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The Concept of Evil in American and German Criminal Punishment

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If we are adequately to explain the gap in harshness between American and German criminal punishment, we must lift the lid on a disquieting moral concept usually left under the surface of criminal theory—the concept of human evil. American criminal punishment represents a belief in the concept of human evil, while German criminal punishment represents a denial of that belief. This paper first takes up the concept of evil philosophically, locating in Hannah Arendt’s work a version of the concept that is both secular and intellectually nuanced. The paper then presents three lines of argument demonstrating the concept’s implicit role in German and American criminal punishment. First, with respect to major crime, American criminal law routinely banishes its worst criminal offenders, while German criminal law almost never does. Second, in the context of recidivism, American law punishes the person, German law the act. And third, with regard to community reintegration, American law approaches ex-cons with a concept this paper terms “residual criminality,” while German law adopts norms of full forgiveness. The paper concludes by asking which system is more just, arguing that German criminal law is naïve for denying the existence of evil where it should be acknowledged, while American criminal law is reckless for rolling genuine evil together with mere error and failure and punishing them all alike.

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INTRODUCTION: DIVIDED OVER A MORAL QUESTION

The United States in the nineteenth century boasted that its treatment of criminals was milder, and therefore more humane, than Europe’s.\(^1\) It was an old source of pride, dating back to Blackstone’s claim that “it will afford pleasure to an English reader, and do honor to the English law, to compare [English punishments] with the shocking apparatus of death and torment, to be met with in the criminal codes of almost every other nation in Europe.”\(^2\) There were these grounds for pride still in the early twentieth century, when Europe’s fascist governments treated those at the state’s mercy with fascist brutality. But the tide began to turn after World War II, and since the 1970s America has steadily adopted harsher criminal punishments while Europe has adopted milder ones. Michael Tonry has commented that punishment in America today is “vastly


\(^2\) WILLIAM BLACKSTONE, 4 COMMENTARIES *370-71.
harsher than in any other country with which the United States would ordinarily be compared."\(^3\) James Whitman fills in the comparison:

By the measure of our punishment practices, we have edged into the company of troubled and violent places like Yemen and Nigeria (both of which, like many jurisdictions in the United States, execute people for crimes committed when they were minors—though Yemen has recently renounced the practice); China and Russia (two societies that come close to rivaling our incarceration rates); pre-2001 Afghanistan (where the Taliban, like American judges, reintroduced public shame sanctions); and even Nazi Germany (which, like the contemporary United States, turned sharply toward retributivism and the permanent incapacitation of habitual offenders).\(^4\)

Now perhaps there is no respect in which the legal systems of Europe and America are more different, or more revealingly different, than with regard to criminal punishment.

How great is the divergence between American and European punishment? America executes its worst criminals, a practice Western Europe has come to view as beyond the pale of civilized state conduct. It is an important difference, one that deserves the enormous attention it has been given, but it is also only a symbol of a much more general divergence between the two systems. America’s sentences of imprisonment are on average five to ten times longer than those of France, and much longer than those of Germany as well—arguably the continent’s leading legal system, and the focus of comparison in this essay.\(^5\) America also uses imprisonment for offenses that Germany would address with fines or community service—indeed, America’s harshness is partly reflected in its grading of offenses, using felonies where Germany would use its equivalent of misdemeanors and misdemeanors where Germany would use its equivalent of violations.\(^6\) Thus imprisonment has become the normal mode of dealing with crime in America. People are imprisoned for crimes ranging from petty theft to smoking in subways to domestic violence to murder. But imprisonment is an exceptional punishment in Germany, in whose prisons one meets, by and large, just terrorists, drug dealers, certain sex offenders, and extreme violent offenders.\(^7\) Finally, America subjects juveniles to long-term imprisonment or (until recently) death by sometimes trying them as adults—"something that Western Europeans

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\(^4\) Whitman, supra note 1, at 4. The comparisons are troubling and are meant to be troubling, but it should be noted that Whitman’s argument on the whole does not attempt to establish a moral equivalence between the United States and the other countries in this comparison.

\(^5\) Id. at 71. German terms of imprisonment are not directly comparable to American ones, but there is no doubt that they are vastly shorter, as Part II.A, infra, shows.

\(^6\) Id. at 62-64.

\(^7\) Id. at 71. Gunter Parche, for example, the German who stabbed tennis star Monica Seles, received a sentence of probation and did no time, according to typical German practice. Id. at 72.
find little less than shocking.8 Both America’s per capita prison rate—748 per 100,000, or a little less than 1% of the population on any given day, to Germany’s 87 per 100,000, or slightly under one tenth of 1%—and America’s astonishing total of roughly 2.3 million prisoners are the world’s highest.9 And that understates the matter. With parole and probation included, about 7.3 million Americans are under correctional supervision, or roughly 1 in every 45 adults.10

Embedded in these different practices are two different visions of human moral nature. This essay’s thesis is that criminal punishment in the United States expresses a belief in the concept of human evil, while criminal punishment in Germany denies that belief. “Evil” is an uncomfortable and disquieting sort of concept in contemporary moral thought; it is an intellectual inheritance from another age, and there is in it something that feels too absolute, too rigid for reasoned social analysis in the contemporary style. Scholarship in criminal law is almost totally silent on the concept of evil.11 But there is something that should seem odd in that silence. American culture is not silent on the matter of evil,12

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8 Id. at 3.

9 INTERNATIONAL CENTRE FOR PRISON STUDIES, KING’S COLLEGE LONDON, WORLD PRISON BRIEF, at http://www.kcl.ac.uk/depsta/law/research/cps/worldbrief (last visited July 11, 2010).


11 Not one piece of legal writing on domestic criminal law explicitly thematizes the concept of evil, according to my research (with the possible exception of Klaus Lüderssen’s Enlightened Criminal Policy, or the Struggle Against Evil, 3 BUFF. CRIM. L. REV 687 (2000)). Usually, when legal scholars use the words “evil” and “criminal” in one breath, they have in mind international law’s crimes against humanity. See, e.g., Roger S. Clark & Madeleine Sann, Coping with Ultimate Evil Through the Criminal Law, 7 CRIM. L.F. 1 (1996). Martha Duncan has stressed the “metaphor of filth in criminal justice” in her explorations of the premises and motivations behind criminal law. MARTHA GRACE DUNCAN, ROMANTIC OUTLAWS, BELOVED PRISONS: THE UNCONSCIOUS MEANINGS OF CRIME AND PUNISHMENT (1996). There are also a few pieces that have explicitly opposed the notion of criminal evil (and many that have opposed it implicitly). See, e.g., Ekow N. Yankah, Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment, 25 CARDOZO L. REV. 1019 (2004). Perhaps legal scholarship on criminal law has neglected the concept of evil in part because of the dominance of empirical, social scientific approaches in the wider field of criminology. Even so, the sociologist James Q. Wilson writes about crime in a way that suggests an interest in evil, though the concept never quite comes to the surface. See, e.g., JAMES Q. WILSON & MURRAY J. HERRNSTEIN, CRIME AND HUMAN NATURE (1985).

12 President George W. Bush, Address on the State of the Union (Jan. 29, 2002) (“We’ve come to know truths that we will never question: Evil is real, and it must be opposed.”). Smart popular writing has edged toward the concept in the context of crime. At the climax of Truman Capote’s famous report on the slaughter of the Clutter family, In Cold Blood, the killer says: “Am I sorry? If that’s what you mean—I’m not. I don’t feel anything about it. I wish I did. But nothing about it bothers me a bit. Half an hour after it happened, Dick was making jokes and I was laughing at them. Maybe we’re not human. I’m human enough to feel sorry for myself. Sorry I can’t walk out of here when you walk out. But that’s all.” TRUMAN CAPOTE, IN COLD
and criminal law is, after all, a cultural product. Criminal law is also a subject naturally taken up with questions of wrongdoing, and the question of evil is just down the road from those. And what if, as I argue in this paper, we cannot understand what we do in contemporary criminal law without recourse to this older current of moral thought? The concept of evil has an overpowering claim on our attention if it constitutes a best explanation of our practices, as I submit that it does. And so we must revive the concept—and in reviving it, try to furnish it with enough intellectual content to make something reasoned and useful of it. This is the object of Part I, below.

In part, the thesis here is about the cause of America’s harsher and Europe’s milder practices of punishment. For one can scarcely take account of the immense differences between the two without asking, as Whitman does in his leading book on the subject, “What is going on in our country?”\(^\text{13}\) (Although, in fairness, one should ask also what is going on in Europe.) Whitman surveys an array of explanations. He disparages the claim that Europe is simply more enlightened than America, that modernity has just marched further along there, as if there were but a single direction in which liberal societies could go.\(^\text{14}\) To the view that “American racism” is the cause, Whitman is not wholly dismissive—but he points out that Europe is racist too.\(^\text{15}\) Whitman also sets aside the claim that Europe learned the lessons of fascism and became mild in response, since he locates the origin of the differences centuries before 1945.\(^\text{16}\) He is more friendly to the notion that America has a strain of violence in its culture, giving it both a high rate of violent crime and a sort of violence in the punitiveness of its response, but “American violence is another problem that I leave for another day.”\(^\text{17}\) Likewise, Whitman highlights, affirms, but leaves for another day two other factors: “some distinctively fierce American Christian beliefs,”\(^\text{18}\) and the

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\(^{13}\) WHITMAN, supra note 1, at 4

\(^{14}\) Id. at 5-6. David Garland—another leading scholar in this area—has actually suggested the opposite: that “the distinctive social organization of late modernity” is a cause of America’s harsh criminal punishment. DAVID GARLAND, THE CULTURE OF CONTROL, at x (2001).

\(^{15}\) Id. at 6. David Garland’s article, *The Peculiar Forms of American Capital Punishment*, should be interpreted, in my view, as a particularly nuanced version of the “American racism” thesis—albeit in the context of capital punishment rather than American punitiveness in general. David Garland, *The Peculiar Forms of American Capital Punishment*, 74 SOCIAL RESEARCH 435, 457-59 (2007) (“[S]ubstantively, many of the same social forces that previously prompted lynchings nowadays prompt capital punishment: . . . . It continues to be concentrated in the South. . . . Racial hatreds and caste distinctions, together with the passions aroused by atrocious crimes, still provide much of its energy.”).

\(^{16}\) Id. at 16.

\(^{17}\) Id. at 6.

\(^{18}\) WHITMAN, supra note 1, at 6.
greater democratic responsiveness of America’s legal culture.\(^{19}\) (It seems that the voting public in France and Germany, as in the United States, regularly elects politicians who want to get tough on crime, but the bureaucratic independence of the continental legal system prevents them from doing so to any great extent.)\(^{20}\)

Rather, Whitman devotes his book to a nuanced historical explanation of how degrading forms of punishment traditionally reserved for persons of the lowest social status (such as hanging) were in America gradually generalized to the whole population, while less degrading forms of punishment traditionally reserved for aristocrats were generalized in Europe. “A yearning for ‘aristocratic equality’ is indeed a constant in continental Europe. . . . [T]he idea hangs on that ‘honor’ is of central importance, and the commitment to equality on the continent is partly a commitment to generalizing honor to all.”\(^{21}\)

American equality has meant the opposite: subjecting its upper classes to the same punishments suffered by its lower classes. As Whitman explains, “There are simply two different roads, to two different forms of equality.”\(^{22}\)

American harshness and European mildness is very likely multicausal, and I do not mean to dismiss any of the explanations just surveyed. Yet it seems to me that none of these explanations take proper account of Europe’s utopian traditions, its rosy, Rousseauian picture of the perfectibility of human nature, in contrast to America’s more jaundiced, Madisonian view.\(^{23}\)

A belief in human evil relates to the darkness of a vision of government filled with devices designed to control power and prejudice, a system of rule premised on human corruptibility. In addition, one important line of explanation, concerning those “distinctively fierce American Christian beliefs,” gets only a mention in Whitman’s work. Evil is a religiously inflected concept, fitted out for a land that at least in the colonial era “made little or no distinction between sin and crime.”\(^{24}\)

And last, I think

\(^{19}\) Id. at 15. Perhaps the greatest symbol of America’s greater democratic responsiveness is the Federal Sentencing Guidelines, which, while leaving “the formal authority through which criminal sentences would be pronounced” in judicial hands, actually “strip [judges] of authority to determine the purposes of criminal sentencing, the factors relevant to sentencing, and the proper type and range of punishment in most cases.” KATE STITH & JOSE CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 1 (1998). This was a transfer of authority over punishment from countermajoritarian to majoritarian branches of government at the authoritative insistence of the majoritarian branches, which passed the Sentencing Reform Act nearly unanimously in 1984. Id. at 2; Franklin E. Zimring, Making the Punishment Fit the Crime, in A READER ON PUNISHMENT 164, 168 (Antony Duff & David Garland eds., 1994).

\(^{20}\) Popular support for capital punishment, for example, is high in many European societies that nonetheless ban the practice. The day France abolished the death penalty, polls showed 73% of the population supported retaining it. R. Nye, Two Capital Punishment Debates in France: 1908 and 1981, 29 HISTORICAL REFLECTIONS/REFLEXIONS HISTORIQUES 211, 225 (2003).

\(^{21}\) WHITMAN, supra note 1, at 192.

\(^{22}\) Id.

\(^{23}\) See generally THOMAS SOWELL, A CONFLICT OF VISIONS 18-39 (1987) (contrasting utopian and anti-utopian political outlooks, characterizing the one as a “constrained” view of human nature and the other as an “unconstrained” view).

\(^{24}\) LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY, 33 (1993). Virginia’s first code of law (1611), usually called “Dale’s laws,” were formally entitled “Lawes
Whitman and many of the other scholars to whom he is replying (with the important exception of David Garland) make far, far too little of the vast increase in crime in the United States from roughly the 1950s through the 1990s, which Germany and other continental European countries simply did not experience. “We seem to be in the midst,” the historian Lawrence Friedman has written, speaking of the last half-century, “of a horrendous crime storm—a hurricane of crime.” “Americans believe something fundamental has changed in our patterns of crime,” the sociologist James Q. Wilson has remarked. “They

Divine, Morall and Martill.” *Id.* at 23. The “draconian bite” of this code suggests how a natural law perspective on crime—the equation, that is, between sin and crime written so deeply into the very idea of a common law of crime—tends to lead to harsh punishment, for the wrongdoer has not merely violated human law but God’s law, and is not morally bad in virtue of breaking the law but breaks the law in virtue of being morally bad. Notably, German law is thoroughly positivistic, something Whitman thinks helps lead it to mildness. *Whitman, supra* note 1, at 14. Clarence Darrow, too, an American lawyer from another generation, thoroughly persuaded of the need for mildness in punishment, is so positivistic as to see criminals simply as those who “leave[] the pack” and crimes not as natural sins but as things that “come and go with new ideals, new movements and conditions.” *Clarence Darrow, Crime: Its Cause and Treatment* 8, 10 (1922).

25 Garland’s argument concerning late modernity touches off from “the prevalence of high rates of crime and disorder in late modern society.” *Garland, supra* note 14, at xi.

26 *Friedman, supra* note 24, at x-xi, 449-65 (1993). The 1950s anthem of juvenile delinquency in *West Side Story*—“Dear kindly Sergeant Krupke,/You gotta understand,/It's just our bringin' up-ke/That gets us out of hand./Our mothers all are junkies,/Our fathers all are drunks./Golly Moses, natcherly we're punks!”—was an early indication of America’s alarm (it wouldn’t have been so funny, after all, if it hadn’t struck a chord). *Leonard Bernstein & Stephen Sondheim, Gee, Officer Krupke, in West Side Story* (1956). Eventually, crime became a “major political issue.” *Friedman, supra* note 24, at x-xi. Richard Nixon declared in his acceptance speech at the 1972 Republican National Convention: “Four years ago crime was rising all over America at an unprecedented rate. . . . I pledged to stop the rise in crime. . . . We have launched at all-out offensive against crime . . . .” President Richard Nixon, Republican Nat’l Convention, Acceptance of Nomination Speech (Aug. 23, 1972). It was around this time that America’s incarceration rates started rising, rising, rising: “The fifty-year period from the early 1920s to the early 1970s,” writes the criminologist Alfred Blumstein, “was characterized by an impressively stable incarceration rate averaging”—roughly like Germany today—“110 per 100,000 . . . .” *Alfred Blumstein, Prisons, in Crime* 387, 387 (James Q. Wilson & Joan Petersilia ed., 1995). And then everything changed. It was in the 1970s ferment, a year before Nixon’s speech and right around the time that America’s incarceration rate started to rise, that Clint Eastwood released the first *Dirty Harry* movie, featuring a villain of baby-faced, giggling, irredeemable malevolence, a villain who kills, in Harry’s (Eastwood’s) words, “[b]ecause he likes it.” *Dirty Harry* (1971) (The movie, in fact, with its furious treatment of Warren Court criminal procedure, should be a classic for lawyers.) After decades of crime, America had come to a certain conclusion about its criminals. The song in *West Side Story* anticipated it: At first, the juvenile gangsters sing, “We ain't no delinquents/We're misunderstood./Deep down inside us there is good!” But a verse later: “Officer Krupke, you're really a square/This boy don't need a judge, he needs an analyst's care!/It's just his neurosis that oughta be curbed./He's psychologic'ly disturbed!” Then: “Officer Krupke, you're really a slob/This boy don't need a doctor, just a good honest job./Society's played him a terrible trick./And sociologic'ly he's sick!” By the end, we know the truth: “Officer Krupke, you've done it again/This boy don't need a job, he needs a year in the pen./It ain't just a question of misunderstood./Deep down inside him, he's no good!” And the boys chant: “We're no good, we're no good!/We're no earthly good./Like the best of us is no damn good!”
are right. . . . [W]e are terrified by the prospect of innocent people being gunned down at random, without warning and almost without motive, by youngsters who afterwards show us the blank, unremorseful face of a seemingly feral, presocial being.”

27 Just what can realistically be expected from citizens in a democratic legal order confronted by this kind of change in basic patterns of personal security? A punitive mixture of fear and anger seems to me an almost inevitable response, at least on a mass scale; that is, *condemnation* seems to me an almost inevitable response—and condemnation of a totalizing enough sort just is the belief in evil. In short, I submit that Europe’s mildness and America’s harshness in criminal punishment trace their origins in part to the differences between the political ideologies of the American and French revolutions; in part to the distinctiveness of American Protestantism; and in part to a natural democratic reaction to terrible, rising crime. The last is the engine of punitiveness; the first two give it conceptual shape. And the shape it takes is a belief in criminal evil.

But in the main, this paper is not a historical or sociological analysis of why Americans fashioned a harsh system of punishment, but a philosophical essay seeking out the moral ideas implicit or embedded or (better) *immanent* in criminal doctrine and practice. Thus it is an interpretive exercise in reading law. The project takes its cue from Jules Coleman’s philosophical interpretations of tort law, where he asks “whether, and to what extent, our current tort practices can be understood as expressing an ideal of justice,” and answers that the very structure of a tort suit, with its confrontation in the courtroom between victim and injurer, “fundamentally implicate[s] the notion of corrective justice.”

28 This is not a causal claim; beliefs about corrective justice could be the historical cause for tort law having the structure it has, but the historical cause could also be something altogether different and Coleman’s claim no less correct. Imagine that tort law changed—that class action attorneys, let’s say, managed to get legislation established mandating punitive damages for injuries caused by merely negligent corporations. Imagine that both the attorneys and the legislators involved in establishing the new law were motivated solely by financial self-interest, without a thought for or against any particular conception of justice. The new system they built could nonetheless properly be said to have commitments with respect to justice. It would be a system that had turned away from corrective justice and toward retributive justice. This essay is meant to be causally suggestive, but the focus is on interpretive social philosophy. Regardless of what beliefs about evil Americans and Germans had, or lacked, or had unconsciously or semi-consciously, when they fashioned such different systems of criminal punishment, regardless of what motivations of any kind led them to establish the law they did, and regardless of what social forces set their activity into motion, they fashioned


law best explained by certain ideas and therefore expressive of those ideas. The presence or absence of the concept of evil might be as much effect as cause. The goal here is to try to discern, within two criminal systems’ dusty codes and routines, certain assumptions about human moral nature. This is the object of Part II, below.

The Conclusion indulges in a more suggestive discussion of what other purposes the concept of evil might be able to serve in comparative law. It also engages—for the only time in this essay—in a normative rather than descriptive discussion of whether the concept of evil in American or German criminal punishment serves the cause of justice.

I. THE CONCEPT OF EVIL

Though the concept of evil has come to be a secondary and awkward matter in contemporary scholarship, there is in fact a magnificent intellectual tradition centered on the concept. It was a subject of interest in ancient times, to start with. Saint Augustine viewed it as “naught but a privation of good”—as fundamentally an absence, a lack, rather than a positive force of its own. There is something characteristically classical about this sort of view. Plato similarly treats evil as a form of privation when he argues that people only do evil from ignorance of the good—evil as intellectual failure. Christine Korsgaard has labeled this “the privative conception of evil,” for which “[e]vil is weakness,” the evil person someone “pathetic, and powerless—the drunk in the gutter, the junkie, the stupid hothead.”

The Christian tradition came in time to a different view, regarding evil as an existential choice—a revocable 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:

29 Friedman suggests a similar thought in describing the expressive function of criminal justice: “The sections of a penal code, written in crabbed legal language, harbor an unwritten subdocument, a subdocument of community morality.” Friedman, supra note 24, at 10.


31 Plato, Protagoras, in Selected Dialogues of Plato 25 (Benjamin Jowett trans., Modern Library Classics 2001) (380 B.C.?). There’s room here to question whether the ancients really had in mind what we do when they used the term “evil” in this way. Nietzsche has argued that the concept of evil is a Judaico-Christian one. See Friedrich Nietzsche, On the Genealogy of Morality (Keith Ansell-Pearson ed., Cambridge University Press 1994) (1887) (contrasting the ancient distinction between “good” and “bad” with the Judaico-Christian distinction between “good” and “evil”).

32 Christine M. Korsgaard, Self-Constitution: Agency, Identity, and Integrity 170 (2009) (“According to one view, the bad or evil person is pathetic, and powerless . . . . Call that the privative conception of evil: evil is a privation, a lack.”).
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; .... 

For Milton, evil was not, as it had been for the ancients, essentially a privation, but was rather a misuse of free will—a certain kind of wrongful choice. Christine Korsgaard calls this “the positive conception of evil,” where “[e]vil is power and goodness is weakness,” where the evil person is someone “powerful, ruthless, unconstrained.”34 (Certainly that is one’s impression of Milton’s Satan.) Kant too, standing within this broadly Christian tradition, characterized evil as basically a misdirection of free will, an “inversion” of our “maxims.”35 Evil thus being fundamentally a certain kind of choice, its ground was not intellectual failure, as it had been for the ancients, but a deformation of the will—a vice. For Milton, the vice was pride. For Kant, it was “venality or selfishness . . . . His model, when he thinks about evil, seems to be the cheat, the chiseler, the guy who bends the rules in his own favor, not the tyrant or the mafia kingpin, and not the serial sex killer or the addict.”36 But then the peculiar horrors of the twentieth century came to pass, and all these old, innocent ideas gave way.

It was Hannah Arendt, in her struggle to find a conceptual apparatus adequate to twentieth century mass murder, racial hatred and genocide, and totalitarianism, who 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.”37 She expressly rejected the Kantian (and Miltonian) view; those of Kant’s era, she argued, did not understand that there exists “goodness beyond virtue and evil beyond vice,” that is, evil that “‘partakes nothing of the sordid or sensual’” but is “‘a depravity according to nature.’”38 She initially proposed the concept of “radical evil”: a demonic opposition to the good based first on the “lust for power” but then by a desire “not only to kill whoever is in the way of further power accumulation but also innocent

33 JOHN MILTON, PARADISE LOST V.73-110.
34 KORSGAARD, supra note 32, at 170-71.
36 KORSGAARD, supra note 32, at 171-72.
38 HANNAH ARENDT, ON REVOLUTION 83, 81-83 (1963) (quoting HERMAN MELVILLE, BILLY BUDD).
and harmless bystanders, and this even when such murder is an obstacle, rather than an advantage, for the accumulation of power.”  

Later, after seeing Adolf Eichmann on trial in Jerusalem and being struck by his bureaucratic thoughtlessness, his utter blankness of mind, she changed her view: “It is indeed my opinion now that evil is never radical, that it is only extreme, and that it possesses neither depth nor any demonic dimension. . . . It is ‘thought-defying,’ as I said, because thought tries to reach some depth, to go to the roots, and the moment it concerns itself with evil, it is frustrated because there is nothing. That is its banality. Only the Good has depth and can be radical.”

Within Arendt’s two proposals are the seeds of a workable conception of evil with which to probe German and American criminal law. What she gives us is philosophical and psychological characterization, not definition; yet we can abstract a definition from her proposals. First, in rejecting the Kantian and Miltonian conception, she came to see evil not as a certain kind of choice but as a certain kind of self—as a “depravity according to nature.” She (and Melville, whom she was quoting) meant by this not the biologist’s conception of nature as one’s genetic makeup; she was not taking a position in the nature/nurture debate. She meant the humanist’s conception of a nature, of a person’s essential and enduring self. There is thus something immutable in evil, something twisted in a way that cannot be undone by simply re-orienting the will, as if the self were a boat that could just set sail in different directions, and the choice for evil just setting out on a dark wind. Evil goes deeper into the human character than that; it is not the direction of sail but the boat. That is not to say that, evil being a part of one’s essential and enduring self, it is totally immutable; even the most deeply rooted elements of a person’s makeup can change. But it is largely immutable, as immutable as a naturally curious person’s curiosity, or a naturally neurotic person’s emotionality. Let us then take this semi-immutability, this relationship of evil to the self, as a first element in the philosophical definition of evil we’re after.

Second, in Arendt’s early concept of radical evil, there is the notion of an active hostility, a malevolence, toward the good things in the world. Arendt speaks of killing innocents “even when such murder is an obstacle, rather than an advantage”—thus gratuitous murder, murder for its own sake. She had in mind the Nazi decision to continue exterminating Jews after it had become clear that the resources required for the genocide were hampering the German war effort.

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40 Letter from Hannah Arendt to Gershom Scholem (July 24, 1963), available at http://memory.loc.gov/cgi-bin/ampage?collId=mharendt_pub&fileName=03/030170/030170page.db&recNum=32 (last visited August 11, 2010).

41 Arendt, supra note 39, at 3.
But there is no reason to limit the scope of her insight to that context. Philosophers conventionally use the notion of “the good” as an umbrella term encompassing all the good things in the world (or rather, the thing in virtue of which all those good things are good). Thus “the good” can be entirely various, encompassing everything from other human lives, to objects of beauty, to relationships held together by love or friendship, to societies held together by justice, to whatever else is the sort of thing we recognize as being fundamentally worth creating or preserving. What Arendt was getting at in her notion of radical evil was a disposition of hostility or malevolence toward those things—toward the good itself, in whole or in part. Let us then take this stance toward the good as the second element in our philosophical definition of evil.

Third, in Arendt’s concept of the banality of evil—which in my view should not replace the concept of radical evil but complement it—there is again the notion of a certain disposition to good things in general, to “the good.” But it is a different disposition. Some have thought Arendt’s treatment of evil as “banal” trivializes evil, removes from it the sting of serious condemnation, but that misunderstands her. It was Arendt’s insight, as she looked upon Eichmann, that evil of the very worst sort manifests not just in the powerful malevolence of an Iago (“I hate the Moor. . . . I’ll pour this pestilence into his ear, . . . [And] make the net/That shall enmesh them all.”), but also in the carping rationalizations and willful indifference of small souls, whose essential failure is the failure to think and care about what they are doing at all. One can think of the radical evil/banality of evil distinction as something like the line between culpable intention and negligence. Indeed, in a way, the banality of evil almost doubles back to the Platonic conception of evil as intellectual failure; it is the classical conception plus modern bureaucracy. And so there is a great deal going on here, but for purposes of philosophical clarity, let us treat this rich notion of the banality of evil with the related, but simpler notion of indifference to the good, at least as weighed against even quite trivial varieties of self-interest. Thus we have a third element in our philosophical definition of evil.

Assembling these pieces, we come to this: Human evil is the possession of a certain kind of self, one that is twisted or fallen such that it stands toward the various good things in the world in a relationship marked at the core by indifference or hostility. In short, evil is an immutable hostility or indifference to the good. Now, Arendt advises that if we are to come to terms with good and evil, “we had better turn to the poets.” Earlier I quoted Milton’s grandiose conception of evil in Satan’s soaring, defiant verse. It is great poetry. But it is, to my ears, as a description of evil in the twentieth and twenty-first century, psychologically ridiculous—or at least psychologically insignificant, so uncommon that, if it exists, or once existed, it is at most an obscurity today. If we want to understand evil, forget Milton. We’d do better to read Don DeLillo:

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42 William Shakespeare, Othello act 1, sc. 3, act 2 sc. 3.
43 Arendt, supra note 38, at 82.
He comes across the sleeping girl and feels a familiar anger rising and knows he will need to do something to make her pay. He’s on her like that. She tries to fight but does not cry out. He beats her with the end of his fist, sending hammerblows to the head. Struggle bitch get hit. He wants to turn her over on her face and put it up inside her. She fights and whisper-cries in a voice that makes him angrier, like who the fuck she think she is, . . . . Either way he’s gonna hit her, she struggle or not, and he looks away when he does it, sidle-type. No eye contact, cunt. Last woman he looked at was his mother. After he does it, driving it in and spilling it out, he hits her one last time, hard, whore, and drags her up on the ledge and leans her over and lets her go. You dead, bitch. Then he goes back to thinking his nighttime thoughts.44

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

II. THE CONCEPT OF EVIL AT WORK

If a position as to human evil is implicit in German or American criminal law, the methodological question we face now is how to make that position explicit, how to bring it to light. My approach is this: Any criminal system, whatever it wants to say as to the question of evil or other moral questions, has to contend with certain practical problems. In any human community, there is major crime, to which the law must respond somehow. There are recidivists and chronic, dangerous recidivists; the law must decide what to do about them. There is the problem of where to set the limits of our punishment—whether we will torture, whether we will execute. When we do not execute, or exile forever, there is the problem of reintegration, of the offender’s re-entry into the community. These sorts of problems are not positions but simply the persistent realities that a criminal system faces. To know what we believe in criminal law from a moral standpoint, the best thing to do is examine how we solve these problems.

Some may be surprised that the discussion here is not more centered on the traditional list of the functions of punishment: retribution, deterrence, rehabilitation, and incapacitation. But these four categories are neither morally nor epistemically basic. To say that Germany is oriented to rehabilitation is not to explain why Germany believes people to be rehabilitable. To say that America is oriented to incapacitation is not to say why America takes incapacitation to be necessary. To say that America is retributivist is not to answer the question of why our conception of retribution is so harsh. (Germany also takes itself to be

When a society favors one of those categories, it does so because of a certain view of the human being behind the crime. The real challenge is to uncover that view. When a society favors one of those categories, it does so because of a certain view of the human being behind the crime. The real challenge is to uncover that view.

A. Major Crime: Membership versus Banishment

Evil, as I’ve defined it, involves an immutable tendency to harm good things. If criminal law is infused with the concept of evil in this sense, then a major crime exposes a twisted nature, which is a more or less permanent thing; the crime, as it were, cuts into the criminal’s self. On the hypothesis that American criminal law expresses a belief in evil, one would therefore expect it to have a retributivist streak, for evil deserves bad treatment if anything does. But even more than retribution, one would expect a belief in evil to turn a system of punishment strongly towards incapacitation, for evil implies perpetual dangerousness. Indeed, one would expect something stronger and more specific than incapacitation: Banishment is the logical response to those who commit major crimes, when committing a major crime is taken to show that someone will never refrain from doing harm. Banishment hooks onto the immutability aspect of evil. What I would like to demonstrate here is that America frequently banishes its criminals, while Germany almost never does.

Whatever happened to banishment? It is one of the fundamental forms punishment can take, and one of the basic forms it has taken from earliest antiquity through modern times—from Cain’s punishment after he killed Abel (“And the Lord said unto Cain . . . ‘[A] fugitive and a vagabond shalt thou be in

45 Strafgesetzbuch [StGB] [Penal Code (translated by the Federal Ministry of Justice)] Nov. 13 1998, § 46 (“Principles of Sentencing. 1. The guilt of the offender is the basis for sentencing. The effects which the sentence can be expected to have on the offender’s future life in society shall be taken into account.”).

46 Similarly, Whitman states that the divergence between German and American punishment “is a mystery that our standard repertoire of philosophical approaches [to punishment] is not well equipped to resolve.” Whitman, supra note 1, at 38.

47 My explanation here of the relationship between the concept of evil and actual American punishment practices, as throughout this essay, is philosophical rather than historical or sociological. But it is worth noting that America openly turned to retributivism at the time its punishments became notably harsher than Europe’s. Consider the titles of books contemporary with the shift: ERNST VAN DEN HAAG, PUNISHING CRIMINALS (1975); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976); DAVID FOGEL, WE ARE THE LIVING PROOF: THE JUSTICE MODEL OF CORRECTIONS (1975). In describing the relationship of retribution to evil, I mean to suggest that America turned to retributivism in part because of a revived belief in evil. I also mean to show, expressively speaking, what moral commitments America inscribed into its law when it turned to retributivism.

48 As just remarked, supra note 47, while my explanation here is philosophical, there is a causal story to tell. America openly turned to incapacitation along with retributivism in the 1970s and 1980s ferment of sentencing reform. M. WOLFGANG ET AL., DELINQUENCY IN A BIRTH COHORT (1972); Norval Morris, “Dangerousness” and Incapacitation, in A READER ON PUNISHMENT 241, 242 (Antony Duff & David Garland eds., 1994).
to Homer’s epics ("Theoclymenus replied, ‘Just like you, I too have left my land—I because I killed a man . . . .’"

to Great Britain’s penal colonies in America and then Australia (where the last convicts set sail up the Swan River in 1868). This is a span of perhaps some three-thousand years, which puts banishment right up there with execution, fines, violence, and shame, and far above loss of liberty, in the set of basic instruments with which the law has responded to major crime. Did this ancient practice just fade away as the world filled up? No it did not. Historians often recall a rehabilitative ideal at the origin of the prison, the notion of the prison as a penitentiary—a place of penance. But it was Holmes who taught us 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.” He should have included “institutions” with rules and formulas, for the prison finally is just a persistent institutional fact about society, faithful to no one function or meaning, a shell into which diverse ideas can be poured—and one idea for which it is well-fitted indeed is that of banishing within our territory those we never again want within our midst. A lengthy prison sentence is a modern banishment. And we use prison in that way, I submit, whenever we sentence someone to life in prison without parole. Indeed, even the verbal formulation is interesting: “life in prison” accomplishes nothing that “one-hundred years in prison” wouldn’t, but it expresses verbally the idea that one’s life, whatever term of years it might prove to be, is to be spent apart from law-abiding people. My sense is that we all intuitively grasp this role of the prison and meaning of a life sentence. Consider this opening argument from defense counsel at the death penalty phase of a California case not so long ago:

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

49 King James, Genesis 4:9-12.
52 See, e.g., FRIEDMAN, supra note 24, at 77-82.
54 See DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 12, 14 (2001) (“In the last few decades, the prison has been reinvented as a means of incapacitative restraint . . . . [T]he ruling assumption now is that ‘prison works’—not as a mechanism of reform or rehabilitation, but as a means of incapacitation and punishment that satisfies popular political demands for public safety and harsh retribution.”)
The jury sentenced the offender to death nonetheless. But the attorney’s understanding seems exactly right: Life imprisonment without parole is functionally identical to Cain’s punishment, a way of casting a person out of the city and into the wilderness—a modern banishment.

Let us, then, take life in prison without parole to be the paradigm manifestation of banishment in modern times. It is not the only such manifestation. Capital punishment is a sort of banishment too—an existential banishment, as it were—and not just conceptually but in point of fact. One of the celebrated and rather unexpected findings of legal history is that capital punishment in early modern Great Britain declined as (astonishingly) 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,” John Beattie has demonstrated. Execution and banishment, that is, were substantially fungible, which makes good sense, for the two contend with the same problem—the problem of what to do with people who simply can’t be lived with—and address it with what is structurally the same solution: removal. That historical connection actually goes deeper still. When Virginia, Pennsylvania, and Kentucky drastically limited capital punishment in 1795 (responding to what was then an anti-death penalty culture in the United States), they almost simultaneously started building prisons—banishment substitutes, as we’ve discussed—with the legislature in one case allocating prison funding on the very day it largely abolished execution. Nor is the connection here just historical. We know that a desire for certainty that the very worst offenders will never be released is an important factor in contemporary death penalty practice. Capital jurors’ thinking has proven to be riddled with the concern that somehow (clemency from the governor, a snafu in the trial, a new parole policy—one way or the other) a defendant convicted of a horrendous crime might, if not executed, be released, and while in public opinion polls, people’s positions on the death penalty prove by and large to be immoveable, there is a shift when those polled are given a choice between “death” and “life without the slightest possibility of parole.”

Now, a caveat: I don’t mean to suggest that the meaning of capital

57 Id.
58 I am not the first to think so. “Of course,” the legal historian Lawrence Friedman remarks, “the ultimate form of banishment was death; from this, there was no danger of return.” FRIEDMAN, supra note 24, at 41. Whitman makes the same point: “In mandatory life sentences, and in the return of the death penalty, we see a program of permanent incapacitation . . . .” WHITMAN, supra note 1, at 53.
punishment is entirely a matter of banishment; capital punishment is too retributive to be understood solely in those terms. But the belief that the offender sentenced to death is someone who should and must irremediably be banished from society is part of capital punishment’s meaning. And so capital punishment joins life in prison without parole as a second form of modern banishment.

But again, not the last. “We might say, of someone,” writes Derek Parfit, “‘After his accident, he is no longer the same person’. This is a claim about . . . identity. We claim that he, the same person, is not now the same person. This is not a contradiction. We merely mean that his character has changed. This numerically identical person is now qualitatively different.”61 Parfit is writing here about what is known in philosophy as the problem of personal identity—the persistence of the person over time—and it is really no surprise that we should find ourselves in this conceptual terrain: Evil, as I argue above, is a matter of a person’s enduring nature. Now, the treatment of the identity problem in philosophy has become, over the millennia of its discussion, complex and in some ways distinct from issues of character, but at its root, as Parfit shows us, there is an intuition familiar to us all. It is merely the thought that “I am the same person I was three years ago, but a rather different person than I was ten years ago, and a substantially different person than I was twenty-five years ago.” There are stages to a life—infancy, childhood, adolescence, youth, early adulthood, maturity, middle age, old age (at least those)—and we make distinctions between the person we were in one stage and the person we are or will be at another. And thus very long prison sentences short of life imprisonment become open to a particular kind of interpretation. When we think about the meaning of a prison sentence, it is not always a smooth slope from a month to a year to a decade to half a century, as if all those terms of years were the same in kind and only different in degree. A three year prison sentence is straightforwardly a punishment. A twenty year sentence is something else; it is not straightforwardly a punishment. A very long prison sentence short of life imprisonment is a kind of banishment; to send a twenty year old to prison for twenty years is to say, “The young man, with his hot blood, is banished. Let the middle-aged man, with his cooler head, rejoin society.” The claim in such a sentence is one of criminal evil, but the evil is thought not to run so deep; the person is twisted only lastingly—not immutably. Now, it’s not easy to say just how long a prison sentence has to be to constitute the banishment of a person for a stage of his or her life. But let us say, as a working hypothesis, that it can be no less than ten years imprisonment without or before parole.

Hickock in Kansas, as Truman Capote reported it—the prosecutor asks the jury: “[W]hat are you going to do? . . . Send them back to the penitentiary, and take the chance of their escaping or being paroled? The next time they go slaughtering it may be your family.” CAPOTE, supra note 12, 305 (emphasis in original).

We now have in view three formulas of modern banishment: death, life in prison (without parole), and prison sentences of ten years or more (without or before parole). Now, I do not think this list is exhaustive. To deprive a felon of the right to vote, for example—as America often does, and Germany as a practical matter does not do—is a loss of membership in the community and a sort of banishment. But let these initial three stand here as modern banishment’s basic forms. What I would like to demonstrate now, empirically, is that America often banishes its worst offenders and Germany never fully does.

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

The German Penal Code (the Strafgesetzbuch, abbreviated “StGB”) opens its section on “Punishments” by announcing that no one may be imprisoned for less than one month or more than fifteen years, unless they are sentenced to life imprisonment.\(^{62}\) Life imprisonment may only be prescribed for murder (which Germany defines to mean intentionally killing for a small set of especially bad purposes, such as “greed,” “sexual desire,” or “to make another crime possible or cover it up”).\(^ {63}\) Thus every crime but murder is punished, at first glance, by a maximum of fifteen years.

However, the official limits on sentence length can only be understood in conjunction with the StGB’s provisions on short sentences, suspended sentences, and parole. First, it is a general statutory rule that any sentence of less than six months is addressed with a fine.\(^ {64}\) The range of allowable sentences now shrinks: There are fines for small crimes, six months to fifteen years for every substantial crime except murder, and then life for murder. But German courts “shall” suspend any sentence of less than one year—putting the convicted criminal on probation with no time served—“if it can be expected that the sentence will serve the convicted person as a warning and he will commit no further crimes in the future even without the influence exerted by serving the sentence.”\(^ {65}\) That judgment becomes discretionary for sentences between one and two years. In terms of actual practice, German courts suspend sentences of less than one year 75% of the time and sentences between one and two years 60% to 65% of the time.\(^ {66}\) Thus, to speak of majorities, the range of sentences has again shrunk: Imprisonment is either for two to fifteen years or for life.

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\(^ {62}\) Strafgesetzbuch [StGB] [Penal Code (translated by the Federal Ministry of Justice)] Nov. 13 1998, § 38 [hereinafter StGB].

\(^ {63}\) Id. at § 211.

\(^ {64}\) Id. at § 47.

\(^ {65}\) Id. at § 56.

But then there is parole. Provided certain conditions (including public security) are fulfilled, German courts “shall” grant parole after two thirds of a sentence between two and fifteen years has been served, and “may” grant parole after half the sentence is served. Again, in a majority of cases, German courts actually do grant parole. And as to life imprisonment for murder, the German Constitutional Court has ruled that sentences of life without parole violate the constitutional principle of proportionality (which means, effectively, that no crime is proportional to such a punishment). Following suit, the StGB requires that those imprisoned for life be released after fifteen years provided “the particular gravity of the convicted person's guilt does not require its [the punishment’s] continued execution.” In practice, this has meant that most life-term sentences function as fifteen year sentences. To speak again of rough majorities only, and of time served rather than formal sentences, German imprisonment is for only one to seven and a half years, or fifteen years.

Thus German law punishes only one crime, murder (specifically, what in U.S. federal law would be considered aggravated murder), with banishment, and even that is a temporary banishment in most cases. Both forms of permanent banishment—capital punishment and life imprisonment without parole—have been deemed unconstitutional by German courts. The contrast with American punishment is stark and simple. Federal criminal sentences range from one day in jail or prison to life imprisonment or death, typically with no probation or parole for serious crimes. There are many crimes which, on a first offense, would lead to sentences longer than our baseline for a temporary banishment, that is, ten years. First, murders that Germany would punish with fifteen years imprisonment (holding out the possibility of a longer sentence for a particularly dangerous offender), federal law would punish with life imprisonment or death. But then comes a long list of crimes that the Federal Sentencing Guidelines (which were, after all, binding until quite recently and still remain important) would classify as an “Offense Level” of 32 or higher, meaning ten years imprisonment or more, for example: attempted murder for money or attempted murder resulting in permanent or life-threatening bodily injury, the worst forms of sexual abuse,

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67 StGB § 57(1).
68 StGB § 57(2).
69 BVerfGE 45, 187.
70 StGB § 57.
71 Preventive detention will be discussed below, along with recidivism.
72 U.S. Sentencing Guidelines Manual § 2A1.1 (2003) [hereinafter Guidelines]. Even in a major state jurisdiction where there is probation and parole, for instance California, it is striking to compare German and American law with respect to specific crimes. Murders that Germany would punish with fifteen years imprisonment, California would punish with death, life without parole, or a term of no less than twenty-five years. CAL. PENAL CODE § 190 (2004).
73 Guidelines § 2A2.1.
such as those resulting in very serious injury or involving children or abduction;\textsuperscript{74} kidnapping, abduction, or unlawful restraint;\textsuperscript{75} embezzling or stealing over a million dollars from a public corporation;\textsuperscript{76} or, among others, carjacking while using a gun so as to cause injury.\textsuperscript{77} This laundry list has a meaning: America sees evil of the sort that calls for banishment in a great array of wrongdoing—from embezzling (a non-violent crime predicated on greed) to the sexual abuse of children (a crime of perversion and lust). German law sees something equally morally culpable only in murder, and even then its banishment isn’t permanent.

A last comment: German lawyers would likely object to the way I have run official sentences and parole together in this discussion. It seems that something quite central to German legal culture resists going behind the “norms” (as they’re called) to which the law gives official expression and questioning whether what is stated as a formal matter captures the reality of the legal system in fact. “The StGB states as a norm that certain crimes are sentenced to life or not less than ten years imprisonment,” the argument would go. “That is the sentence a judge must give and the true punishment, and nothing that parole does to shorten that sentence later on is relevant to the norm.” I find (as I suspect most Anglo-American lawyers would) this sort of formalism both baffling and misleading. If a criminal system had two provisions of law, one of which states that every theft must be punished with the gallows, and the other of which states that any taking of property not one’s own is to be considered “coercive trading” rather than theft and punished with compensation to the owner and a fine, could anyone really say in seriousness that the system is committed to punishing theft with death? Even the strictest formalists should make room for reading one provision of law against another and taking the system as a whole. And at the end of the day, our “official” norms answer to the facts of what we do. When Germany’s criminal system is taken as a whole and in light of the facts, the typical punishment for even the worst forms of murder is a prison sentence of fifteen years, with a real but fairly small chance of a longer term, and an enforced demand that, even if held for a longer period of time, parole must always be possible. A “norm” of “life imprisonment” in such a context is not to be taken seriously.

\section*{B. Re-Entry: Forgiveness versus Residual Criminality}

\textsuperscript{74} Id. § 2A3.1. Germany punishes rape with a sentence of no less than one year (or two for circumstances “which especially degrade”), which works out practically to a floor of no time served or one year served, and a ceiling of seven and a half years. StGB § 177.

\textsuperscript{75} Guidelines § 2A4.1.

\textsuperscript{76} Id. § 2B1.1.

\textsuperscript{77} Id. § 2B3.1. I deliberately avoid discussion of federal drug crimes, where sentences of over ten years are routine, because I think they might distort the comparison. Germany and America punish drug crimes differently not mainly because they have different attitudes to punishment, but because they have different attitudes to drugs.
When criminal offenders are not banished, they eventually must rejoin the community. But under what terms will they rejoin the community? Is it to be hoped that they can be rehabilitated and reintegrated into society in full?

The conceptual relationship between re-entry and evil is not as intricate as the conceptual relationship between incapacitation and evil. It seems straightforward enough to see that a fallen and twisted nature is not rehabilitable, at least not in any but the rarest moments of incandescent transformation. A belief in criminal evil thus steers a punishment system away from rehabilitation. A *disbelief* in criminal evil, on the other hand, steers a punishment system toward rehabilitation, for a disbelief in evil is not merely the absence of a belief in evil, but an active belief of its own that explains criminality (which has to be explained, after all, somehow) with factors that don’t reach so deep as a person’s nature. The factors might be passionate impulses (like a flash of anger), or conditions (like poverty), or even character deformations (like an anger management problem). In any case, the crime has causes, and causes can be alleviated, either by instructing the criminal, or treating him, or changing his circumstances. The very language of causality removes the prick of criminality from the deepest parts of a person’s self, for causes always have a certain exteriority: One says, “I have a problem with my temper,” as if the temper is something other than the “I,” as if it is something one *has* the way one has a handbag or a bald spot—and of course, the temper is a “problem” which implies a solution. Crime thus becomes a type of error, both on the part of society and on the part of the criminal. The famous American progressive criminal defense attorney, Clarence Darrow, expresses the pattern of thought in extreme, and therefore abundantly clear, form in his aptly named book, *Crime: Its Cause and Treatment*: “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.”

Instead, we should see that “each act, criminal or otherwise, follows a cause,” which is “all-sufficient” such that “the individual [is] in no way responsible” for it—and having done so, we should “so far as possible, remove the cause.” Only then will we find a “treatment” and “cure” for “this most perplexing and painful manifestation of human behavior.”

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78 I note again, *supra* note 37-38, the causal background to my philosophical analysis. America openly lost faith in rehabilitation in the 1970s and 1980s. Franklin Zimring notes in his now classic 1977 essay: “Of all the institutions that comprise the present system, parole is the most vulnerable—a practice that appears to be based on a now-discredited theoretical foundation of rehabilitation and predictability.” Zimring, *supra* note 19, at 166. *See also* Blumstein, *supra* note 26, at 395 (“[F]aith in rehabilitation was severely challenged in the early and mid-1970s by a succession of experimental studies . . . .”). Again, I mean to argue that a revived belief in evil was part of why America turned against rehabilitation, and also to suggest what moral commitments America inscribed into its law when it turned against rehabilitation.

79 DARROW, *supra* note 24, at xix.

80 Id. at 36.

81 Id. at xxii.
not in the ordinary sense a cause—or a problem, or an error—but a profoundly interior malevolence, a kind of self.

Thus if the hypothesis that American criminal punishment expresses a belief in evil and German criminal punishment expresses a disbelief in evil is correct, we should expect to see strong rehabilitative norms in German punishment and a relative lack of such norms in American punishment. And so we do, as I’ll show first with a discussion of parole and indeterminate sentencing, second with respect to resocialization and treatment while in prison, and third with respect to how criminals are treated after release. Before proceeding, however, let me emphasize that I am not claiming that America shows no interest in rehabilitation and that Germany shows interest only in rehabilitation. Claims so absolute are rarely true (Whitman argues that “[n]o absolute descriptive claim about any legal system is ever true”).\(^{82}\) In particular, some American state jurisdictions show more interest than the federal government in rehabilitation. But Germany’s example shows by comparison just how little American jurisdictions care about rehabilitation relative to how much they might care about it.\(^{83}\)

Starting in the 1970s, American criminal law, with federal law in the lead, turned away from indeterminate sentencing.\(^{84}\) That meant, first, sharply cabining judicial sentencing discretion by prescribing ranges (with high floors) both by statute and in the Federal Sentencing Guidelines. Second, it meant abolishing parole. That is particularly revealing, for parole is, like life imprisonment, an institutional practice easily open to moral interpretation: To release a person prior to the end of his sentence because he is rehabilitated is to say that punishment is not the purpose of imprisonment—that rehabilitation is so much its purpose that imprisonment should be ended when rehabilitation is achieved. When American federal law rejects parole it thus rejects, at least partly, the idea of rehabilitation.\(^{85}\) Whitman discusses the larger historical and conceptual pattern: At the end of the nineteenth century, “the new philosophy of *individualization* . . . took hold everywhere in the Western world.”\(^{86}\) Individualization, which was associated with “indeterminate sentencing” (and “scientific reformers” who “viewed crime as a problem of social management”), held that “[t]he goal of punishment . . . should be to resocialize the offender—to do whatever might be necessary to make him a functioning member of society if possible.”\(^{87}\)

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\(^{82}\) WHITMAN, supra note 1, at 16 (italics added).

\(^{83}\) Id. at 17 (“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.”).

\(^{84}\) Id. at 49-56.

\(^{85}\) America’s rejection of rehabilitation in recent decades has been the subject of much comment. See, e.g., F.A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL (1981). It seems, however, that few if any writers have associated this decline with an affirmation of the concept of evil.

\(^{86}\) WHITMAN, supra note 1, at 51 (italics in original).

\(^{87}\) Id. at 52.
the notion of evil? And what has taken place since, in the United States, is a “campaign to eliminate all forms of individualization,” thus rejecting rehabilitative norms in favor of their opposite: norms about immutable twistedness.

But individualization “reigns in Europe,” and in Germany, “individualization, oriented toward treatment and resocialization, remains unchallenged orthodox doctrine in the practice of punishment.” German law, as we’ve seen, routinely grants parole. Indeed, it jealously guards parole: The German Constitutional Court, as discussed above, has held that there is a constitutional right to be considered for parole. Only a minority of offenders serve their full sentence. In addition, those sentences are relatively short, which itself expresses a faith that criminals will be routinely, predictably, rehabilitated. Looking at the short sentences and availability of parole together, one might say that in Germany, there is a presumption—just barely rebuttable—that criminals will be rehabilitated.

We turn now to how criminals are treated when imprisoned. The German Code of Punishment Practice has a statutory requirement of Angleichungsgrundsatz—“the principle of approximation” (or “the principle of normalcy”)—which “holds that prison life must resemble as closely as possible life in the outside world.” The profoundly rehabilitative thought underlying this principle is that those in prison landed there because they did a poor job of managing everyday German life. The solution is to have them live an ordinary German life with supervision, to get practice at normal life—as if the criminal were, not hardhearted, but just poorly trained, an unskilled musician but not a tone-deaf one.

The application of the principle of approximation in Germany is stunning to American eyes. The German prisoner has a right to a job, as well as the duty to take a job. He earns wages on par with those outside of prison, cannot be terminated without cause (just like those outside of prison), and even has a right to four weeks paid vacation (recently raised from three, but still short of the non-prisoner norm of six). Turning from economic to familial life, 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

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88 Id. at 53 (italics in original).
89 Id. at 49.
90 Id. at 73. Curiously, German penologists have sounded the same empirical concerns about rehabilitation that American ones have. But the German legal bureaucracy has been unresponsive. Id.
91 Id. at 87. Whitman develops the approximation theme mainly with reference to German dignitary principles, rather than with reference to a rehabilitative ideal. I do not disagree. I simply hope to expose another factor: the rehabilitative logic embedded in the principle and practice of approximation.
92 Id. at 86-92.
prison. In political life, far from the “civil death” American felons still to some extent experience (when, for example, they lose the right to vote), German prisoners are encouraged to vote. Indeed, soon after arriving in prison, they are visited by a civil servant whose job it is to train them in performing civic duties such as voting.93

The criminal pictured in these practices is not morally tone-deaf, not a them, but one of us, a fellow-student who happens to be flunking the class and needs some extra tutoring. Perhaps it all seems astonishingly and even offensively lenient to American eyes. There is something that feels outrageous about, for example, a rapist serving just a two year sentence in such comfortable conditions, or about Monica Seles’s assailant serving no time at all for stabbing her; victims seem so valueless in this system. But that reaction itself is retributivist: From a rehabilitative point of view, these measures are neither lenient nor harsh but simply logical and hopefully effective. The reaction only shows how much more retributive than Germany America has become, and how much more rehabilitative than America Germany has become.

After release, German criminals have a network of rights meant to promote their entire integration with and membership in ordinary German society. Perhaps the most astonishing is their right to have their criminal file destroyed, fingerprints and all, after their release from prison.94 They also have substantial rights not to have their crimes publicized. Whitman contrasts the two 1970s cases of Paul v. Davis and Lebach. In the first, the U.S. Supreme Court permitted the circulation of a photo of a “known” shoplifter, although the charges against him had been dropped. In the second, the German Constitutional Court forbade the release of a movie about a 1960s radical convicted of the terrorist murder of soldiers on the grounds that the movie would “violate his constitutional right of personality and impede the resocialization that was his entitlement as a German prisoner.”95 In Germany, there are no sexual offender registries, to say the least.

Again, one’s first reaction as an American is likely to be astonishment (and then a certain outrage at the seemingly greater concern for criminals than for possible future victims). But the German practices make sense if one accepts the premise that the criminal is supposed to be entirely re-integrated into society, wholly forgiven. The contrast with Germany exposes a certain American belief closely tied to the belief in evil: a belief in residual criminality. Americans would think it outrageous to destroy a criminal’s files after his release because those files are seen as an essential investigative resource; after all, aren’t past criminals more likely to commit crimes in the future? To American eyes, the criminal’s crime exposes his character; perhaps prison reformed that character, but more likely the character in question is so bent and twisted that it can never be made straight. We

93 German judges retain the power to temporarily suspend offenders’ voting rights and other political rights, but it is rarely done.
94 Id. at 92.
95 Id. Again, Whitman associates this holding with Germany’s dignity traditions.
are on the lookout for evil; we suspect it. And if the rapid spread of sexual offender registries is any indication, we are getting more suspicious all the time.

C. Recidivism: Punishing the Act versus Punishing the Person

On the surface, American criminal law punishes acts, not people. Our criminal codes contain lists of forbidden acts, not lists of forbidden character traits. Yet from the perspective of a belief in evil, a serious crime is a piece of evidence; it creates a presumption, or at least a suspicion, that the person behind the crime has a corrupt nature.\(^{96}\) One would expect a criminal system committed to the concept of evil, but formally constrained to punishing acts, to have devices with which to pick out characteristics that reveal an evil nature standing behind an evil act. The simplest such indication is a particularly terrible crime, such as a premeditated murder. The American response to such a crime—banishment—has already been discussed. But surely the second indicator must be recidivism. If American criminal punishment expresses a belief in evil, we should expect it to react strongly and harshly to repeat offenders.

The relationship of recidivism to a disbelief in evil is complicated and nonobvious, for recidivism poses a challenge to the disbelief in evil. It suggests that rehabilitation has failed and that the offender is enduringly dangerous. The impulse to account for the repeat offender’s incorrigibility is irresistible, but the process of explanation might lead to a forbidden place, that is, to the belief in immutable bad character. The most thoroughgoing, determined resistance to the concept of evil, then, would lead a legal system to pretend away repeat offenses, to punish each act entirely separately and without regard for whether the person behind the act had transgressed before—a memoryless criminal system. But a criminal system is not made to be theoretically clean. Ignoring recidivism completely is not practicable. (And perhaps not necessary: A nuanced rehabilitationist might think recidivism relevant insofar as it indicates a need for especially concerted and sustained efforts at rehabilitation.) We would expect, then, that German criminal punishment, if it does express a disbelief in evil, should take a sort of reluctant account of recidivism, imprisoning recidivists for as long as it must while also trying to bring that longer sentence into harmony with rehabilitative norms. And we would expect Germany to avoid implicitly accusing recidivists of a corrupt nature, lest it accuse itself of false premises.

The United States is tough—very tough—on repeat offenders. To some degree, it always has been. New York picked out and gave lifetime sentences to certain types of career offender at judicial discretion as early as 1797. In the

\(^{96}\) American criminal scholarship has shown renewed interest in the criminal as a type of person. See, e.g., WILSON & HERRNSTEIN, supra note 11 (suggesting that criminality is a certain aspect of human nature); and R.J. Herrnstein, Criminogenic Traits, in CRIME 39, 42 (James Q. Wilson & Joan Petersilia eds., 1995) (studying the “continuity of criminal behavior” over time and exploring social and biological risk factors for criminality).
1960s, twenty-three other states had similar statutes. With the turn toward determinate sentencing since the 1970s, the discretionary aspect of such sentencing has evaporated. The federal sentencing guidelines, for example, have a chart for figuring out what sentence a crime ought to receive. Along the vertical axis, the chart has a numerical scale rating the seriousness of the particular offense in question. Along the horizontal axis, the chart has criminal history categories. Pages of text within the guidelines go to explaining how to assign criminal history categories, but simplifying greatly, each past crime leading to a sentence of one year or more moves an offender one step along the horizontal axis, increasing his or her punishment typically by about 12%. Past offenses stay relevant to the calculation—one has what I earlier termed “residual criminality”—for fifteen years. Judges are permitted to make upward departures from the Guidelines quite easily; all that is needed is that “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.” But downward departures are tightly controlled: They may not be given to an “armed career criminal” or a “repeat and dangerous sex offender,” and those departures that are allowed are sometimes limited in extent.

Surely the great symbol of America’s toughness with repeat offenders are the 1990s three-strikes-and-you’re-out laws. One interesting feature of these laws is that they began with referenda, first in the state of Washington in 1993 and then in California in 1994. The citizens intervened directly in criminal punishment with ferocious unity—72% in favor, 28% against in California—and within ten years, twenty-four states and the federal government had adopted similar measures. Undoubtedly, then, these new laws represent an attitude on the part of the American people toward repeat offenders. The statutes typically provide that a third felony conviction brings a sentence of life in prison either without parole or without parole until some lengthy period (usually twenty-five years) is served. A fair number of the statutes count drug and even non-violent property offenses among the relevant felonies; sometimes those offenses even “interact with enhancement statutes, which regrade prior misdemeanors as more serious felonies.” California’s version of the statute is particularly harsh: Any third felony merits a lifetime sentence without parole so long as the first two felonies

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97 WHITMAN, supra note 1, at 56.
98 Guidelines § 4A1.1.
99 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.
100 Id. § 4A1.2.
101 Id. § 4A1.3(a).
102 Id. § 4A1.3(b).
103 Initiative 593.
104 Proposition 184.
105 WHITMAN, supra note 1, at 56-57.
were either “violent” or “serious.” 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; in another, fifty years to life for a defendant who shoplifted videotapes and had also never been convicted of an act of violence. 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.”

America, then, has a massive apparatus for identifying and banishing those who reveal themselves to be of a corrupt nature. Germany, even as it bows to the necessity of giving more lengthy imprisonments to recidivists, does not do the same. What Germany does do is complicated.

Germany has two tracks that lead to criminal detention: The first falls under Title One of Germany’s Penal Code, entitled “Punishments,” and the second falls under Title Six, “Measures of Reform and Prevention.” Within Title One, there is no statutory provision dealing with recidivism. Until the 1970s, Germany had something much like the career offender provision in the Federal Sentencing Guidelines, but as the United States was increasing sentences for repeat offenders, Germany was abolishing its recidivist statute as a violation of the constitutional principle of blameworthiness (Schuldprinzip). Now, Germany has no career offender provision, and anything like the long sentences repeat offenders face in the U.S. would violate not only the principle of blameworthiness but also two other constitutional principles. One is the principle of proportionality, “which holds that sentences, though indeterminate, cannot be disproportionate to the gravity of the [individual] offense” (a principle that is also protected by the human rights law of the European Union). The other is the requirement that only acts, not people, be punished (Tatstrafrecht). Taken together, these three rules make it impossible to punish a repeat offender for repeating his crimes. Under Title One, recidivism affects punishment only by increasing the blameworthiness of the instant offense. Judges have discretion to take the possibility of this increased blameworthiness into account when sentencing, provided they stay within the three borders of punishing only acts, with proportionality, and according to blameworthiness alone. As a practical matter, German judges usually do increase sentences for recidivists. Bearing in

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106 CAL. PENAL CODE § 667.
109 Ewing, 538 U.S. at 11.
110 StGB a.F. 48.
111 Whitman, supra note 1, at 56.
113 StGB § 46 (listing past offenses as aggravating elements in sentencing).
mind that fifteen years imprisonment is the maximum sentence for all German criminals but murderers, this would mean that the maximum sentence for a repeat offender who does not commit murder would be fifteen years.

What complicates the story considerably—and quite revealingly—is track two, “Measures of Reform and Prevention.” There are provisions here that look quite like American three strikes laws, providing for indefinite “preventive detention” for three-time offenders whose two prior sentences were for a year or more, and whom the court judges to be a be a serious danger to the community.114 The provisions are a recent development in German law in response to public outrage over repeat child sex offenders. Yet deeper examination shows that these provisions have far less bite than, and a very different meaning from, America’s superficially similar recidivist laws.

First, as of 1998, the grand total of detainees under Germany’s preventive detention law, out of a population of over eighty-two million, was sixty-one.115 Second, preventive detention is not conceived in Germany as a punishment. When it is ordered, it is ordered “collateral to punishment,” outside the track entitled “Punishment,” and typically preceding or following the term of punishment.116 It is thought of, then, as existing solely to prevent danger, not to punish; those are distinct. Indeed, perhaps what is most interesting about the law governing preventive detention is the company it keeps. The “Measures of Reform and Prevention” target three groups: the criminally insane, drug addicts, and chronic recidivists.117 Recidivists are thus conceptually assembled with the blamelessly or semi-blamelessly ill. The accusation of an evil nature is thus avoided; recidivists are, like the insane, in need of treatment—and indeed, the German Constitutional Court has ruled that they have a right to treatment.118 Preventive detention is shot through with other such rehabilitative, blame-removing elements. The statutes governing it explicitly permit a judge to take measures to assure the detainee’s “resocialization,”119 and the detainee has a right to have his detention reviewed every two years to see if the court judges his resocialization successful.120 After ten years, the criminal code establishes a rebuttable presumption that the defendant is rehabilitated and may be released.121 (Formerly, preventive detention could not last longer than ten years under any circumstances, but a recent media firestorm concerning sex offenders—the typical

114 Id. § 66.
115 MEIER, supra note 62, at 227.
116 StGB § 66.
117 Id. § 61.
118 HERBERT TRÖNDLE & THOMAS FISCHER, STRAFGESETZBUCH UND NEBENGESETZE §§ 67d, e (52d ed. 2004).
119 StGB § 67d.
120 Id. § 67e.
121 Id.
focus for the public in national conversations about preventive detention—led to legislative change.)

These features change the meaning of recidivism in Germany. America combines its incapacitative and retributive measures in, as it were, a single gesture. By separating those out, and grouping those it incapacitates for recidivism with those it incapacitates for insanity or addiction, Germany weaves through its complicated obstacle course, on the one hand banishing those who cannot be lived with, and on the other, denying that those it banishes are evil. Even so, German lawyers are uncomfortable with preventive detention, as the trivial number of actual detainees shows. One can sense the conflictedness in the German prosecutor Frank Meyer’s statement about it:

It is not unconstitutional to justify an exception from the guilt-principle on the basis of the theoretical difference that exists between a criminal conviction with its moral disapproval and a technical security measure addressing only the danger of the detainee. But it probably contradicts the principle of proportionality since detention could be much longer than a criminal sanction would have legitimately been. Its impact can come close to capital punishment. However, despite the subliminal feeling of discomfort with this decision one cannot ignore that a community of citizens has the right to demand protection by their government.

Perhaps Meyer feels that there is something un-German about preventive detention because it imports foreign matter into the German system: the belief that criminality is maybe, just maybe, immutable.

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. His sentence in Germany is harder to determine, but the StGB gives a floor of five years and a ceiling of fifteen years; the general rule in Germany is that the sentences of first-time offenders hew to the minimum and in all likelihood, he would be paroled in about two and a half years. His second offense would lead to about a six year sentence in the

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122 In fact, the American jurisdictions could distinguish preventive detention from simple punishment if it chose. Oregon is currently sentencing repeat sex offenders to indefinite civil detention much like Germany’s. That the United States chooses not to make this distinction generally is revealing: It demonstrates a belief that recidivism is relevant for blame, not just a practical protection for society.


124 Guidelines § 2B3.1.

125 StGB §§ 38(2), 250(2).

126 Recall that a majority of those imprisoned are released after serving half their sentence. In addition, German judges typically (and one would think, certainly on the first offense) sentence
Germany is again more open-ended (the offender would qualify again for the same five to fifteen year range), but perhaps the aggravating factor of a second offense would lead to a seven year sentence, three and a half years to serve. At this point, the American sentences are roughly double the German sentences. But things change on the third offense. In America, the offender would now qualify as a career criminal, and not just that, but an “armed career criminal,” giving a sentence of twenty-five years (and life in California and many other states). In Germany, the offender would obviously not join the sixty-one child sexual predators under preventive detention. His sentence would rise perhaps to ten years, with five to serve. Suddenly, on the third offense, America’s punishment is not just twice as harsh but five times as harsh as Germany’s (or even more under California law).

Let’s try that comparison again with another crime. Imagine an offender who twice commits forcible rape upon other adults, in circumstances involving sexual penetration and physical compulsion, but without use of a weapon and without causing serious bodily injury. In New York, this crime, on a first offense, would constitute rape in the first degree, a class B felony carrying a minimum sentence of one year and a maximum of twenty-five years. In Germany, it would carry a two year minimum and a fifteen year maximum. Now, these are large discretionary windows, and it is difficult to say how different the actual sentences and actual time served in the two jurisdictions would turn out to be (both permit parole). But at least the statutory windows are not so different. On a second offense, however, New York would reclassify the crime, due to the prior conviction, as “predatory sexual assault”—a class A-II felony carrying a ten to twenty-five year minimum and a maximum of life imprisonment; parole would be impossible before the minimum of at least ten years had expired. Germany would simply trend upwards within the same two to fifteen year window, with the usual expectations of parole. So again the pattern is of roughly comparable levels of punishment on a first offense and vastly different levels of punishment for repeat offenses.


129 N.Y. Penal Code §§ 70(2)(b), 70(3)(b), 130.35.
130 StGB §§ 38(2), 177(2). Given the usual rule in Germany that first time offenses hew to the minimum and the usual expectation of parole, this two to fifteen year window would mean something like one to two years to serve for forcible rape. I’ve found that even Americans who are generally sympathetic to German criminal sentencing often find something deeply objectionable about this level of mildness in this context. And in fact, the case is more extreme than it might appear: By German standards, the crime described in the hypothetical above constitutes an “especially serious” form of rape due to the sexual penetration; absent that, the use of force to compel a sexual act would ordinarily earn a minimum sentence of only one year, which often means no time to serve. Compare StGB § 177(1), with § 177(2).
131 N.Y. Penal Code § 130.95.4.
Although considerably more empirical study would be needed to support the point fully, it seems that the difference in harshness between America and Germany is not evenly distributed across repeat offenses. America’s relative harshness swells as repeat offenses mount. Put simply, much of the difference between American and German criminal punishment lies in how the two systems treat repeat offenses; this is, to a disproportionate degree, the location of American harshness and German mildness. It is a revealing location. It speaks to the degree to which America punishes the person, Germany the act, and thus the degree to which American condemnation of certain forms of crime become a condemnation of the criminal’s whole being, while Germany always refuses to let the condemnation spread so far. And as I remarked earlier, condemnation of a totalizing enough sort just is the belief in evil.

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132 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.
CONCLUSION: HARSHNESS AND JUSTICE

The object of this essay has been to expose the assumptions about human evil embedded in American and German criminal punishment. The ways in which the two systems approach the problems of major crime, recidivism, and the re-entry of former offenders into the community, I have argued, imply divergent pictures of the human moral condition.

In developing this point, I have stayed within the mode of philosophically interpreting facts about legal rules and practices. But throughout, there has been a sort of causal suggestiveness. America is the land of preachers like Jonathan Edwards, who sermonized that sinners “deserve to be cast into hell,” that “the wrath of God burns against them.” America is also the land where Madison wrote: “If men were angels, no government would be necessary.” The government he participated in designing emphatically assumed that human beings are not angels. Against these influences, Germany is a land lapped by the tides of the French Revolution, whose leading thinker, Rousseau, held that human beings are by nature good, and only go wrong when corrupted by society. Germany is also a nation that has itself committed unspeakable acts of evil, and one wonders if it embraces the ideals of forgiveness and rehabilitation so ardently because it has stood in such great need of them. (This indeed is my sense of Germany after having lived and worked there for some years—that it is a country whose people feel a burning need to deny that there is such a thing as immutable evil,

133 JONATHAN EDWARDS ET AL., SINNERS IN THE HANDS OF AN ANGRY GOD AND OTHER PURITAN SERMONS (2005). Friedman fills out the moral cosmology that Edwards and other early Americans lived within: “Every period asks the question: Why is there evil in the world? Why do people do terrible crimes?” Colonial America answered with a distinction between two types of people: “For most offenses, the colonial answer was: simple weakness and bad character;” but, for people who were “very bad, even incorrigible,” who “seemed to embrace evil boldly and with enormous relish,” the answer early Americans gave was religious and metaphysical. The colonists “firmly believed” in an “invisible world,” the world of angels and spirits; this world was a “crucial aspect of the colonial theory of criminality.” One half of this invisible world was “dominated” by “Satan, the eternal adversary.” The worst criminals had “sold out” to him, were “in league” with him; they had become “human in form, but inhuman at heart.” FRIEDMAN, supra note 24, at 47. I am aware that the relationship between early America’s conception of evil and present-day America’s treatment of crime is robust enough that I might have respectfully grounded this essay entirely in it. I have tried to treat the subject more cautiously. One often hears that contemporary America’s treatment of various matters—sexual matters for example—traces back to the country’s Puritan origins. Perhaps. But Jonathan Edwards graduated from Yale College in 1720. Two and a half centuries, punctuated by a political revolution based on the Enlightenment, is a great enough distance to warn against leaps from colonial to contemporary America. And actually, the colonists were gentler on minor offenses than we are today: They would “forgive and forget, provided the offense was not too gross; if the sinner repented, he was reabsorbed into the community . . . Today, a man or woman with ‘a record’ is stigmatized far more indelibly.” Id. at 52.

134 THE FEDERALIST NO. 51 (James Madison).

unforgiveable evil, in order to reconcile themselves to what the people they love, their parents and grandparents, have done. To be evil is to be hateful and it is not psychologically viable for a people collectively to hate itself.) In any case, I have meant to suggest that different attitudes about human evil might not only be discernible in the two societies’ divergent practices of punishment, but also the cause of the divergence.

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

Finally, this essay has so far been resolutely descriptive. But seeing how deeply the American and German criminal systems diverge, the normative question is inescapable: Which one has got this issue of evil right? Which view of evil contributes to a better criminal system?

This is not a simple question. It takes an array of different forms—too many to address here. One form of the question is: Which criminal system’s view of the moral situation is the more accurate one? Does evil in the sense I’ve been using the term really exist? Another form of the question is: If evil does exist, is it the business of criminal law to deal with it—or should criminal law try, so far as possible, to put such ultimate moral questions out of mind and focus more narrowly on social cause and consequence? A third form of the question is: Which approach to criminal punishment does a better job of minimizing crime (at
reasonable cost)? Even a view of evil that is both morally probative and appropriate to criminal law might be rejected if its effect were a higher crime rate.

I would like to set all these forms of the normative question aside. It is not that they are unimportant. But nothing said so far in this essay gives us purchase on them. The aim of this study has been to bring to light the immanent moral norms at work in two systems of criminal law—the Hegelian “Ideas,” as it were, at work in the two systems. I take it that that is a worthwhile inquiry, but it doesn’t tell us whether there really is such a thing as evil, or whether criminal law should or shouldn’t have a moral point of view, or how best to control crime. Those are “external” questions—questions of the fit between the content of criminal law and some external purpose or normative conception. The inquiry here has been an “internal” one, concerned with uncovering the ideas in the criminal law itself. Answering the external questions would require a second and a different kind of essay.

Yet there is an internalist form of normative critique, and it has a contribution to make here. The internalist question is whether a social practice or system stays true to its own ideals or whether it falls short of them, because of hypocrisy or carelessness, perhaps, or because the ideals are unreasonable in light of what the world has to give us. And from that standpoint, it is striking to note how often in the analysis above the German system was embarrassed in its attempt to maintain the denial of evil while yet managing the practical problems with which it, as a criminal system, has to deal. With the problem of major crime, for example, we saw something of a frantic effort to keep the most dangerous criminal offenders in prison while yet staying committed in principle to saying of no wrong and no person, “This is unforgiveable.”

Thus German law held that no crime can give rise to a sentence of life imprisonment but one, and with that one, the sentence may be symbolically for life, but is almost always actually for less, and then again, it may actually be for life, but it cannot be required to be for life. The whole business felt like a game of dodgeball. Likewise, with regard to recidivism, the German policy of preventive detention is basically a subterfuge—the subterfuge of claiming that permanent imprisonment of the most hated criminal offenders, child sex offenders, isn’t really punishment at all—and that sort of subterfuge is a clue that the law’s ideals are too rigid for the requirements of real life. I think Germany’s denial of the existence of evil is naive and its leniency so extreme as to be unjust. But what I can establish on the basis of the analysis in this paper is that Germany’s denial of evil and leniency are unworkable on their own terms; the world serves up problems that just won’t permit such idealism.

Yet the American side of the picture is worse. Evil is supposed to be genuinely extreme; an immutable hostility or indifference to the good is obviously extraordinary, even among people who behave very badly. Yet what is most

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136 See supra Part II.A.
137 See supra Part II.C.
striking in the analysis above is how little it takes to persuade the American criminal system that a wrongdoer is evil. America takes acts that could be grounded in deprivation, or outbursts of passion, or desperation, or dissipation, or indeed evil, lumps the offenders together, and grinds them all alike. As Germany has lost the concept of evil, has America lost the concept of error? It is often said that American criminal punishment is too harsh. I think that claim, though not false, is insufficiently specific. American criminal punishment is not simply too harsh; it is too careless about when and against whom to be harsh—too careless, that is, about when and against whom to level the accusation of evil. The moral ideas on which our severity is based cannot support what we do. There is a recklessness in American criminal punishment that dishonors justice.