

# AMERICAN EVIL: A Response to Kleinfeld on Punishment

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Joshua Kleinfeld argues that American moral understandings are reflected in its system of criminal justice.<sup>1</sup> Far more than Europeans, Americans regard those who have committed crimes as irretrievably defective people whom it is appropriate to lock away for many years. Some Americans, Kleinfeld argues, hold this view in moralistic terms, regarding criminals as evil. Others are more instrumental, regarding criminals as irremediably dangerous. But the two sides come to the same policy conclusion: “[T]he *crime* problem is a *criminals* problem, and the solution is to separate criminals from ordinary people.”<sup>2</sup>

In the course of his comparative enterprise, Kleinfeld considers several different ways of understanding evil: the Christian conception of a willful rejection of what is right; Hannah Arendt’s notion of “demonic malevolence, an active desire to harm and to kill,”<sup>3</sup> which she eventually supplemented with the idea of a banal failure to appreciate the moral character of one’s deeds. American law draws on these conceptions, regarding even minor and first-time criminals as having an unchangeable disposition of hostility or depraved indifference toward all that is good.

An inference that Kleinfeld does not draw, but which I will make here, is that the American criminal justice system itself qualifies as evil under any of these understandings of that term.

This is not quite Kleinfeld’s view. The normative view he presents, although profoundly ambitious in its own right, is this: “American criminal punishment is not too harsh because it reserves the ability to severely punish some people but because it metes out severe punishment to far, far too many people. American criminal punishment’s essential moral failure is its

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1. Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 941 (2016).
2. *Id.* at 1032.
3. *Id.* at 1010.

recklessness about when and against whom to be harsh.”<sup>4</sup> I think this understates how bad American criminal punishment is.

Kleinfeld’s basic methodological claim, in this and other work, is that “our social practices and institutions are constituted as they are in part because of values that are implicit, immanent, instantiated, or embodied in them.”<sup>5</sup> If one views the criminal justice system through this lens, we have a lot to answer for.

### I. TWO CONCEPTS OF EVIL

Kleinfeld observes that American and European criminal law are divided by differing conceptions of human evil: “American punishment treats the worst offenders’ moral failings as depriving the offenders of their moral humanity—they become, morally speaking, more monsters than persons—while European punishment denies that any wrongdoing cuts so deep.”<sup>6</sup>

The American vision draws on several conceptions of evil. The traditional Christian view is that evil is a kind of wrongful choice, a willful rejection of what is good. That conception, though, would not support the idea of irredeemable evil, since a person with free will can always repudiate his past choices: “A criminal system that held a traditional Christian conception of evil would have more room for rehabilitation and forgiveness than contemporary American law does.”<sup>7</sup> But this idea of willful rejection can be combined with the idea of a settled trait of character, “a disposition of hostility or malevolence”<sup>8</sup> toward all that is good. A second conception, which one finds in Arendt’s study of Eichmann, focuses on “the rationalizations, excuses, and indifference of small souls whose essential

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4. *Id.* at 1035–36.

5. Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1487 (2016). Kleinfeld focuses on the positive values of social solidarity and justice that should be protected by criminal law, but there is huge variation in the values that social practices can embody. The Aztec empire, Nazi Germany, apartheid South Africa, and the slave states of the early U.S. should suffice to show that a social system can be evil.

6. Kleinfeld, *supra* note 1, at 1013. I am not persuaded that Europe is insufficiently harsh toward the severest offenders. In Germany, Kleinfeld reports, “As of 2013, out of a population of 81 million and a prison population of 56,000, there were only 691 prisoners serving sentences of ten to fifteen years and another 1994 serving sentences of life with parole for aggravated murder—about 2700 people total.” *Id.* at 959. For comparable figures from France and Italy, see *id.* at 962. Kleinfeld offers us no reason to think that this number is too small. One would need to know more about the marginal cases.

7. *Id.* at 1010.

8. *Id.* at 1012.

failure is the failure to think or care about what they are doing at all.”<sup>9</sup> Their failing is “*indifference* to the good, or at least, indifference to the good when weighed against even quite trivial varieties of self-interest.”<sup>10</sup> When one pulls these together, what makes a person evil is “a settled character disposed to malevolence or indifference to the good things in the world.”<sup>11</sup>

## II. AMERICA

The United States, Kleinfeld observes, is remarkably ready to declare that a person who has committed a crime is irredeemable. American indiscriminateness routinely generates horror stories. Here’s one: in *Miller v. Alabama*,<sup>12</sup> the U.S. Supreme Court held by a bare five-to-four margin that *mandatory* sentences of life without the possibility of parole are unconstitutional for juvenile offenders. One of the appellants in that case was fourteen years old when an accomplice shot someone during a robbery. That was all that Arkansas needed to know in order to deem him irreversibly evil.

How bad is our criminal justice system? To begin with, we’re not all that persnickety about whether the people we have in custody are actually guilty of anything at all. Innocent people are routinely convicted on the basis of false and coerced confessions, questionable eyewitness procedures, invalid forensic testimony and corrupt statements by jailhouse informers.<sup>13</sup> Many public defender offices are underfunded and understaffed.<sup>14</sup>

There are 2.3 million prisoners.<sup>15</sup> In 2007, more than three percent of the U.S. population was under correctional control.<sup>16</sup> Approximately 50,000

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9. *Id.*

10. *Id.*

11. *Id.*

12. 567 U.S. 460, 493 (2012).

13. See generally BRANDON L. GARRETT, CONVICTING THE INNOCENT (reprt. ed. 2011) (exploring how systemic failures are partly responsible for wrongful convictions); Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173 (2008) (showing the extent to which individuals are wrongfully convicted for crimes other than rape and murder, which are the most widely reported cases of wrongful convictions).

14. See KAREN HOUPPERT, CHASING GIDEON: THE ELUSIVE QUEST FOR POOR PEOPLE’S JUSTICE 250 (2013); THE NAT’L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 50–51 (2009), [www.constitutionproject.org/pdf/139.pdf](http://www.constitutionproject.org/pdf/139.pdf).

15. THE PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 1 (2009), [http://www.pewtrusts.org/~media/assets/2009/03/02/pspp\\_1in31\\_report\\_final\\_web\\_32609.pdf](http://www.pewtrusts.org/~media/assets/2009/03/02/pspp_1in31_report_final_web_32609.pdf).

16. Kleinfeld, *supra* note 1, at 938.

people are serving sentences of life imprisonment without parole.<sup>17</sup> About 2,500 of them received that sentence for crimes committed when they were juveniles.<sup>18</sup> Among federal prisoners, 87,000 are serving sentences of ten years or more.<sup>19</sup>

Conditions in prisons are notoriously vile.<sup>20</sup> Kleinfeld reports “substantial evidence” supporting the popular image of prisons as places of “male-on-male rape, domination by racial gangs, assault by sadistic guards, and assault by other prisoners.”<sup>21</sup> The ubiquitous use of solitary confinement has produced a modern form of torture.<sup>22</sup> These conditions are themselves productive of future crime: “An exceptional study of 1,205 inmates released from federal prisons in 1987 found that moving prisoners from minimum to low security, thereby subjecting them to harsher prison conditions, roughly doubles the probability of rearrest within three years following release.”<sup>23</sup>

Kleinfeld observes that the system attributes either radical evil or permanent dangerousness to a large portion of the individuals who have been convicted of a crime.<sup>24</sup> Some of this is a result of Americans’ conscious beliefs, but some, Kleinfeld argues, comes about by accident—for example, as a side-effect of the transition to determinate sentencing.<sup>25</sup> As Dorothy Roberts notes, “the prison explosion is largely attributable to sentencing changes that made punishment *less* individualized,”<sup>26</sup> exemplified by sentencing guidelines, the virtual uniformity of plea bargaining, and the use of nondiscretionary actuarial measures to determine degrees of punishment.<sup>27</sup>

Kleinfeld focuses on the injustice done to the prisoners themselves. But in other work and in this one, he notes that the American system of justice also has broader ecological effects.<sup>28</sup> Mass incarceration has a devastating impact on society outside the prison, and particularly on African Americans. “On

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17. *Id.* at 955.

18. *Id.*

19. *Id.* at 963.

20. See, e.g., MICHAEL G. SANTOS, *INSIDE: LIFE BEHIND BARS IN AMERICA*, at x (2006) (collecting interviews from various inmates to illustrate the nature of prison conditions).

21. Kleinfeld, *supra* note 1, at 996–97.

22. See LISA GUENTHER, *SOLITARY CONFINEMENT*, at xi (2013); TERRY KUPERS, *PRISON MADNESS* 55–56 (2008); SHARON SHALEV, *SUPERMAX: CONTROLLING RISK THROUGH SOLITARY CONFINEMENT* 162 (2009).

23. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 *STAN. L. REV.* 1271, 1289 (2004).

24. Kleinfeld, *supra* note 1, at 1008.

25. *Id.* at 1014.

26. Roberts, *supra* note 23, at 1301.

27. *Id.* at 1302.

28. Kleinfeld, *supra* note 1, at 941.

any given day, nearly one-third of black men in their twenties are under the supervision of the criminal justice system—either behind bars, on probation, or on parole.”<sup>29</sup> These effects are concentrated in the poorest minority neighborhoods; in some places, one in four adult males are in prison on any given day.<sup>30</sup> After release, they are denied health and housing benefits, college aid, and the right to vote.<sup>31</sup>

Social capital, the connections between people that enable them to work together, is systematically degraded in these areas. “The mass movement of adults between the neighborhood and prison impedes the ability of families and other socializing groups, such as churches, social clubs, and neighborhood associations, to enforce informal social controls.”<sup>32</sup> The state is perceived as a hostile, alien force. Victims of crime are reluctant to approach the police. Prison loses its stigma and becomes a normal rite of passage into adulthood. “[P]eople who live in neighborhoods with high prison rates tend to feel a strong distrust of formal sanctions, less obligation to obey the law, and less confidence in the capacity of informal social control in their communities.”<sup>33</sup> Former prisoners are unemployable in any but the most menial jobs, so that, in neighborhoods where they are most of the adult population, children have no access to mentors or links to the working world.<sup>34</sup>

Kleinfeld has argued elsewhere that a central function of the criminal law is to sustain social solidarity by reconstructing the social order that has been violated by crime.<sup>35</sup> He has argued that, in these communities, mass incarceration perversely attacks the social fabric that it should be sustaining.<sup>36</sup> He develops those points in *Two Cultures*:

Punishment in America has essentially gotten some dangerous people off the streets at the cost of creating a permanent underclass and a massive breakdown in social solidarity. There is tragedy and irony in this. *Crime* is supposed to be antisocial; *punishment* should be prosocial. But American punishment has morphed into its own enemy: it has become antisocial itself.<sup>37</sup>

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29. Roberts, *supra* note 23, at 1272.

30. *Id.* at 1276.

31. *Id.* at 1291.

32. *Id.* at 1285.

33. *Id.* at 1287.

34. *Id.* at 1293–94.

35. Kleinfeld, *supra* note 5, at 1489.

36. *Id.* at 1494–96, 1550–51.

37. Kleinfeld, *supra* note 1, at 1036.

The effect on the children of prisoners is particularly salient in a system that purports to be acting upon moral judgments of intractable evil. In 1999, most state and federal prisoners had children under age eighteen.<sup>38</sup>

About 2% of the nation's children—close to 1.5 million children—had a parent in prison that year, an increase of a half-million children in less than a decade. Seven percent of black children had a parent in prison in 1999, making them nearly 9 times more likely to have an incarcerated parent than white children.<sup>39</sup>

Separation from incarcerated parents has devastating psychological consequences: “depression, anxiety, feelings of rejection, shame, anger, and guilt, and problems in school.”<sup>40</sup> Partially as a result of mandatory sentencing laws, the number of children with a mother in prison nearly doubled from 1990 to 2000.<sup>41</sup> The consequence was a greatly increased likelihood of ending up in foster homes.<sup>42</sup> Prisons are often in rural areas many hours distant from where inmates' children live. Visitation is often prohibitively difficult, even though contact with family is one of the best preventers of recidivism.<sup>43</sup> “More than 60 percent of parents in prison are held more than one hundred miles from home.”<sup>44</sup> In federal prisons, nearly half of parents are more than 500 miles from home.<sup>45</sup> Even telephone contact is difficult, exorbitantly expensive and typically limited to fifteen minutes at a time.<sup>46</sup>

And then there are the children who are in prison themselves.

About 70,000 children are in prison on any given day.<sup>47</sup> About 10,000 of them are in adult prisons, where they are far more likely to be beaten or sexually assaulted.<sup>48</sup> Most juvenile prisoners are there for offenses that most

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38. Roberts, *supra* note 23, at 1283.

39. *Id.* (footnotes omitted).

40. *Id.* at 1284.

41. *Id.*

42. *See id.* (“One in ten mothers in state prison, for example, reported that her children were in foster care or state institutions.”).

43. *See* NELL BERNSTEIN, *ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED* 77 (2005).

44. *Id.* at 78.

45. *Id.*

46. *Id.* at 85–87.

47. Brad Plumer, *Throwing Children in Prison Turns out to Be a Really Bad Idea*, WASH. POST: WONKBLOG (June 15, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/06/15/throwing-children-in-prison-turns-out-to-be-a-really-bad-idea/>.

48. *See Children in Prison*, EQUAL JUST. INITIATIVE, <https://www.eji.org/children-prison> (last visited Feb. 12, 2018).

youth commit, such as truancy, shoplifting, and disturbing the peace.<sup>49</sup> Black children are almost five times as likely to be locked up as Whites who commit the same offenses.<sup>50</sup> From 1989 to 1999, the number of cases heard in juvenile court rose forty-four percent, even though the rate of juvenile violent crime was rapidly *dropping*.<sup>51</sup>

Like adult prisons, juvenile prisons are rife with physical and sexual abuse, all this experienced at a developmental stage where what the child needs most is positive relationships with caring adults.<sup>52</sup> Solitary confinement, routinely used as a disciplinary tool, is particularly devastating for children. According to the American Academy of Child and Adolescent Psychiatry, its consequences “are well recognized and include depression, anxiety and psychosis.”<sup>53</sup> Most suicides in juvenile prisons occur in solitary confinement.<sup>54</sup>

Being incarcerated in a juvenile facility is a better predictor of adult criminality than gang involvement or delinquency itself: juvenile prisons essentially manufacture criminals.<sup>55</sup> “Children who are incarcerated have virtually no chance of getting a good job when they grow up.”<sup>56</sup> Regardless of the length of the sentences, children who are convicted of crimes are permanently exiled from mainstream society.

Because American mental health care is so poor, there is also a huge population of mentally ill prisoners who shouldn’t be in prison at all.<sup>57</sup> Deeming them irretrievably evil is a category mistake on a massive scale.

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49. NELL BERNSTEIN, *BURNING DOWN THE HOUSE: THE END OF JUVENILE PRISON* 53 (2014).

50. *Id.* at 13.

51. *Id.* at 75. “Between 1995 and 2004, the juvenile arrest rate for serious property and violent crimes fell fully 45 percent, and the juvenile homicide rate plummeted even further, decreasing by 70 percent over the same period.” *Id.* at 78. The drop was steepest in the states that did not pass harsh new juvenile crime laws. *Id.*

52. *See id.* at 82–84, 145.

53. *Id.* at 131 (quoting AM. ACAD. OF CHILD & ADOLESCENT PSYCHOLOGY, *SOLITARY CONFINEMENT OF JUVENILE OFFENDERS* (2012), [http://www.aacap.org/aacap/Policy\\_Statements/2012/Solitary\\_Confinement\\_of\\_Juvenile\\_Offenders.aspx](http://www.aacap.org/aacap/Policy_Statements/2012/Solitary_Confinement_of_Juvenile_Offenders.aspx)).

54. BERNSTEIN, *supra* note 49, at 131.

55. *See id.* at 7–8.

56. Roberts, *supra* note 23, at 1294.

57. *See* PATRICIA ERICKSON & STEVEN ERICKSON, *CRIME, PUNISHMENT, AND MENTAL ILLNESS: LAW AND THE BEHAVIORAL SCIENCES IN CONFLICT* 4 (2008); KUPERS, *supra* note 22, at 45–46; MARY BETH PFEIFFER, *CRAZY IN AMERICA: THE HIDDEN TRAGEDY OF OUR CRIMINALIZED MENTALLY ILL* 273 (2007).

## III. THE INFERENCE

Kleinfeld observes:

[T]he most striking feature of American punishment is how wildly reckless the country is about whom it puts in [the category of the irredeemable]. America takes acts that could be grounded in deprivation, or outbursts of passion, or impulsivity, or desperation, or dissipation, or indeed a ruined character; lumps the offenders together; and treats them as if they were all the worst of the worst. In doing so, the country throws away tens or hundreds of thousands of lives that could be salvaged.<sup>58</sup>

American law, Kleinfeld thinks, “seems to have lost the concept of error.”<sup>59</sup> It is “hardhearted and callous in a way that dishonors the entire tradition of Western democracy.”<sup>60</sup>

This is harsh, yet not harsh enough. The larger cultural context also matters. The values implicit in the practice of mass incarceration are not merely those of hardheartedness and callousness, nor of recklessness.

If one were to discern the values embodied in American criminal justice, one would be a bad anthropologist if one did not notice that the population of people deemed irredeemable is disproportionately black. Paul Brest observes that one way in which equal protection can be violated is for state actions to reflect “racially selective sympathy and indifference,” meaning “the unconscious failure to extend to a minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one’s own group.”<sup>61</sup> Racism, sadism, and mindless inertia interact in complex ways.

American public discourse rarely focuses on this massive engine of destruction of human lives. (On the political left, there has lately been some increased discussion of the “prison-industrial complex.”) Part of the problem is the endless debate over the death penalty, which sucks all the air out of the room. But another part is a broad collective indifference: what’s happening to these people doesn’t bother most voters.

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58. Kleinfeld, *supra* note 1, at 1035.

59. *Id.*

60. *Id.* at 1036.

61. Paul Brest, *The Supreme Court, 1975 Term Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7–8 (1976). For discussion of the scope of the principle, see ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL EQUALITY* 52 (1996).

Perhaps it is sometimes possible for the law to detect “a person’s essential and enduring self,” their “deeply rooted and settled feature of character.”<sup>62</sup> I have doubts. Repeated violent episodes are probably the best you can do, though even those will sometimes bespeak poor impulse control: some people with violent histories are genuinely repentant and hope to behave better in the future.

But the American readiness to attribute such evil to someone who shoplifts three times<sup>63</sup> goes beyond a failure of instrumental rationality. Acceptance of that idea bespeaks evil, as Kleinfeld understands that concept, not on the part of criminals, but on the part of the American criminal system itself—malevolence or indifference to the good things in the world. Said good things include millions of human beings who have made mistakes in the past and could do better in the future.

One of the understandings of evil that Kleinfeld describes is a settled disposition to do harm. Such a disposition is a characteristic of American culture. Mickey Spillane, possibly America’s best-selling novelist of the twentieth century,<sup>64</sup> wrote a series of detective novels in which his uncritically adored hero, Mike Hammer, was fortunate enough to meet dozens of intractably evil criminals whom he could then brutally execute. These killings were described with deep satisfaction, in graphic detail. President Trump likes the idea of torturing prisoners, even when he has been told it is ineffective, and even when there is no specific situation before him in which it might seem to be necessary.<sup>65</sup> Evidently we love this kind of thing.

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62. Kleinfeld, *supra* note 1, at 1011–12.

63. *Id.* at 976 (citing *Lockyer v. Andrade*, 538 U.S. 63, 66–68 (2003)).

64. John Sutherland, In Memoriam, *Mickey Spillane*, *GUARDIAN* (July 18, 2006), <https://www.theguardian.com/books/2006/jul/18/culture.obituaries>.

65. Adam Serwer, *Can Trump Bring Back Torture?*, *ATLANTIC* (Jan. 26, 2017), <https://www.theatlantic.com/politics/archive/2017/01/trump-torture/514463/>.

In a study of obscenity law some years ago, I observed that this type of violent fantasy is a staple of popular culture:

The typical scenario is one in which it is first established that there are some truly terrible people, for whom no punishment would be sufficiently severe. Then the hero, after considerable difficulty, proceeds to do in these nasties, one by one. The audience cheers, because they have been given a permissible outlet for their own inclinations to violence. As with pornography, the fantasy has created a context in which it is safe to pursue a dangerous kind of pleasure—more dangerous here than in the sexual case, because it is clear that the bad guys are not consenting to what is happening to them. Unlike the pornographic fantasies, the evildoers' pain and fear is a necessary element of the fantasy.<sup>66</sup>

It is widely understood that violent *sexual* fantasies are dangerous if their audience cannot separate fantasy from reality. The same point is made less often about “action movies.” In the latter case, though, these sadistic daydreams do seem to bleed over into actual action. Americans evidently have a great yearning to hurt someone, and they pounce on the opportunity when it arises.<sup>67</sup> And they don't seem to be particularly inquisitive about who that is.

Kleinfeld observes the increasingly harsh treatment of juveniles was the product of the “superpredator” myth, which was almost immediately disavowed by one of its leading proponents.<sup>68</sup> But the notion immediately struck a cultural nerve, and produced a radical reshaping of our juvenile justice system into a network of massive factories for the destruction of children.<sup>69</sup> The evidence for the “superpredator” theory was pathetically thin,<sup>70</sup> but that didn't matter. Evidently we were primed for this kind of thing. We wanted it to be true.

American criminal justice's harshness began as a response to a real problem: the spike in crime, including violent crime, beginning in the late

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66. Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1661 (2005).

67. America has been unusually susceptible to the creation of demons. “Savage Indians, satanic witches, Irish priests, Mormon polygamists, slave traders, saloon keepers, smut peddlers, drug pushers, Internet providers, and generations of black men would all take their turn as a menace to the nation's innocent white women or children.” JAMES A. MORONE, *HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY* 2 (2003).

68. Kleinfeld, *supra* note 1, at 1030–31.

69. BERNSTEIN, *supra* note 49, at 71–80.

70. *Id.*

1960s. That had to be dealt with, and incarcerating criminals was a rational response. But the practice has taken on a life of its own. Prison populations continued to rise even after crime began to decline.<sup>71</sup>

A lot of the pathologies of the present system are unintended side-effects of policies that sounded good before we implemented them, such as making criminal sentences more uniform. “Mass imprisonment was not a policy that was proposed, researched, costed, debated and democratically agreed.”<sup>72</sup> But as its catastrophic consequences have become clear, we have shown little inclination to modify it.

The Model Penal Code regards, as an instance of the most culpable form of murder, homicide as “committed recklessly under circumstances manifesting extreme indifference to the value of human life.”<sup>73</sup> In such cases, death is caused by “the intentional doing of an uncalled-for act in callous disregard of its likely harmful effects on others.”<sup>74</sup> One need not intend harm. One who endangers others “for his diversion merely”<sup>75</sup> manifests a “depraved mind, regardless of human life.”<sup>76</sup>

In America, we have collectively decided that our interest in feeling superior to all those bad guys outweighs the atrocity of mass incarceration. This has gone on for years. The culture appears to have a settled character that is disposed to this form of malevolence or depraved indifference.

In his first edition of *Economic Analysis of Law*, Judge Richard Posner observed that the American criminal justice system appears to be irrational, because there are cheaper ways to deter criminal behavior than mass

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71. The cause appears to be a growing inclination by prosecutors to bring felony charges against arrestees who previously would have been permitted to plead to misdemeanors or less. See JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* 9–10 (2017).

72. David Garland, *Introduction* to *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* 1, 2 (David Garland ed., 2001).

73. MODEL PENAL CODE § 210.2(1)(b) (AM. LAW INST. 1985).

74. *Commonwealth v. Malone*, 47 A.2d 445, 449 (Pa. 1946).

75. *Brown v. Commonwealth*, 17 S.W. 220, 221 (Ky. 1891).

76. *State v. Thompson*, 558 P.2d 202, 205 (Wash. 1977).

incarceration.<sup>77</sup> Arthur Leff, reviewing the book, suggested that perhaps Posner misunderstood the intended maximand:

What if [society] doesn't want deterrence, or even rehabilitation, but the satisfaction of some other interest, revenge say, or what (if one were being judgmental) one might call sadism? After all, a link between prison and increased crime has been suspected by quite a number of people for quite a long time. There has even been some evidence of a link between the nastiness of the prison and the *rate* of increased crime. Nonetheless there has been firm opposition, at least from large segments of the public, to any decrease in imprisoning or amelioration of prison life. It is altogether possible that while the society does see increased crime as a cost, it considers it one well worth incurring in order to experience the otherwise socially unobtainable joy of inflicting pain.<sup>78</sup>

Kleinfeld's article offers powerful support for Leff's theory.

Some aspects of the criminal justice system can only be explained as manifestations of the joy of destruction. Kleinfeld observes that most Americans are aware of the ubiquity of rape in prison, but they nonetheless think that prison is either not harsh enough or about as harsh as it should be. They also routinely make jokes about prison rape. Kleinfeld argues that this shows how American culture *devalues* prisoners. Prisoners, he writes, can be raped because their rights "just do not matter that much[;]"<sup>79</sup> their suffering is a matter of indifference. But their suffering is not a matter of indifference. It is a matter of glee.

#### CONCLUSION

America maintains, at huge expense, an immense industry whose purpose and effect is the mindless or malevolent destruction of human lives.

One may respond that it is a category mistake to attribute evil to a complex social system. The system that I have described was not consciously designed by anyone. It is the product of a large number of individual, uncoordinated

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77. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* § 7.1 (1st ed. 1973). Kleinfeld writes: "As a practical matter, what stands in the way of extremely harsh and permanent punishment for incorrigibly dangerous offenders is a moralistic ideology of human dignity and rights." Kleinfeld, *supra* note 1, at 1015. Posner is a counterexample: he has no interest in that moralistic ideology, but he thinks that the present system is a massive waste of funds and human capital.

78. Arthur Alan Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 465 (1974).

79. Kleinfeld, *supra* note 1, at 998.

decisions, most of which were probably rational within their context. It therefore is neither just nor unjust.<sup>80</sup> But that response would call into question Kleinfeld's entire approach. His core methodological claim, once more, is that "our social practices and institutions are constituted as they are in part because of values that are implicit, immanent, instantiated, or embodied in them."<sup>81</sup> The members of a culture are not separable from their ways of doing things, even if those ways have evolved over time without conscious design. His work shows that it is sometimes illuminating to treat a culture as though it were an intentional actor. If the American criminal justice system were an intentional actor, it would be a mighty nasty one.

It no doubt will seem overwrought to say that the American system is evil. Doubtless you know a lot of Americans—so do I—and they are very nice people. But we are the ones who are doing this. Evidently we are happy to keep doing it. That's evil.

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80. See 2 FRIEDRICH HAYEK, *LAW, LEGISLATION, AND LIBERTY: THE MIRAGE OF SOCIAL JUSTICE* 31 (1976) ("Strictly speaking, only human conduct can be just or unjust. If we apply the terms to a state of affairs, they have meaning only so far as we hold someone responsible for bringing it about or allowing it to come about.").

81. Kleinfeld, *supra* note 5, at 1487.