TWO WAYS OF LOOKING AT A CRIMINAL: T

CONTENTS

INTRODUCTION: THE GREAT DIVERGENCE

For most of its history, the

countries consider beyond the pale of civilized state conduct.

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

The third thing to understand about the great divergence is that it is a thing of our time

are, but no one denies the difference in moral attitudes or denies that it has some significance. That America has a "punitive culture" is all but a platitude; that "some distinctively fierce American Christian beliefs,"[19] have something to do with the great divergence is acknowledged

collectively (because constitutionally) permits the death penalty; Europe collectively prohibits it. Criminal law in continental Western Europe has common points of origin (such as the civil law tradition), is shaped by some common experiences (such as World War II), and is increasingly brought together by the European Union, Council of Europe, and European Court of Human Rights, among other transnational institutions. Criminal law in the United States also has common points of origin, is shaped by common experiences (such as—crucially in my view—a high crime rate), and is brought together by the federal system and U.S. Constitution. There is a very real sense in which America has

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

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

not. A certain punitive moral vision was already latent in American culture, and the crime wave spurred a great many Americans to embrace that vision. Other Americans reacted to the crime wave in ways that were less morally freighted—

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

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

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

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

Pennsylvania, and Kentucky drastically limited capital punishment in 1795 (responding to a politically powerful anti-death penalty movement in the early United States), they almost simultaneously started building prisons, with the legislature in one case allocating additional prison funding on the very day it passed a bill to limit

Finally, to deprive a felon of civil rights, particularly participatory democratic rights like the right to vote or serve on a jury is another kind of partial banishment: an eviction from the political community, the community of citizens. The same is true of permanent, state-imposed bars on certain kinds of employment, like barring sex offenders from

However, these announced sentences can only be understood in conjunction with the German law of parole. Provided certain conditions (including public security) are fulfilled, German courts "shall" grant parole after two thirds of a sentence between two and fifteen years has been served,[47] and "may" grant parole after half the sentence is served.[48] Again, in a majority of cases, German courts actually do grant parole. Thus most of those sentenced even to fifteen years imprisonment (including repeat offenders, as I'll discuss later) serve seven-and-a-half to ten years. And as to life imprisonment for murder, the German Federal Constitutional Court ruled in 1977

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

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

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

The ECHR's rulings are not advisory; juridically, ECHR rulings are binding upon member states.[66] As of 2013, life imprisonment without parole is unconstitutional

suffer a variety of state-sanctioned private deprivations (e.g., employment opportunities)

A last point: European and particularly

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

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

[83] Guidelines § 4A1.1.

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

[85] *Id.* § 4A1.3(a).

[86] *Id.* § 4A1.3(b).

[87] Initiative 593.

[88] Proposition 184.

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

[90] CAL. PENAL CODE § 667.

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

America, then, has a massive apparatus for identifying and banishing those who reveal themselves by means of repeat offenses to be of a corrupt nature. On the surface, our criminal codes consist in lists of forbidden acts, not forbidden character traits, and it is a commonplace to say that American criminal law punishes acts not people. But the creed is false: an act is the trigger for the criminal process, but once the guilt phase is settled

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

Italy, France, and Germany all illustrate the first two techniques: the movement toward being memoryless, and the use of discretion to contain some of the risks of being memoryless. Italy in 1974 made recidivism an optional rather than obligatory aggravating factor.[94] France permitted recidivism to raise the maximum allowable sentence for a crime, but not the minimum sentence, and left the decision as to whether to make use of the new maximum to judges.[95] (New reforms under President Sarkozy have introduced mandatory minimums for repeat offenders.) Germany until the 1970s had a recidivist statute that functioned much like the career offender provision in the Federal Sentencing Guidelines,[96] but its Constitutional Court struck the statute down. Today, Germany's basic sentencing concept is that, for any given criminal act, there is a "frame"—that is, a maximum and a minimum sentence—determined solely by retributive principles with reference to the offender's act alone. Within that retributive, act-specific frame, judges are authorized to take account of past crimes, either for utilitarian reasons (to deter additional offenses) or retributive ones (conceptualizing the past crime as making the present one more blameworthy).[97] But however long the offender's criminal record, her sentence can never

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

A detaile

Let me begin by explaining the cultural context that makes purely normative

for it and disapproved of its abolition.[132] Yet politicians from the Left and the Right

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

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

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

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[140] *Id.* at 98.

[141]

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

The other side of the coin does not quite work symmetrically. For those who think the death penalty is never just, a possible and natural position is that the right to life is never forfeit for any wrong, and, further, to think that the right to life is never forfeit for any wrong because the right's foundations are attached to a feature of humanity that is orthogonal to wrongdoing (e.g., consciousness or the capacity to suffer).[143] But that position does not follow

worthless; to say as a claim of justice that a person's right to life is forfeit for wrongdoing is to say that the person's worth is *lost*. Capital punishment thus represents a statement about the value of the person executed. He is subject to death because he is no longer valued. The impulse to kill him may come from anger at his deeds, disgust with his character, a desire to deter others, or just the cost of keeping him alive in prison. It is not the impulse to kill the worst criminal offenders that needs to be explained; nothing could be more natural. W

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

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

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

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

[149] AUGUSTINE OF HIPPO, THE T

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

A darker view emerged with the peculiar horrors of the twentieth century. Hannah Arendt, in her struggle to find a conceptual apparatus adequate to twentieth century genocide and totalitarianism

as a certain kind of self—as, again, a "'depravity *according to nature*.'" She (and

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

III. CAUSES: WHY HAVE EUROPE AND AMERICA DIVERGED?

The object of this essay thus far has been to expose the assumptions about the character of criminals embedded in American and European criminal punishment. I have not taken a position on why, causally, American and European criminal punishment have become so different. But one can scarcely take account of the divergence without asking

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

Two other alternative explanations, often focused on capital punishment, should be taken up together. One regards American harshness as a manifestation of American racism. The other regards it as a manifestation of American populism (including state control of penal codes, the election of judges and prosecutors, and other features of popular criminal justice). There are kneejerk versions of these explanations, but there are sophisticated versions of them as well, and among the best of them is David Garland's remarkable study of capital punishment, *Peculiar Institution*, which ties the racism and populism explanations together in a synergistic way.[169] Garland begins with Foucault's famous depiction of capital punishment in *Discipline and Punish*, in which Robert Damien is torn limb from limb in the public square in a "theater of cruelty" meant, Foucault argp( )-20.4 (de) (e) [

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

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

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

[170] *Id.* at 35.

[171] *Id.* at 38.

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

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

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

[175] *Id.*

[176] *Id.*

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

not support a general capital-punishment-as-popular-justice theory. Indeed, it seems to me that

while less degrading forms of punishment traditionally reserved for aristocrats were generalized in Europe. In so doing, Whitman argues, both Europe and America were acting on their conceptions of what equality demands—conceptions that were set into place in America at the Founding and in Europe at its various points of democratic re-founding. But they had two different conceptions of equality: Europe leveled up, America leveled down. "A yearning for 'aristocratic equality' is indeed a constant in continental Europe. . .

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

The American public was passionately concerned about this hurricane of crime. The 1950s anthem of juvenile delinquency in *West Side Story*—"Dear kindly Sergeant Krupke,/You gotta understand,/It's just our bringin' up-ke/That gets us out of hand./Our mothers all are junkies,/Our fathers all are drunks./Golly Moses, natcherly we're punks!"—was an early indication of America's alarm (it wouldn't have been so funny, after all, if it hadn't struck a chord).[187] Eventually, crime became a "major political issue."[188]

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

Just what can realistically be expected from citizens in a democratic legal order confronted by this sort of a massive reduction in personal security? A punitive mixture of fear and anger seems to me a very natural response. In short, I submit that the basic trigger of America's harshness in criminal punishment was the crime wave between the 1950s and 1990s. Europe, which never experienced a crime wave, continued along the same path America was going down and would have continued down if not for the crime wave's shock. Indeed, as a causal matter, I think the ubiquity of fear was a more important factor in the European/American punishment split than the concept of evil. If a young man is walking behind a woman on an empty street at night in an American city, she will—even if the neighborhood is not a bad one and the man is not particularly threatening—very likely glance back nervously several times and quicken her pace, perhaps even jog or run forward. In continental Europe, that same woman in that same situation is u2 (oc) 0..2 (i) 0T.24 0 0 0.24

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

Thus my view in full is that Europe's mildness and America's harshness in criminal punishment trace their origins in part to the diffe

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

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

Yet there is an internalist form of normative critique, and it has a contribution to make here. The internalist question is whether a social practice or system stays true to its own

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