus the American moralistic and instrumental perspectives, although very different from one another, come to the same place: they cross the act/actor line, viewing serious criminal offenses as showing the worst offenders to be bad or ruined in ways that justify social banishment and extreme hard treatment. The European moralistic and instrumental perspectives, although also very different from one another, also come to the same place: they insist that even the worst offenders are not just the sum of their offenses, that they have the potential for good, and that they can and should be restored to the fold.

A. Moralism and the Concept of Evil

“Evil” is an uncomfortable and disquieting thing to talk about in academic legal writing—even a sort of taboo. The concept seems like an intellectual inheritance from another age, antiquated, religious, absolutist, and rigid. Criminal cases routinely feature serious and even monstrous wrongdoing because it is in the nature of the criminal instrument to deal with such wrongdoing, but contemporary criminal law scholarship is almost totally

silent on the concept of evil.³²⁷ We long to live in a cool-headed and rational modernity, but there are older, darker, and more mysterious ideas at work in our law, because law is not the product of cool rationalism alone. Law is the product of a culture in full, and cultures make claims about ultimate moral matters like the concept of evil. The reason to pierce the taboo and lift the lid on these ultimate and sometimes troubling ideas *is that they are there*, at work in the law, and to understand the law is to see them.

The challenge is to specify the right version of the concept of evil. The classical view held evil to be, as Augustine put it, “naught but a privation of good,” that is, only an absence, a lack, rather than a positive force of its own.³²⁸ Christine Korsgaard has labeled this “the privative conception of evil,” for which “[e]vil is weakness,” the evildoer someone “pathetic, and powerless—the drunk in the gutter, the junkie, the stupid hothead.”³²⁹ 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.³³⁰

For Milton, evil was fundamentally a misuse of free will—a certain kind of wrongful choice. Christine Korsgaard calls this “the positive conception of evil,” where the evil person is someone “ruthless, unconstrained” and thus “[e]vil is power and goodness is weakness.”³³¹ Standing within this broadly

327. In the very rare cases in which legal scholars have used the words “evil” and “criminal” in one breath, they have generally done so either in the context of international law’s crimes against humanity or to express opposition to the concept of evil. *See, e.g.*, Roger S. Clark & Madeleine Sann, *Coping with Ultimate Evil Through the Criminal Law*, 7 CRIM. L.F. 1, 1-3 (1996); 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, 1020-21 (2004).

328. AUGUSTINE, *THE CONFESSIONS OF ST. AUGUSTINE* 37 (J.G. Pilkington trans., Easton Press 1979) (n.d.).

329. CHRISTINE M. KORSGAARD, *SELF-CONSTITUTION: AGENCY, IDENTITY, AND INTEGRITY* 170 (2009).

330. JOHN MILTON, *PARADISE LOST* IV.79-110, at 80 (Gordon Teskey ed., W.W. Norton & Co. 2005) (1674).

331. KORSGAARD, *supra* note 329, at 170-71.

Christian tradition, Kant too characterized evil as essentially a misdirection of free will, an “inversion” of our “maxims.”³³² When Kant thought about evil, his model was “the cheat, the chiseler, the guy who bends the rules in his own favor.”³³³ Again, the focus is on free will and wrongful choices, along with the vices of character—for Milton, pride; for Kant, selfishness—that lead to wrongful choices.

Note that this Christian tradition of thinking about evil is not consistent with the version of the concept found in contemporary American criminal law. Evil as wrongful choice implies that evil is *not* permanent, not immutable. A free will can reverse itself; a proud person can learn humility, a selfish person can learn to be fair. To say someone *has* a vice is not to say someone is ruined; there is space between the person and her shortcomings. A criminal system that held a traditional Christian conception of evil would have more room for rehabilitation and forgiveness than contemporary American law does.

A new and darker conception of human evil emerged with the peculiar horrors of the twentieth century. A contemporary person asked to give models of evil would not speak of the “drunk,” the “hothead,” or the “chiseler” but “the tyrant[,] . . . the mafia kingpin, . . . the serial sex killer.”³³⁴ The great twentieth-century philosopher of evil is Hannah Arendt, who, 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.”³³⁵ She expressly rejected the Kantian view: people of his era did not understand, she argued, 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.”³³⁶ She set herself the task of developing an alternative conception of evil equal to the wrongs of the twentieth century. She ended up developing two alternative conceptions.

Initially, Arendt proposed a conception that she labeled “radical evil”—a demonic malevolence, an active desire to harm and to kill, that starts with “lust for power” but over time becomes a desire “not only to kill whoever is in the

332. IMMANUEL KANT, *Religion Within the Boundaries of Mere Reason*, in RELIGION AND RATIONAL THEOLOGY 39, 83 (Allen W. Wood & George di Giovanni eds. & trans., Cambridge Univ. Press 1996) (1793) (alteration in original).

333. KORSGAARD, *supra* note 329, at 171-72.

334. *Id.* at 170-72.

335. Letter from Hannah Arendt to Samuel Grafton 2 (1963), http://memory.loc.gov/cgi-bin/ampage?collId=mharendt_pub&fileName=03/030160/030160page.db&recNum=21.

336. HANNAH ARENDT, ON REVOLUTION 78 (1965) (quoting HERMAN MELVILLE, *Billy Budd*, in THE PORTABLE MELVILLE 637, 675 (Jay Leyda ed., 1952) (1924)).

way of further power accumulation but also innocent and harmless bystanders, and this even when this murder is an obstacle rather than an advantage for mere power accumulation[.]”³³⁷ 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.³³⁸ But 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 and proposed a new conception of the nature of evil—the “banality of evil”:

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.³³⁹

The banality of evil is a magnetic but elusive idea. One way to grasp it is to notice that sometimes people do genuinely terrible and even shocking things because they are just not thinking about the meaning of what they are doing. Some people are skilled at being thoughtless or prone to such thoughtlessness. And certain kinds of bureaucratic social structures encourage people not to think about the moral character of their deeds. The banality of evil thus refers to the capacity of some people in some situations to be so detached as not to notice, reflect on, or care about the moral character of what they do at all.

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 Christian conception of evil as a misuse of free will, she came to see evil not as a certain kind of choice but as a certain kind of self—as, again, a “depravity *according to nature*.”³⁴⁰ She (and Melville, whom she was quoting) meant by this not the biologist’s conception of nature as one’s genetic makeup, but the humanist’s conception of *a* nature, of a person’s essential and enduring self. Evil may not be totally immutable—even the most deeply rooted elements of a person’s makeup can change—but it is not the sort of thing that can be undone by simply reorienting the will. It is, like a naturally curious person’s curiosity or a

337. Hannah Arendt, Notes for Lecture at the University of Notre Dame (1950), <http://memory.loc.gov/cgi-bin/ampage?collId=mharendt&fileName=05/051480/051480page.db&recNum=0>.

338. *Id.*

339. Letter from Hannah Arendt to Gershom Gerhard Scholem 5-6 (July 24, 1963), http://memory.loc.gov/cgi-bin/ampage?collId=mharendt_pub&fileName=03/030170/030170page.db&recNum=32.

340. See ARENDT, *supra* note 336, at 78 (emphasis added) (quoting MELVILLE, *supra* note 336, at 675).

naturally neurotic person's emotionality, a deeply rooted and settled feature of character.

Second, in Arendt's early concept of radical evil, there is the notion of an active hostility and malevolence toward the good things in the world. Arendt speaks of killing innocents "even when this murder is an obstacle rather than an advantage"—thus gratuitous murder, murder for its own sake.³⁴¹ But there is no reason to limit the scope of her insight to the context of murder or even violence. Philosophers conventionally use the notion of "the good" as an umbrella term encompassing all the good things in the world—thus including 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 worth creating or preserving.³⁴² What Arendt was getting at in her notion of radical evil was a disposition of hostility or malevolence toward such things.

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 active malevolence of an Iago ("I hate the Moor . . . I'll pour this pestilence into his ear . . ." ³⁴³) but also in the rationalizations, excuses, and indifference of small souls whose essential failure is the failure to think or care about what they are doing at all. There is a great deal going on in this aspect of Arendt's thought, but 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.

Assembling these pieces, we come to this: to be evil is to have a settled character disposed to malevolence or indifference to the good things in the world. *This* is a concept of evil for the modern world. It may have distantly religious roots, but it is not directly theological and in many ways it departs from Christian tradition, or at least picks up on some aspects of Christianity's complex and plural traditions and pushes other aspects of the Christian legacy aside. This version of the concept of evil sees evildoers as inhuman or demonic rather than as errant. It sees them as having sheared away the moral qualities in virtue of which one can say that human beings are made in the image of God.

341. Arendt, *supra* note 337, at 19.

342. See, e.g., MARILYN McCORD ADAMS, HORRENDOUS EVILS AND THE GOODNESS OF GOD 2 (1999).

343. WILLIAM SHAKESPEARE, OTHELLO, THE MOOR OF VENICE act 1, sc. 3, act 2, sc. 3 (Cornmarket Press 1969) (1681).

Now, recall the two elements of the pictures of the criminal we found in American and European criminal punishment. First was immutability: American punishment treats the serious, repeat offender as a bad person rather than an ordinary person who did a bad thing, while European punishment expressively insists on the latent and potential goodness of all. This is a disagreement over Arendt's "depravity according to nature"—over whether wrongdoing ever crosses the border separating a bad choice from a bad self. Second was devaluation: American punishment treats the worst offenders' moral failings as depriving the offenders of their moral humanity—they become, morally speaking, more monsters than persons—while European punishment denies that any wrongdoing cuts so deep. This is a disagreement about whether anyone truly is malevolent or indifferent in his basic disposition to the world—about whether anyone really is radically or banally evil. In other words, Arendt's concept of evil and the ideas at work in American and European punishment are a match. American criminal punishment reflects a belief in the existence of human evil. European criminal punishment denies the existence of human evil. Indeed, what it means to say that the worst criminality is immutable and devaluing, at least from a moralistic standpoint, is to say that the worst criminals are evil. The conflict of visions that separates American and European law and culture—the deep meaning of the great divergence—is in part about the concept of evil.

B. Instrumentalism and the Concept of a Dangerous Being

A belief in human evil is one path to the patterns of banishment and devaluation that characterize American punishment but not the only one. For an instrumentalist, the issue is not whether offenders are evil but whether they are *dangerous*. Guido Calabresi once remarked to me that, as a judge in criminal cases, he leaves it for God to condemn: "My job is to protect society."³⁴⁴ That is the attitude exactly. Foucault's great classic, *Discipline and Punish*, is a book of many theses, not all true, but its core insight is that the Enlightenment, rationalist-instrumentalist frame of mind characteristic of modern governance is fixated on techniques of social control.³⁴⁵ In the criminal context, that means the basic project of government is to *control dangerous people*. On a purely conceptual level, instrumentalism could have other goals than this. One could be an instrumentalist whose goal is to use punishment to save souls. Philosophical utilitarians aim at the almost wholly undefined goal of maximizing overall social welfare, which—if rights talk proved to be good for utility—could mean a highly rights-oriented criminal system.³⁴⁶ But that only

344. Conversation with Judge Guido Calabresi, in New Haven, Conn. (2006).

345. See *supra* notes 37, 57, 240 and accompanying text.

346. See R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 3-4 (2001) (characterizing consequentialist theories in criminal law as aiming ultimately at "final
footnote continued on next page

shows the degree to which “social welfare” needs further specification to be a functional policy directive. As a lived, cultural matter, the instrumentalist tradition in criminal law is about *crime control*.³⁴⁷ The question for present purposes is this: how should an instrumentalist whose goal is crime control respond to a dangerous and apparently incorrigible offender?

If the goal is exclusively to make sure the law is obeyed, there is only one possible response: permanently incapacitate that offender. If the goal is to control crime while minimizing overall costs, there is a little more wiggle room: one can ask whether the costs of permanent incapacitation are less than the costs of the offenders’ crimes. But the answer will be yes so long as the crimes are frequent or serious enough. Furthermore, the costs of incapacitation can be lowered by reducing the amount spent on prisons or trials or whatever else is required for the incapacitative job. In other words, from a purely instrumental perspective, the appropriate response to an incorrigibly dangerous offender is to execute him or imprison him for life in conditions that are meant above all to minimize how much money is spent on his behalf—that is, to get rid of the offender as cheaply as possible. The appropriate response, in other words, is to engage in precisely the practices of banishment and devaluation at work in America today.

There is a striking irony in this. Without ever engaging in condemnatory or moralistic thinking, instrumental approaches to punishment recapitulate precisely the patterns of harshness produced when one thinks of criminals in the most moralistic way imaginable—when one thinks of them as evil. There need be no condemnatory or retributive feeling, no hatred or anger, no conscious devaluation. The harshness is an explosive side effect of combining a reasonable goal with a reasonable belief of fact. The belief of fact is that some offenders are incorrigibly dangerous—that they will reoffend if given the chance and that we lack the rehabilitative techniques to reform them in a cost-justified way. The goal is to control crime while minimizing the use of scarce resources. That combination gives rise to extremely harsh punishment without a breath of ill will. Of course, one could combat that logic by presenting an argument to the effect that severe and permanent measures of punishment impose subtle or long-term costs that exceed the obvious or short-term benefits. But such arguments are difficult to prove; may ask too much of political actors with short time horizons; and have little purchase in particular sentencing decisions, where the participants must decide on some course of action with respect to a specific defendant and the overall social framework of

good(s),” like happiness, and “intermediate good[s],” of which “crime prevention is the obvious candidate” and cost is an additional concern).

347. See *id.* at 4; see also, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 169-70, 181 (1968) (proposing a version of the crime control model that focuses on minimizing the overall costs of crime, enforcement, and punishment itself).

punishment is beyond both the scope of the proceedings and the reach of the participants' authority.

As a practical matter, what stands in the way of extremely harsh and permanent punishment for incorrigibly dangerous offenders is a moralistic ideology of human dignity and rights. Instrumentalists like to flatter themselves that their rationalism is more humane than moralistic approaches,³⁴⁸ and sometimes it is. But moralism in criminal punishment is Janus-faced: it can condemn and protect; it can turn on a dime. Instrumental rationalism has no source of constraint, no counterbalancing force, except better instrumentalism, which is unreliable, especially in particular cases. The principle of instrumental punishment with respect to the worst offenders is "more, cheaper." A purely pragmatic approach to criminal matters has the potential to be extremely inhumane.

V. Causes: A Crime Wave and a Conflict of Visions

The argument thus far has not been causal or historical; I have taken no position as to how American and European criminal punishment came to be so different. The argument has been interpretive. Ideas of immutability, devaluation, banishment, forfeiture, evil, dangerousness, and their opposites are implicit in what American and European criminal punishment *do*, and my aim has been to make those implicit ideas explicit. Hegel, one source of inspiration for work of this kind, had a special vocabulary for this. "Philosophy," he said, "has to do with Ideas and therefore not with what are commonly described as *mere concepts*."³⁴⁹ The difference is that "mere concepts" are purely mental things; they may or may not exist outside the mind. An "*Idea*," by contrast, is a "concept . . . and its actualization."³⁵⁰ Those who aspire to understand the social world, he thought, should set their sights on ideas, rather than the floating abstractions of mere concepts, because insofar as the social world is built out of actualized concepts, to understand the social world is to understand the concepts actualized in it. In my view, this thought ranks among the great achievements of intellectual history. It is also a fine mission statement for legal philosophers, because the concepts at work in the social world are often actualized in the law. Pure normative philosophy slips naturally into mere conceptual analysis, but it is native to legal philosophy to

348. See, e.g., CLARENCE DARROW, *CRIME: ITS CAUSE AND TREATMENT*, at v (1934) ("Unfortunately, the Courts and the great majority of writers have treated the subject [of crime and punishment] from the metaphysical and religious standpoint of moral delinquency. This view, of course, is utterly unscientific, and no longer believed in by thinking men.")

349. See G.W.F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* § 1, at 25 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 1991) (1821).

350. *Id.*

distinguish between mere concepts and actualized concepts and to prefer the latter. This Article's aim thus far has been to bring to light the ideas immanent in the great divergence. That is what immutability, devaluation, banishment, forfeiture, evil, dangerousness, and their opposites really are—actualized concepts, immanent ideas. To say that is not fundamentally different, though a little richer and a good deal more controversial, than to say that they are the ideas *expressed* by the law, or that the enterprise thus far has been an *interpretive* one.

But to say that immutability, devaluation, and the rest are immanent ideas in the law is not necessarily to say that they are *causes*. Hegel thought immanent ideas would exert causal influence over the long run, but his views on that score are famously elusive.³⁵¹ He recognized that sometimes the historical actors who put ideas into the world are aware of and motivated by those ideas, but sometimes they are not, and sometimes they understand those ideas only partially and dimly.³⁵² He recognized as well that sometimes the historical forces behind events are not agents at all; they are impersonal.³⁵³ Ideas somehow emerge from the assorted causes behind human events nonetheless. In clever moments, Hegel spoke of this process of bringing ideas out of events as the “[c]unning of [r]eason”;³⁵⁴ in extreme moments, he postulated a world spirit, like a collective consciousness or a sort of god, guiding events in the direction of the ideas they come to express.³⁵⁵ These claims are profoundly difficult to understand; the relationship between immanent ideas and causes is mysterious. But just to see the distinction is to see that there is a vast space between cause and meaning. Otherwise careful scholars commonly run the two together; if we were to survey the various scholars who have written about the great divergence and press them to explain what parts of their accounts are claims of cause and what parts are claims about immanent ideas or interpretive meaning, much of their work would just fall apart. But who can blame them? To see the distinction between immanent ideas and causes is to see how hard it is to draw any inference from one to the other, and thus how hard it is to give a truly satisfying account of any complex phenomenon in the social world—an account that speaks both to

351. See HEGEL, *supra* note 92, at 22 (arguing that human freedom is “[t]he *final goal of the world* . . . toward which all the world's history has been working”).

352. See *id.* at 23, 28 (discussing “the *means* whereby freedom develops itself” in history given that the “the only springs of action” are individuals and nations acting on “their needs, their passions, their interests, their characters and talents,” and ultimately arguing that the “mass of wills, interests, and activities” are instruments “of the World Spirit for achieving its goal . . . the tools and means of something higher and greater (of which they know nothing and which they fulfill unconsciously”).

353. See *id.* at 28.

354. *Id.* at 35 (emphasis omitted).

355. See *supra* note 352.

how something came about and what that something *means*, that is, an account that speaks to both sides of the question “Why?”

Yet there is one respect in which just *seeing* the distinction between immanent ideas and causes provides a very simple framework for thinking about complex social phenomena, including the great divergence. Immanent ideas are not necessarily causes, but they *may* be. The motivations of historical actors *may* account for the meaning of what they did, or they may not. In trying to understand some particular social practice, institution, or event, one can therefore mount two analyses. In one, we ask what ideas are at work in the social practice, institution, or event. In the other, we ask how the social practice, institution, or event came to be. There is reason to suspect the two to be connected, but they are not necessarily or straightforwardly connected; the nature of the connection must be examined rather than assumed.

Thus this Article, in Parts I through IV above, examined the great divergence’s immanent ideas; this Part asks whether those immanent ideas played a causal role in bringing the great divergence about. We come, then, at last to the question of historical causation. Did the ideas of immutability, devaluation, and the rest play a role in bringing the great divergence about? Did they motivate the political and legal actors who mattered?

A. The Question of Causation

Before giving my own answer to the causal question, it is worth pausing over the astonishing array of causal explanations other scholars have put on the table.

One line of explanation focuses on European fascism: “As most of the standard continental literature tells the tale, the making of the humane conditions of today began in earnest only after World War II, when that fascist-era harshness was forthrightly rejected.”³⁵⁶ Another line of explanation focuses on American racism: “What has changed since the collapse of Jim Crow” is that has “it is no longer socially permissible to use race, explicitly, as a justification for discrimination, exclusion, and social contempt.”³⁵⁷ Thus “we use our criminal justice system to label people of color ‘criminals’ and then engage in all the practices we supposedly left behind.”³⁵⁸ A third line of explanation focuses on crime rates: “We seem to be in the midst of a horrendous crime storm—a hurricane of crime.”³⁵⁹ The hurricane of crime

356. WHITMAN, *supra* note 3, at 100; *see also* Savelsberg, *supra* note 21, at 391 (“[T]he abolition of capital punishment, was a direct response to the murderous abuse of government power during the Nazi regime.”).

357. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2 (2010).

358. *Id.*

359. FRIEDMAN, *supra* note 3, at x.

spurred public fear and then a political demand for “law and order, toughness, stringency,” which “translated itself into law.”³⁶⁰ Still another line of explanation contrasts American populism with Europe’s more insulated criminal justice bureaucracies: “[T]raditions of state power can make for *mildness* in punishment.”³⁶¹ Europe has “state apparatuses that are both relatively powerful and relatively autonomous [T]hey are steered by bureaucracies that are relatively immune to the vagaries of public opinion.”³⁶² They thus resist the kind of “mass politics”—the “popular justice,” and indeed populist justice—that makes American punishment so harsh.³⁶³

The list goes on and on. Scholars trying to explain the great divergence, or just trying to explain American severity, focus on America’s heterogeneity versus Europe’s relative homogeneity;³⁶⁴ on American individualism versus European collectivism;³⁶⁵ on differences between American and European conceptions of equality;³⁶⁶ on America’s greater religiosity and more fire-and-brimstone type of religiosity;³⁶⁷ on the rise of a certain kind of American right-

360. *Id.* at 452. David Garland is prominently associated with this argument. See DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 106, 147-48 (2001) (arguing that, as high rates of crime became a “normal social fact” in the 1970s, instability led to fear, and fear to punitiveness).

361. WHITMAN, *supra* note 3, at 12.

362. *Id.* at 13-14 (emphasis omitted).

363. *Id.* at 14-15. Garland is associated with this thesis as well: he sees America’s retention of capital punishment in an abolitionist age as the joint consequence of American populism and American racism. See GARLAND, *supra* note 3, at 32-38. Garland is thus associated with three lines of explanation in this set: *Culture of Control* focuses on the crime wave, while *Peculiar Institution* focuses jointly on racism and populism. Compare GARLAND, *supra* note 360, at 106, 147-48 (crime wave), with GARLAND, *supra* note 3, at 32-38 (racism and populism). It is not clear how all the pieces fit together. Perhaps it is the capacity of popular politics to channel both feelings of racism and fear of crime.

364. See Alberto Alesina et al., *Why Doesn’t the US Have a European-Style Welfare State?* 30 (Harvard Inst. of Econ. Res., Discussion Paper No. 1933, 2001) (“The US has significantly more racial heterogeneity than Europe, and importantly, American minorities are disproportionately represented among the poor.”).

365. See SEYMOUR MARTIN LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD* 19-21 (1996) (arguing that the same individualism that fosters American creativity and achievement also gives rise to social disconnectedness and crime); SEYMOUR MARTIN LIPSET, *CONTINENTAL DIVIDE: THE VALUES AND INSTITUTIONS OF THE UNITED STATES AND CANADA* 93 (1989) (arguing that European and Canadian collectivism can be conformist and stifling but also tends to knit people together and to enable and encourage nonlegal forms of social control).

366. See WHITMAN, *supra* note 3, at 6-9, 11, 191-92 (arguing that the American egalitarian tradition is a leveling-down tradition focused on cutting the high-and-mighty down to size, while the European egalitarian tradition is a leveling-up tradition focused on generalizing aristocratic dignity to all, and arguing that these tendencies have led America to generalize low-status, harsh punishments and Europe to generalize high-status, mild punishments).

367. See GARLAND, *supra* note 3, at 178-79; WHITMAN, *supra* note 3, at 6.

wing politics and its associated “war on crime”;³⁶⁸ on the differences between America’s and Europe’s welfare states;³⁶⁹ on the peculiar incentive structures at work in America’s criminal justice bureaucracies;³⁷⁰ and on “modernity” itself.³⁷¹ Furthermore, the twelve very different explanations just given are illustrative, not comprehensive; there are many others.

Beyond the sheer length and diversity of explanations, what is most striking about this list is the intuitive plausibility and evidentiary support available to many or all of them and the difficulty of amassing evidence that would clearly disprove any of them. Furthermore, any living room conversation with reasonably intelligent people will suggest additional explanations, which will surely also be plausible—and also unprovable. The great divergence is one of those vast social developments for which many explanations can be given and none proven. It is like a Rorschach blot: people see in it whatever is on their mind, and their preferred explanation likely tells us more about the explainer than the explained.

It is tempting in light of this surfeit of possibilities to think the explanations are unprovable because they are malformed—perhaps they are in principle unfalsifiable—but that is not true. The explanations above are not malformed. They are just difficult to evaluate because the relevant evidence is subject to conflicting interpretations and traverses a vast quantity of learning across multiple countries. It is also tempting to throw up one’s hands and say: “All these explanations are true; all of them add a contributing factor to the great divergence.” There is some truth in this: the great divergence is surely

368. See JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 7-10 (2007).

369. See Alex Lichtenstein, *Mass Incarceration Has Become the New Welfare*, ATLANTIC (Sept. 16, 2015), <http://www.theatlantic.com/politics/archive/2015/09/mass-incarceration-has-become-the-new-welfare/404422> (arguing that, rather than caring for the poor and mentally ill through a comprehensive welfare system, America ignores their problems unless and until those problems surface in the form of crime, at which point it imprisons them, and thus provides through the prison system the very welfare services it formerly withheld).

370. See Stuntz, *supra* note 18, at 510, 533-35 (arguing that American harshness is the product of a political alliance between prosecutors and legislators, with prosecutors demanding harsh sentences so that they can pressure defendants to plea bargain and legislators supplying harsh sentences because being tough on crime is good politics).

371. See FOUCAULT, *supra* note 37, at 16-17, 22-23, 231 (proposing his book as a “history of the modern soul on trial” and arguing that modern punishment represents a form of “domination” of the “soul” characteristic of a peculiarly modern “type of power”); see also Emile Durkheim, *Two Laws of Penal Evolution*, 4 ANNÉE SOCIOLOGIQUE 65 (1901), reprinted in DURKHEIM AND THE LAW 102, 125-26 (Steven Lukes & Andrew Scull eds., T. Anthony Jones & Andrew Scull trans., 1983) (postulating that, as societies modernize, punishment will tend toward mildness). But as Whitman points out: “The sociology of ‘modernity’ simply does not grapple with the question of how punishment practices can vary—let alone how sharp differences can exist between the ‘modern’ societies of places like the United States, France, or Germany.” WHITMAN, *supra* note 3, at 5.

multicausal, like most large-scale social phenomena. But just assuming *all* the explanations above to be true is intellectually lazy and assuming them all to be *equally* true is absurd: surely some of the explanations above are false or unimportant. It is just hard to know which ones.

My causal argument is therefore a modest one. There is an explanation of the great divergence that is consistent with the major facts, intuitively plausible, and focused on the implicit ideas in European and American punishment—ideas of immutability and devaluation, actors and acts, membership and banishment, dangerousness and evil. My goal in what follows is to present and substantiate this explanation, which I believe to be an important part of the truth, though not necessarily the whole truth.

B. A Hurricane of Crime

Recall the basic outline of the story: When the United States was founded as a democratic, Enlightenment country, its modes of punishment were expected to be milder than those of Europe, and the prediction proved correct from the founding through the late nineteenth century, when Europe became milder itself.³⁷² In the early- and mid-twentieth century (with the exception of the fascist period in Europe), American and European punishment were developing in parallel.³⁷³ European punishment since then has by and large proceeded step-wise along the familiar path, getting steadily but not radically more mild. American punishment veered off the familiar path, and did so both radically and recently. American incarceration rates, for example, which had been both low and stable from the late 1920s through the early 1970s, started to rise in the 1970s and essentially doubled each decade into the 2000s.³⁷⁴ Capital punishment, which was unpopular in the 1960s and looked likely to be abolished in the early- to mid-1970s, was revived with a vengeance in the late 1970s and 1980s.³⁷⁵ American prison reform efforts, which aimed to make prisons more humane and rehabilitative, paralleled European ones in the 1960s and 1970s but then split dramatically away in the 1980s.³⁷⁶

The question to ask in light of this story is: Why did America change, and why did it change when it did? As to the causal story behind European mildness, I touch on it below, but the focus is on the American side. The story of Europe might well be the one Montesquieu, Locke, Tocqueville, and the other Enlightenment thinkers predicted: a democratic tendency (not a law of

372. See *supra* notes 1-12 and accompanying text.

373. See *supra* notes 1-17 and accompanying text.

374. See *supra* notes 15, 18, 23-33 and accompanying text.

375. See *supra* notes 260-72 and accompanying text.

376. See *supra* Part III.B.

penal evolution, it turns out) toward penal mildness.³⁷⁷ But if so, that just makes the American departure from the norm all the more puzzling.

The most straightforward argument at this point would be to claim that the great divergence stems purely from ideological differences between America and Europe. American culture affirms the existence of human evil while European culture by and large does not, the argument would go, and Americans are open to instrumental forms of thought that Europe rejects. There is more than a little truth to these claims, and the argument is tempting, but there is a problem: those ideological differences predate the great divergence. They cannot explain America's early mildness, its similarity to Europe at mid-century, or the timing and apparent contingency of the split. This is in fact an objection to many of the explanations of the great divergence above: a surprising number of them explain current European/American differences in light of longstanding cultural differences, and thus have no resources by which to explain why America *changed*.

To account for that change, we must shift from seeing ideas as freestanding causes to seeing them as mutually causes and effects. My argument is that, confronted by a massive crime wave, Americans reached into their culture for ideas with which to understand what was going on and decide how to respond. They grabbed hold of the concept of evil and also grabbed hold of the instrumental approach. Those ideas were indeed part of America's distinctive cultural ideology and indeed gave rise to a punishment system marked by patterns of banishment and devaluation, but they were not freestanding causes. It took the crime wave to activate them politically.

There is an obvious candidate for why America changed when it did: from the 1960s through the 1990s, the country experienced a crime wave of incredible proportions. "We seem to be in the midst," the historian Lawrence Friedman has written, "of a horrendous crime storm—a hurricane of crime."³⁷⁸ Statistics on homicide are a useful measure of the scale of the crime wave, since good comparative data is available. The average homicide rate throughout Western Europe from 1950 to 1990 ranged from about 1 to 2 victims per year per 100,000 people in the population.³⁷⁹ (These numbers reflect killings that take place in the course of willful assaults only, not including warfare. They exclude vehicular manslaughter and represent essentially the risk of being killed by an act of deliberate violence in the course of civilian life.) The United States has always had a higher rate of homicide than Europe, but the rate fell steadily from the 1940s through the 1950s. As of 1960, the American homicide rate was 2.5 per 100,000 among white Americans and 22 per 100,000 among

377. See *supra* notes 4-9 and accompanying text.

378. FRIEDMAN, *supra* note 3, at x, 449-65.

379. RANDOLPH ROTH, AMERICAN HOMICIDE 5 fig.1.2 (2009).

black Americans.³⁸⁰ Despite the incredible racial disparity (a 10 to 1 black/white differential with respect to the likelihood of being a homicide victim has been a constant throughout the century³⁸¹), these numbers were and would be the lowest of the century for both blacks and whites; the popular perception of the 1950s as a time when American streets were safe is in fact quite true. But by 1970, the white and black homicide rates had doubled to nearly 5 per 100,000 and 45 per 100,000.³⁸² The black rate fell slightly after that but the white rate rose to almost 7 per 100,000 by 1980.³⁸³ In the years between 1960 and 1980, then, the black homicide rate doubled and the white homicide rate nearly tripled. Compared to Europe in the same period, America's white homicide rate was 3 to 7 times higher and the black rate was 20 to 40 times higher.

To understand these numbers, bear in mind that they are yearly *rates*.³⁸⁴ If the homicide rate is 1.5 per 100,000, the average person lives to be 78, and the homicide rate stays constant over time, a newborn has a 1 in 854 chance of being the victim of murder or nonvehicular manslaughter in the course of his or her life. If the homicide rate is 5 per 100,000, those chances are 1 in 256.³⁸⁵ At America's homicide peaks, had the rates stayed constant over time, white Americans would have had a 1 in 183 chance of being the victim of a murder or nonvehicular manslaughter at some point in their lives, and black Americans would have had a 1 in 28 chance of the same. Furthermore, high as those numbers are, they quite massively understate the risk of violence Americans faced at the time. Homicide is rare; robbery, assault, rape, and other forms of violence are far more common. I am using homicide as a proxy for criminal violence generally because the relevant data is solid, but if the chance of being criminally killed is 1 in 183 or 1 in 28, the chance of being the victim of some sort of serious crime, though difficult to state with precision, is obviously far higher.

Numbers these extreme are humanly quite destabilizing. "Fear was a New Yorker's constant companion in the 1970s and '80s," Myron Magnet writes³⁸⁶:

We lived behind doors with triple locks, some like engines of medieval ironmongery. We barred our ground-floor and fire-escape windows with steel grates [W]e held our keys at the ready and looked over our shoulders

380. *Id.* at 441 fig.9.1.

381. *See id.*

382. *Id.*

383. *Id.*

384. *See id.* at xii-xiii.

385. *See id.* at 5.

386. Myron Magnet, *Mr. Sammler's City*, CITY J. (Spring 2008), <http://www.city-journal.org/html/mr-sammler%E2%80%99s-city-13087.html>.

Only once was I too slow and lost my money. A neighbor, who worked at a midtown bank, lost his life.³⁸⁷

Or as James Q. Wilson, a sociologist who devoted most of his career to understanding the crime wave, wrote at the time: “Americans believe something fundamental has changed in our patterns of crime. They are right.”³⁸⁸ And then again the fear: “[W]e are terrified by the prospect of innocent people being gunned down at random, without warning and almost without motive, by youngsters who afterward show us the blank, unremorseful faces of seemingly feral, presocial beings.”³⁸⁹ Crime became a cultural issue and then a “major political issue.”³⁹⁰ Richard Nixon made crime 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 an all-out offensive”³⁹¹ In 1994, Bill Clinton said “gangs and drugs have taken over our streets”³⁹² as he signed into law the Violent Crime Control and Law Enforcement Act, which created sex offender registries, expanded the federal death penalty, and reduced prisoners’ educational opportunities, among other things.³⁹³

Popular entertainment focused on crime and punishment as well and reflected the evolving cultural conversation. Before the crime wave, legal dramas and police procedurals often featured heroic defense attorneys and innocent defendants, as in *Perry Mason*. In the 1961 anthem of juvenile delinquency in *West Side Story*, the juvenile gangsters at first sing: “Gee, Officer Krupke, we’re very upset; / We never had the love that ev’ry child oughta get. / We ain’t no delinquents, / We’re misunderstood. / Deep down inside us there is good!”³⁹⁴ But the picture darkens with each verse: “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!”³⁹⁵ By the end, with

387. *Id.*

388. James Q. Wilson, *What to Do About Crime*, COMMENTARY (Sept. 1, 1994), <https://www.commentarymagazine.com/articles/what-to-do-about-crime>.

389. *Id.*

390. FRIEDMAN, *supra* note 3, at x.

391. President Richard Nixon, Remarks on Accepting the Presidential Nomination of the Republican National Convention (Aug. 23, 1972), <http://www.presidency.ucsb.edu/ws/?pid=3537>.

392. Erick Eckholm, *In a Safer Age, U.S. Rethinks Its ‘Tough on Crime’ System*, N.Y. TIMES (Jan. 13, 2015), <http://nyti.ms/1ydlrzX>.

393. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-122, 108 Stat. 1796 (codified as amended in scattered sections of the U.S. Code).

394. Leonard Bernstein & Stephen Sondheim, *Gee, Officer Krupke*, in WEST SIDE STORY (1956), <http://www.westsidestory.com/site/level2/lyrics/krupke.html>.

395. *Id.*

mockery and dark irony, but perhaps also a note of fear, we hear: “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!”³⁹⁶ 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!”³⁹⁷ That is the sound of a culture talking about something together. In the crime and punishment ferment of the early 1970s, Clint Eastwood released the first *Dirty Harry* movie, featuring a villain of baby-faced, giggling, irredeemable malevolence, a villain who kills, in Harry’s (Eastwood’s) words, because “[h]e likes it.”³⁹⁸ (The film also featured an array of lawyers and politicians too concerned with criminals’ rights to protect victims and a particularly furious treatment of Warren Court criminal procedure.) When the great divergence was in full swing, popular shows about crime and punishment like *Law & Order*, *CSI*, and *The Closer* almost always took police and prosecutors’ point of view, portrayed criminals as dangerous and evil, and relished, not just the heroes’ triumphs over them, but the criminals’ pain. Each episode was like a little hate song addressed to criminals.

Just what can realistically be expected from citizens in a democratic legal order confronted by this sort of massive shift in personal security? The changes in crime reached how ordinary people experienced daily life. Think of the nervous, over-the-shoulder glances on dark streets, of averted eyes on public transportation, of parents’ fearful watchfulness, of the very real shift in personal security from the first half of the twentieth century to the second. What could be more natural on the part of the citizenry than a punitive mixture of fear and anger in response, together with a desperate desire to get control of the situation? Self-questioning might be a better response, but it is not a realistic one. Given the facts on the ground, one would expect legal change to follow the crime rate after a little lag time, and that is precisely what happened: the homicide rate shot upward in the 1960s and 1970s, and the incarceration rate followed in the 1970s and 1980s.³⁹⁹ The recent downtick in punitiveness has followed crime rates too. The homicide rate fell in the mid-1990s so dramatically that, as of 2000, the rate for both races was at its lowest point since 1960: the black rate was equal to its 1960 low of 22 per 100,000 and the white rate was at about 4 or 5 per 100,000.⁴⁰⁰ American cities became vastly safer. It is not a coincidence that America’s taste for punitiveness, after a little lag time, diminished as well. Support for the death penalty declined in the late

396. *Id.*

397. *Id.*

398. *DIRTY HARRY* (Warner Bros. & Malposa Co. 1971).

399. *See supra* notes 28-33, 379-82 and accompanying text.

400. ROTH, *supra* note 379, at 441 fig.9.1.

1990s and 2000s,⁴⁰¹ incarceration rates started falling in 2008,⁴⁰² and there are now widespread, bipartisan political efforts to reform criminal justice.⁴⁰³

Ideas respond to events. The events are motivational: they spur the desire to understand something. But so motivated, people do not fashion their ideas from whole cloth; they reach into their culture to find materials from which to craft an understanding—to know what to think and to formulate a position as to what to do. Any complex culture faced with a complex problem will make an array of ideas available in response. Because the ideas are culturally rooted, ordinarily socialized members of the community will find most or all of them intelligible. But the ideas do not constitute a unified system of thought; they are not that consistent. People pick the ones that suit them. The ideas in a culture are like a huge menu at a bad restaurant: every cuisine is there, but customers pick and choose the cuisine they like based on taste, and no one would eat something from the Italian section alongside something from the Chinese section. What determines a member of the community's selection among those ideas—what makes one of them and not another seem true, important, or attractive—is an emotionally laden backdrop of experience that is itself shaped by events. People step into the sphere of ideas looking for a certain kind of *satisfaction* and they find it in those ideas that make sense of their experiences and emotions. Thus events intrude again, not only motivating the search for understanding but also creating background plausibility conditions that favor some culturally available ideas over others. I have written in other work that “the spirit of a normative position is the unity of its reasons and the feelings that make those reasons seem compelling.”⁴⁰⁴ The reason the spirit of a normative position matters, rather than merely its bare propositional content, is that anyone who finds the position compelling has already absorbed a set of background plausibility conditions as important to the position as any proposition it sets forth.

Americans faced with a nightmarish disaster like the crime wave thus reached into their culture for ideas to understand what was happening to them and to decide what to do about it. They thought and talked and argued a great deal about crime and criminals. In another culture, the crime wave might have given rise to an effort to cure the ills of the urban and rural poor, to build social solidarity, or in some other way to craft a sociological response to what is essentially (in a certain sense obviously) a social problem. But America is too

401. See Gallup *Historical Trends: Death Penalty*, *supra* note 260.

402. See *supra* note 34 and accompanying text.

403. See, e.g., President Barack Obama, State of the Union Address (Jan. 13, 2016), <https://www.whitehouse.gov/the-press-office/2016/01/12/remarks-president-barack-obama---prepared-delivery-state-union-address>; Carl Hulse, *Unlikely Cause Unites the Left and the Right: Justice Reform*, N.Y. TIMES (Feb. 18, 2015), <http://nyti.ms/1CKyskT>.

404. Kleinfeld, *supra* note 35, at 1564.

individualistic for that. Talk of large-scale social causes sounds like excuses in a culture deeply committed to personal responsibility. (The American belief in personal responsibility is one of the most extreme measurable differences between American and European values.⁴⁰⁵) Furthermore, sending in social workers is a poor salve to fear and anger. And finally, social problems implicate the society in which they occur; to view the crime problem in social terms would have required a large number of Americans to regard structural features of their own society as defective. That is not psychologically realistic. Now, America *does* have cultural resources with which it might have responded more mildly to the crime wave. We have, for example, the cultural resources with which to see criminals in individualistic but merciful terms—to see them as errant but forgivable, and, above all, as salvageable. But in conditions of fear and anger, and in a crisis of confidence about whether rehabilitation works, those ideas just lost their grip. Faced with the crime wave, Americans reached into their culture and pulled out the concept of evil and the concept of a cage.

C. A Moralistic Response

The concept of evil has legs in American culture. Indeed, America and Europe have clashed over it before, in contexts well outside criminal law. Ronald Reagan famously invoked the concept during the Cold War: “I urge you to beware the temptation . . . to ignore the facts of history and the aggressive impulses of an evil empire, to simply call the arms race a giant misunderstanding and thereby remove yourself from the struggle between right and wrong and good and evil.”⁴⁰⁶ Europe was puzzled and alarmed.⁴⁰⁷ President George W. Bush invoked the concept again in his post-September 11 State of the Union address, calling North Korea, Iran, and Iraq “an axis of evil” and saying: “We’ve come to know truths that we will never question: evil is real, and it must be opposed.”⁴⁰⁸ Europe reacted with puzzlement, alarm, and disdain.⁴⁰⁹ Evil is also a religiously inflected concept, and America is not only

405. PEW RESEARCH CTR., *supra* note 273, at 6-8 (reporting that only 36% of Americans agree that “success in life is pretty much determined by forces outside our control,” versus 72% in Germany, 57% in France, and 50% in Spain).

406. President Ronald Reagan, Remarks at the Annual Convention of the National Association of Evangelicals (Mar. 8, 1983), <https://reaganlibrary.gov/major-speeches-index/31-archives/speeches/1983/2177-30883b>.

407. Opinion, *Listening to the Message from Europe*, N.Y. TIMES (Mar. 22, 1987), <http://nyti.ms/23QQXSN>.

408. President George W. Bush, State of the Union Address (Jan. 29, 2002), <http://georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020129-11.html>.

409. Mark Lilla, Opinion, *New Rules of Political Rhetoric*, N.Y. TIMES (Feb. 24, 2002), <http://nyti.ms/20hury1>.

much more religious than Europe⁴¹⁰ but has also developed distinctively fire-and-brimstone forms of indigenous Protestantism. The Puritan communities of the colonial era “made little or no distinction between sin and crime.”⁴¹¹ Virginia’s first code of law in 1611 was formally entitled “Lawes Divine, Morall and Martiall.”⁴¹² Its “draconian bite”⁴¹³ suggests how equating sin and crime leads to seeing criminals as having violated moral law, not merely human law, and as being morally bad not in virtue of breaking the law but breaking the law in virtue of being morally bad. The famous eighteenth-century preacher Jonathan Edwards sermonized that sinners “deserve to be cast into hell” and that “[t]he wrath of God burns against them.”⁴¹⁴ Members of indigenous American Protestant denominations, like Evangelicals, continue to be more punitive than other Christians.⁴¹⁵ Finally, America’s governmental traditions, if not exactly affirming human evil, reflect a jaundiced, Madisonian view of human nature, linked to a vision of government filled with devices designed to control power and prejudice, a system of rule premised on human corruptibility. Europe has prominent utopian elements in its political culture, including a Rousseauian tradition of believing that human beings are good by nature, that the source of their failings is societal and external to them, and that a better society would restore them to their native decency. Europe is a land in which pacifism has real political pull and many people believe that force and war are never right and never necessary, where many Americans see it as part of the office of good people to be prepared to fight bad ones.⁴¹⁶ The darkness of America’s view of human nature and the optimistic brightness of Europe’s was one of the intellectual elements dividing the French and American revolutions.

The concept of evil offers an understanding of the crime wave. The pattern of thought goes like this: *The crime problem is a moral problem, a problem of individual moral wrongdoing and responsibility, and the proper response to it is to affirm the right, condemn the wrong, and hold the wrongdoers to account. The reason there is crime is that sometimes people yield to their immoral impulses. The reason*

410. PEW RESEARCH CTR., *supra* note 273, at 8 (reporting that 50% of Americans state that religion is “very important in their lives” versus 22% in Spain, 21% in Germany, and 13% in France).

411. FRIEDMAN, *supra* note 3, at 33.

412. *Id.* at 23.

413. *Id.*

414. JONATHAN EDWARDS, *Sinners in the Hands of an Angry God*, in SERMONS AND DISCOURSES, 1739-1742, at 404, 405-06 (Harry S. Stout et al. eds., Yale Univ. Press 2003) (emphasis omitted).

415. Savelsberg, *supra* note 21, at 378.

416. See PEW RESEARCH CTR., *supra* note 273, at 2 (reporting that 75% of Americans agree that “it is sometimes necessary to use military force to maintain order in the world” versus 62% in France and Spain and 50% (up from 41%) in Germany).

there are terrible crimes is that some people are evil. It is of the first importance to recognize evil for what it is, call it by its name, condemn it in the way it deserves, and not pretend that such people are likely ever to change or to stop unless they are controlled. Why are there evil people? Why do there seem to be so many these days? That is difficult to answer. Perhaps it is a matter of purely individual choice; perhaps something went wrong in the wrongdoer's life and damaged his character; perhaps there is even some social explanation, like broken families or cultural dissolution. But those causes are not excuses, and in any particular case, they do not matter. Where the offender is truly evil, the right response is to control and condemn. This pattern of thought can be seen in the popular image of criminals as demonically predatory in the TV shows and films of the great divergence,⁴¹⁷ in the politics that made sympathy to criminals electorally fatal,⁴¹⁸ and even in the statements of legal officials and scholars. The head of the U.S. Justice Department's Office of Juvenile Justice in 1985 "accused the juvenile courts of naively adopting Rousseau's theory that youths are 'incapable of evil unless they are corrupted.'"⁴¹⁹ James Q. Wilson and Richard Herrnstein's 1985 book, *Crime and Human Nature*, argued that many criminals are genetically predisposed to criminality, that their predisposition should be understood in moral terms, and that the necessary response is permanent incapacitation.⁴²⁰ William Bennett, John DiIulio, and John Walters's 1996 book, *Body Count*, argued that a large and growing number of juvenile offenders—traditionally the group thought most amenable to rehabilitation—are morally bankrupt in ways that make them permanently and profoundly dangerous and that they should accordingly be incapacitated as adults.⁴²¹

The individualism and moralism at the root of the concept of evil are widespread and influential elements of American political culture. Spurred by the crime wave, adherents of this point of view became an extremely powerful political force. They decided elections, made laws, and ultimately—though not alone—wrote the concepts of immutability and devaluation into American criminal punishment.

Two final comments are in order about this point of view. First, as a response to the crime wave, it has serious explanatory problems; it gives less purchase on the problem than it might appear to give. I confess that all of my intuitive sympathies are with the moralistic point of view, but one can believe

417. See *supra* note 398 and accompanying text.

418. See *supra* notes 269-72 and accompanying text.

419. Rachel Aviv, *No Remorse: Should a Teen-ager Be Given a Life Sentence?*, *NEW YORKER* (Jan. 2, 2012), <http://www.newyorker.com/magazine/2012/01/02/no-remorse>.

420. JAMES Q. WILSON & RICHARD J. HERRNSTEIN, *CRIME AND HUMAN NATURE* 43, 56, 102-03, 506-07 (1985).

421. WILLIAM J. BENNETT ET AL., *BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS* 27, 60-61, 118 (1996).

in the existence of human evil, and even believe that some criminals are evil, without believing that the concept of evil is a good explanation of the crime wave. True evil—not just an evil deed but an evil self—is *rare*, and the crime wave was a mass phenomenon. Some of those criminals were probably evil, but surely most of them were not. And a crime wave is by definition a *change* in crime rates, a spike in crime. One can imagine social problems of various sorts leading to more crime, but a massive spike in true human evil? Really? The concept of evil does not scale up well; a sociological phenomenon calls for a sociological explanation. Anecdotally, I like to ask police officers, prison guards, and others who interact regularly with criminals, “What percentage of the criminals you deal with would you characterize as evil?” In Europe, the question is met with discomfort, laughter, or a request for clarification (“What do you mean by evil?”). In America, requests for clarification are surprisingly few and the answer surprisingly consistent: “About 10%.” An explanation of a phenomenon that cannot account for 90% of the phenomenon is a bad explanation.

Second, the moralistic point of view is less rigid than it might appear. If moralism condemns more harshly than instrumentalism, there is also in it more potential for sympathy, mercy, and humane restraint than in instrumentalism. Consider John DiIulio, who in the 1990s was one of the leading voices for moral condemnation and harsh punishment. His book, *Body Count*, coined the term “super-predators” for the “radically impulsive, brutally remorseless youngsters, including ever more preteenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs, and create serious communal disorders. They do not fear the stigma of arrest, the pains of imprisonment, or the pangs of conscience.”⁴²² That book was published in 1996. On March 20 of that very same year, while praying at mass on Palm Sunday, DiIulio had an “epiphany—a conversion of heart, a conversion of mind,” in which it “just became crystal clear to me . . . that for the rest of my life I would work on prevention, on helping bring caring, responsible adults to wrap their arms around these kids.”⁴²³ And that is just what he has done for the last twenty years, trying unsuccessfully to “put the brakes on the superpredator theory” almost as soon as it appeared, opposing mass incarceration, and advocating “churches over prisons.”⁴²⁴ Instrumentalism has no resources for this sort of shift in register from condemnation and control to mercy, love, and forgiveness. Instrumentalism also has no resources by which to shift into the register of human rights. It is the moral point of view that can insist that even the worst wrongdoers are

422. *Id.* at 27.

423. Elizabeth Becker, *As Ex-Theorist on Young ‘Superpredators,’ Bush Aide Has Regrets*, N.Y. TIMES (Feb. 9, 2001), <http://nyti.ms/1D36YpA>.

424. *Id.*

made in the image of God, or to cite Waldron again: “The foundational work that *imago Dei* does for dignity is, in my opinion, indispensable . . . for overriding the temptation to demonize or bestialize ‘the worst of the worst.’”⁴²⁵ If the crime problem had been just a little less extreme, the anger and fear just a little toned down, America’s moralists might have been a corrective to its instrumentalists, a humanizing influence.

D. An Instrumental Response

Of crucial importance on the instrumental side of American politics was that, during the 1970s ferment of scholarship and cultural conversation about the crime wave, a large body of criminological work emerged whose basic message was that rehabilitation does not work. As Franklin Zimring wrote in 1976: “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 individual predictability.”⁴²⁶ As Alfred Blumstein recounts: “[F]aith in rehabilitation was severely challenged in the early and mid-1970s by a succession of experimental studies . . .”⁴²⁷ It was a historic moment within criminology, a finding of paradigm-shifting significance. The accepted wisdom within both the American and European criminological communities prior to these studies had been that rehabilitation is possible. That was the foundation of the dominant penal philosophy of the 1950s and 1960s in the Western world, the philosophy of *individualization*, which held that “[t]he goal of punishment . . . should be to resocialize the offender”—a goal written into the institutional apparatus of indeterminate sentencing and parole.⁴²⁸ But instrumentalism is technical in the Heideggerian sense: it is a form of knowledge that exists to give the wielder *control* over something.⁴²⁹ In the criminal justice case, the theme of all instrumental thought is control over crime. If rehabilitation does not work and the whole

425. Waldron, *supra* note 275, at 226.

426. Franklin E. Zimring, *Making the Punishment Fit the Crime: A Consumer’s Guide to Sentencing Reform*, 6 HASTINGS CTR. REP. 13, 14 (1976). See generally FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981) (describing the rapid and spectacular fall of rehabilitationism from the dominant ideology of criminal sanctions to one with few adherents). One cannot help wondering if the “discoveries” about rehabilitation came first and drove a harsher penal policy or if the felt need for a harsher penal policy came first and drove the “discoveries.”

427. Alfred Blumstein, *Prisons*, in CRIME 387, 395 (James Q. Wilson & Joan Petersilia eds., 1995).

428. WHITMAN, *supra* note 3, at 51-52.

429. MARTIN HEIDEGGER, *The Question Concerning Technology*, in BASIC WRITINGS 312 (David Farrell Krell ed., HarperCollins rev. ed. 2008) (1949) (“For to posit ends and procure and utilize the means to them is a human activity The current conception of technology, according to which it is a means and a human activity, can therefore be called the instrumental and anthropological definition of technology.”).

mode of thought is about getting something to work, the institutional and philosophical program goes up in smoke.

If rehabilitation does not work, what, on an instrumentalist view, is criminal punishment for? The answer cannot be retributive justice; retributivism does not aim to control crime and is based on a foreign moral vocabulary. Deterrence is one answer, and it had and continues to have considerable influence. But deterrence failed to respond to the fundamental implication of the research that overthrew rehabilitation in the first place. Implicit in the message that rehabilitation does not work is the claim that the criminally inclined will always be criminally inclined, that they are incorrigible. The logical response to a permanent criminal is incapacitation.

In Thomas Kuhn's theory of scientific revolutions, crucial to a paradigm shift is that subsequent research confirms the new paradigm.⁴³⁰ Multiple streams of research tended to confirm the new incapacitative paradigm. Probably the most influential of them was the research on the federal sentencing guidelines. Early versions of the federal sentencing guidelines had a different *y*-axis than they have now. Originally, the *x*-axis contained a wide variety of offense characteristics, as it still does, and the *y*-axis contained a wide variety of offender characteristics.⁴³¹ It was not then the simple measure of criminal history it has since become. It changed because the goal of the sentencing scheme was conceived to be preventing recidivism, and criminal history turned out to be the only reliable predictor of recidivism.⁴³² The sentencing guidelines are part of the daily routine of criminal lawyers and judges in the federal system and the many states whose sentencing guidelines mimic the federal ones. Thus the incapacitative outlook supported by the new scholarship also became part of daily legal practice. In addition, a belief took hold that perhaps the most frightening class of offenders, sex offenders and especially pedophiles, cannot be rehabilitated.⁴³³ Thus a sensational finding joined a body of scholarly work and a daily operating assumption. The new paradigm was secure.

The instrumentalist view dominated within a small but extraordinarily influential group of people: criminal justice professionals, including criminal justice scholars and the officers of the criminal system itself.⁴³⁴ It also tended to

430. See generally THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

431. Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 19 n.97 (1988).

432. See Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 56-60 (2003); see also Breyer, *supra* note 431, at 19-20.

433. See Jill S. Levenson et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES SOC. ISSUES & PUB. POL'Y 1, 12, 13 tbl.2 (2007).

434. See ALLEN, *supra* note 426, at 8-9.

dominate educated opinion.⁴³⁵ What happens in academic research tends to bleed out into the popular culture of educated people—what is derisively called the culture of the chattering classes. Opinion within that social class—which is not small and wields influence out of all proportion to its size—matters a great deal in modern democracies, and often the real stakes in academic argument is influence over opinion within that social class. In the early- and mid-twentieth century, it was a cocktail party assumption that crime is a symptom of social or physical ills, that retribution is primitive and uncivilized, and that rehabilitation is the goal of punishment.⁴³⁶ But as criminology transformed, this culture did too. Educated people repeated casually to one another that rehabilitation does not work. They turned to the idea of a cage.

Thus the moralist and instrumentalist views come by very different routes to the same understanding of the problem and the same policy solution: the *crime* problem is a *criminals* problem, and the solution is to separate criminals from ordinary people. The moralists were numerous; they affected elections and were good targets for anticrime political rhetoric. The instrumentalists were opinion-makers, policy wonks, and often criminal justice officials. The two views are weakly associated with different social classes—the moralistic stance brings to mind folk morality, the instrumental one academic rationalism—but by no means is that uniformly true. Furthermore, the two views, despite the differences in outlook from which they come, can very easily be combined. Even a moralist wants to get control of the crime problem; even an instrumentalist might wonder what it is about certain people that makes them ineradicably inclined to commit crimes. One can thus see the two views, moralist and instrumentalist, either as representing two populations or as representing two arguments. What is essential is that the two views, whether as populations or as arguments, were aligned. American harshness was the joint product of their political alliance.

E. Churches and Professionals in Europe

Europe experienced a nontrivial increase in crime between the 1960s and 1990s but nothing like the crime wave experienced in the United States.⁴³⁷ The social conditions that led American moralists and instrumentalists to be so influential did not take hold. Europe had its own moralists and professionals, but their agendas were very different than their American counterparts.

435. *Id.*

436. *See id.* at 5.

437. *See supra* notes 378-83 and accompanying text; *see also* Michael Tonry, *Punishment Policies and Patterns in Western Countries*, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES, *supra* note 97, at 3, 10 fig.1.2, 12 fig.1.4, 191 tbl.5.1, 192 tbl.5.2.

Germany's churches, for example, were a major political force in advocating for *mild* criminal punishment. Churches were behind two key moments of German penal reform: the overhaul of the criminal justice system of 1969, which among other things largely abolished short prison terms, and the prison reform bill of 1976, in which the "principle of approximation" that made prisons so rehabilitative was established.⁴³⁸ Throughout, Germany's churches were campaigning to reduce or eliminate incarceration for those convicted of all but major crimes, to make imprisonment more rehabilitative even for those convicted of major crimes, and broadly to introduce "forgiveness traditions, traditionally reserved for the private realm" throughout the criminal system.⁴³⁹ Although in many ways at odds with the tradition of German Lutheranism, those attitudes became prominent elements in the country's religious thought. In 1990, the Council of Protestant Churches (Germany's largest religious organization) authored a book on what Protestant principles mean for prison policy. It stated: "We must get beyond a distinction that associates love with the personal realm but order and justice with that of the state."⁴⁴⁰ The most striking language is at the opening of the volume by the Council President:

Responsibility for one's deeds must not be denied. Yet, punishment must be understood in a broader frame toward the positive development of the person. . . . Individual responsibility . . . is embedded in the effects of the social environment, beginning with the first significant other all the way to general societal conditions. . . . The Christian belief views every individual—offender, victim, and those related to them—as a person created and loved by God whose life entails both: suffering and guilt and the chance of cure and ever new beginning. This view of mankind and of the social world is far from idealistic euphoria, but it must also resist the expulsion of individuals from the community.⁴⁴¹

Almost every theme of this Article—immutability, forgiveness, and banishment; devaluation, evil, and the *imago Dei*; and the very idea that to think about crime is to think about the person standing behind the crime—is reflected in that statement.

Meanwhile, among criminal justice professionals, the individualization paradigm that reigned in the United States until the empirical studies of the 1970s "still reigns in Europe."⁴⁴² Europe's criminal justice professionals are good European civil servants: they are thoroughly trained in these ideas and approach their jobs accordingly.⁴⁴³ Now, European scholars have generated

438. Savelsberg, *supra* note 21, at 392; *see supra* note 158 and accompanying text.

439. Savelsberg, *supra* note 21, at 393.

440. *Id.* at 395.

441. *Id.* (alterations in original).

442. WHITMAN, *supra* note 3, at 49.

443. *See id.* at 15, 55, 59, 77.

empirical evidence indicating that rehabilitation does not work just as have American scholars, but the practices of indeterminate sentencing, rehabilitative prisons, and parole continue all the same, indifferent to the empirical findings.⁴⁴⁴ This might seem very puzzling until one realizes that rehabilitation in Europe is not purely about controlling crime. It is an ideology. European criminal justice professionals are just not as instrumental as American criminal justice professionals.

Thus, just as American moralists and instrumentalists came from two very different perspectives to the same conclusions about policy, European moralists and criminal justice professionals also came to agree about policy. They denied the concept of human evil and denied the need for a cage.

Conclusion

This Article's chief aim has been to articulate the ideas immanent in America's harsh and Europe's mild systems of criminal punishment. This Article has also aimed to show how these immanent ideas became causal forces in the great divergence between American and European criminal punishment. The ideas concern immutability and devaluation, social banishment and membership, dignity and the foundations of rights, moralism and the concept of evil, instrumentalism and the concept of dangerousness, and above all competing pictures of the person standing behind the crime. No normative position on punishment makes sense without roots in a conception of the offender.

Yet although moral ideas have been at work throughout this Article, they have been at work for descriptive purposes. The goal has been to *understand* American and European punishment; I have not taken a position normatively on either system. The normative question is whether the American or European approach to punishment is admirable, effective, or just. I have not passed over that question because it is unimportant; it is immensely important. I have passed over it because, to fully answer the normative question, one would need both a full-scale theory of proper punishment and an empirical analysis of whether either American or European punishment accomplishes punishment's rightful goals. That is a huge enterprise and not this Article's ambition.

Yet seeing clearly the immanent ideas at work in a social practice or institution sheds light on normative questions about that social practice or institution. An immanent understanding shows us what it is we are truly judging when we sit in judgment. It is like holding a mirror up to ourselves and asking if we like what we see. And it is all but impossible to engage in sustained interpretive analysis without reacting on a normative level to the thing being

444. *See id.* at 73.

interpreted. I would therefore like to suggest some moral responses to American and European punishment.

Some readers might find Europe's mildness in punishment intuitively appealing, but I must say, I do not. It strikes me as utopian in ways that are both dangerous and offensive. The root of the whole system is the minimization of wrongdoing—both individual responsibility for wrongdoing and the wrong itself—rising ultimately to the denial of the very existence of human evil. *Everything* can be forgiven. *No one* is just a bad person. That view of human beings is to my mind both extremely naïve as a claim about human moral psychology and imprudent as a claim about policy: it encourages excessively weak responses to bad actors. Furthermore, that minimization of wrongdoing and leniency toward wrongdoers has ugly and troubling implications in a land with Europe's history. The question it brings to mind is: how could the land of pogroms and Nazis ever deny the existence of human evil? And then one realizes: no one needs to deny it more. In Germany above all, my sense after having lived and worked there for some years is 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 their culture and people—indeed their *families*, and their parents and grandparents—have done. To be evil is to be hateful, and it is not psychologically possible for a people to hate itself. Part of the reason Europe embraces ideals of rehabilitation and forgiveness so ardently is because it has stood in such great need of them.

Yet all that said, it must also be said that Europe's humaneness in punishment—its spirit of love and community, and above all its commitment to treating every human being as having dignity and therefore rights—does honor to the entire tradition of Western democracy. It also seems to work: Europe is afflicted neither by the crime nor the punishment crisis that afflicts the United States. Anecdotally, one hears reports in Europe suggesting that European criminal systems often struggle to control or deter certain serious, determined criminals. Yet those struggles do not seem to rise to the level of a significant problem.

American criminal punishment is in my view right in thinking that, among criminal offenders, some are bad and even evil people who need to be controlled and who warrant severe punishment. But the most striking feature of American punishment is how wildly reckless the country is about whom it puts in that category. America takes acts that could be grounded in deprivation, or outbursts of passion, or impulsivity, or desperation, or dissipation, or indeed a ruined character; lumps the offenders together; and treats them as if they were all the worst of the worst. In doing so, the country throws away tens or hundreds of thousands of lives that could be salvaged. As Europe has lost the concept of evil, America seems to have lost the concept of error. It is often said that American criminal punishment is too harsh. I think that charge, while true, is insufficiently specific. American criminal punishment is not too harsh because it reserves the ability to severely punish some people but because it

metes out severe punishment to far, far too many people. American criminal punishment's essential moral failure is its recklessness about when and against whom to be harsh. There is in that reckless harshness something hardhearted and callous in a way that dishonors the entire tradition of Western democracy.

To this, it must be added that American criminal punishment does *not* seem to work. We had a crime crisis; we created a punishment crisis. The key to understanding the punishment crisis lies in the expressive content of American punishment, in the immanent ideas of banishment and devaluation with which this Article has been concerned. Our criminal system says to serious offenders, "You are forever outside and beneath this community. You are ruined people." A society can afford to say that to a few people. It cannot afford to say that to large portions of the population. Punishment in America has essentially gotten some dangerous people off the streets at the cost of creating a permanent underclass and a massive breakdown in social solidarity. There is tragedy and irony in this. *Crime* is supposed to be antisocial; *punishment* should be prosocial. But American punishment has morphed into its own enemy: it has become antisocial itself.

What we need is a punishment system that is European with respect to the vast majority of offenders and American with respect to the sliver remaining. Lacking that third option, forced to choose between European naiveté and American brutality, I would take the naiveté. But neither deserves full admiration. A plague on both their houses.