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Adam, Eve, and Emma: On Criminal Responsibility and Moral Wisdom

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I. INTRODUCTION

At the heart of every social institution and of every literary or legal text are unarticulated assumptions about human nature and experience. One remarkable and singular contribution of Professor Herbert Morris has been to examine criminality and punishment to uncover their tacit picture of experience. At the same time, he has used the many stories of our culture—from Adam and Eve to Emma Zunz, from stories of child rearing to psychoanalytic stories of neurosis—to investigate the moral emotions and offer an illuminating analysis of guilt, shame, and innocence. Finally, he has carried the lessons of moral philosophy and introspection back to criminal law to describe the institutional parameters of an improved system respectful of our mutual moral rights and obligations. In this paper, I try to uncover the themes that make his work so humanistic and compelling and compare them briefly with alternative accounts of criminality.

II. ADAM AND EVE AND BEING HUMAN

In his essay, Lost Innocence, which is the fifth and final chapter of On Guilt and Innocence, Herbert Morris sums up the lessons of the story of Adam and Eve:

To appreciate that there is evil in the world, to hold to no illusions about it, to be serious about it, to have experienced its many manifestations, to have seen as well as evil what allows for its being overcome, to see all that makes for the good and to give it due weight—these seem among the essential

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Professor Morris links lost innocence, moral wisdom, and "a life of a certain depth and scope."3 By "depth and scope," I take it that he is alluding, among other things, to the central role in an examined life of reflection and self-reflection—not merely the capacity but also the exercise of critical moral analysis and evaluation of one's actions and those of others. "Depth and scope" must be reflected not simply in one's thinking, but also in one's feelings and actions. Indeed we must avoid the linguistic, conceptual, Platonic temptation to talk about thoughts and beliefs, feeling and emotions, and actions as separable dimensions of experience. Human nature, in the way it interests Morris, cannot be cabined. Guilt, for example, involves thinking about one's self and one's actions in a certain way—and is itself a way of feeling, one that disposes a person to act and refrain from acting.

In this paper I will examine some of the parameters and assumptions of the flourishing of human nature toward moral wisdom as it is presented in Morris' essays. First, I will argue that, as a goal and ideal, it shapes his account and justification of punishment. Second, I will consider its roots in one kind of Freudian or psychoanalytical view of what it is to be a human being. Finally, I will look briefly at competing accounts of human nature and criminal responsibility that seem incompatible with at least some of Morris's assumptions and applications. In doing so, I will use as illustration the situation of Emma Zunz in Borges' story of that name,4 the subject of Morris's most recent essay.5

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2. Id. at 161.
3. Id.
III. Methodological Preliminaries

In his seminal essay, *Persons and Punishment*, which appears as Chapter 2 of *On Guilt and Innocence*, Morris defends what he calls one's inalienable right to be treated as a person, a right that human beings have simply by virtue of being human. The essence of that right is a matter of respect and responsibility. Respect for persons is recognition that persons are autonomous but interdependent beings capable of understanding alternatives for action, shaping their conduct in accordance with rules, taking account of incentives and consequences, choosing among possible actions, and deserving praise or blame for those choices. All of these elements are presumed when we say that persons are appropriately held responsible for their actions. Treating someone as a person involves moving from an explanatory framework of cause and effect to one dealing with reasons for actions, justifications, excuses, and rules. Morris alludes to this latter way of thinking as showing how "human beings pride themselves in having capacities that animals do not." This picture of human nature, he reminds us, is one in which satisfaction at achievement is possible and in which shame, resentment, gratitude, and pride are all appropriate feelings and attitudes.

Nowhere in his writings does Morris directly confront what many regard as the Achilles heel of this familiar description of persons or human nature. For the most part he judiciously avoids the terms "will" and "free will" per se, cognizant, one imagines, of the philosophical baggage they carry. Methodologically, he uses philosophical argument to clarify the terms with which we refer to experience, not to question them. In the Austinian tradition, he tries to be as sensitive as possible to the complexity of the "things we do with words," assuming that illumination into human nature is to be achieved through linguistic phenomenology, through inquiry into our understanding of what we mean when we speak of guilt, shame, and innocence. Accordingly, if a theory implies that choice is an illusion and feelings of satisfaction are also illusory because they rest on assumptions about freedom of choice,

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7. *Id.* at 53.
8. *Id.* at 50.
9. *Id.* at 42.
so much the worse for the theory. Theories are tested by their usefulness in explaining experience; the familiar elements of experience, our familiar ways of referring to experience and understanding it, on the other hand, are not in jeopardy simply because they fail to fit the matrix of a particular theory.

When Morris offers criticisms, they are, in the Wittgensteinian tradition, criticisms of mistakes generated by bad theories. In *Persons and Punishment*, he contrasts familiar institutions of punishment, which are examples of a practice of holding persons responsible for their conduct and accordingly respecting their personhood, with proposed institutions that “proceed . . . on a conception of man which appears to be basically at odds with that operative within a system of punishment.” In the latter framework, “when an individual harms another his conduct is to be regarded as a symptom of some pathological condition in the way a running nose is a symptom of a cold.” He describes the contrast as a matter of responding to crime with punishment as opposed to responding with therapy, and he argues that the latter is a mistaken way to proceed.

What kind of mistake is the mistake of responding to crime with therapy? Is it a conceptual mistake, one that follows from a mistaken account or theory of human conduct? Is it a moral mistake, one that involves ignoring the moral entitlements of persons, the respect which they deserve? Note that the argument is not about where to draw a line between responsibility and non-responsibility; Morris’ concern is not that some persons who are regarded as non-responsible, as excused, or as having mitigated responsibility, should be held fully responsible. The debate is about how to regard criminal conduct in general.

Arguably the mistake is both conceptual and moral. Morris says that “[t]he right to be treated as a person is a fundamental human right to all human beings by virtue of their being human. It is also a natural, inalienable, and absolute right.” Every person has this package of rights that are inseparable from being “treated as a person.” At the same time, being a person is a matter of moral entitlement; to be treated in a way that demeans one’s personhood is to be morally wronged.

Is this concept of a person culturally relative? On one hand, Morris’ elaboration of the right to be treated as a person bears the

12. See MORRIS, ON GUILT AND INNOCENCE, supra note 1, at 36.
13. Id.
14. Id. at 49.
15. Id.
indelible marks of Western liberalism and individualism. He places a premium on self-scrutiny and on scrutiny of our relations with others. He assumes that any instance of unequal treatment—for example, of offenders and non-offenders—and any deprivation of freedom needs moral justification. As Brian Barry reminds us, the notion that “inequalities are a social artifact”\(^\text{16}\) and that “doctrines should be open to critical scrutiny and that no view should be held unless it has in fact withstood critical scrutiny”\(^\text{17}\) are liberal ideas, part of our shared legacy from the Enlightenment.

On the other hand, the inherent rights of persons in his account are universal. One is no less a person if one is born into a culture that is hostile to certain inalienable rights. The moral wisdom that Adam and Eve acquire after eating the fruit of the tree of knowledge is the universal inheritance of all persons; the moral rights they have by virtue of being persons is not dependent on a particular culture or a particular history.

IV. ON BEING A PERSON AND BEING A WRONGDOER

Morris' account of personhood, the rights of persons, and moral wisdom gives us a framework to address his account of punishment. In *Persons and Punishment*, and a later article, *A Paternalistic Theory of Punishment*,\(^\text{18}\) he criticizes and rejects what he calls a therapeutic model of the treatment of offenders but endorses what he calls a paternalistic model of punishment. Superficially, these claims seem paradoxical. A therapeutic approach to offenders would seem to be motivated by the purpose of rehabilitation, and rehabilitation, in turn, seems to require a paternalistic attitude toward such offenders. Therapeutic methods and paternalistic goals thus seem to be in harmony.

For Morris, therapeutic responses to wrongdoing have a narrower focus. They are characteristic of a system in which an individual’s harmful conduct is “regarded as a symptom of some pathological condition in the way a running nose is the symptom of a cold.”\(^\text{19}\) Therapeutic treatment is administered as it would be for a disease; that the disease is a matter of conduct or behavior rather than a condition of

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17. *Id.*
19. See MORRIS, ON GUILT AND INNOCENCE, supra note 1, at 36.
mind or body is irrelevant.\textsuperscript{20} Morris' fundamental objection to such therapy is that it violates the "natural and inalienable" right of all persons to be treated as persons.\textsuperscript{21} To be treated as a person is to be regarded and respected as a being whose behavior is a manifestation of choice, a choice to violate the rules that are understood and accepted to guide the coordination of interests for members of the community. Moreover, the denial of the right to be so regarded "entails the denial of all moral rights and duties."\textsuperscript{22} Morris argues that it is "surely intuitively clear that any framework of rights and duties presupposes individuals that have the capacity to choose on the basis of reasons presented to them, and... what makes legitimate actions within such a system are the free choices of individuals."\textsuperscript{23}

The familiar system of social response and punishment that Morris endorses is one in which the rules of law anticipate a particular distribution of benefits and burdens and in which wrongdoers choose to disrupt the fair distribution of such benefits and burdens, causing a maldistribution.\textsuperscript{24} Punishment "restores the equilibrium... by taking from the individual what he owes, that is, exacting the debt."\textsuperscript{25}

The main point here is the claim that the wrongdoer chooses to act within a shared practice and implicitly signs on to the consequences of his act, not the claim that equilibrium is the result of punishment. Morris would concede, I imagine, that not all offenders benefit from their crime, that not all crimes entail burdens on victims, and that weighing the ostensible benefits and burdens is endlessly difficult and controversial. As I read his account, it merely posits that offenders seek to gain some benefit from their rule-violating acts, even just the satisfaction of having broken a rule. It is appropriate to punish offenders not because we must exact from them a burden that precisely cancels their benefit and rectifies a balance, but because choosing to do wrong inevitably creates stresses in a system of general rule obedience. Under such circumstances, Morris claims, the general right to be treated as a person entails the particular right to be treated as an actor who has

\textsuperscript{20} An intriguing fictional treatment of this situation is to be found in Samuel Butler, Erewhon (1872).

\textsuperscript{21} See Morris, On Guilt and Innocence, supra note 1, at 50.

\textsuperscript{22} Id. at 56.

\textsuperscript{23} Id. A similar argument is made in response to the work of British criminologist Barbara Wootton by H.L.A. Hart, Punishment and Responsibility 158-186 (Oxford Univ. Press 1968).

\textsuperscript{24} See Morris, On Guilt and Innocence, supra note 1, at 34.

\textsuperscript{25} Id.
chosen to unbalance the system. It entails, paradoxically, the right to be punished.  

Although this defense of punishment is framed in terms of benefits and burdens and trade-offs among them, it is not a utilitarian account. Morris does not claim that a maximization of benefits is the goal of a system of punishment or its justification. Rather, the actor who chooses to attain a benefit by imposing a burden in violation of a rule inherently deserves punishment. This is her entitlement, her right, regardless of the consequences. The account, is also, he makes clear, not a retributive account. "A paternalist, attached to the good of the wrongdoer, would reject retributive justice and utility as the sole determinative criteria [of punishment], and would propose a good to be realized that is independent of these values."  

Morris's objection to both retribution and utility is the following. A paternalistic theory of punishment "makes morally impermissible, despite what [a wrongdoer] has done, [any punishment] that would be inconsistent with [the] fundamental right [to be treated as a moral being]," while utilitarianism and retributivism may in appropriate circumstances endorse such punishments. The problem with both retributivism and utilitarianism is that they allow us to treat wrongdoers as means rather than ends in a morally inappropriate way. Utilitarianism allows us to punish them for the greater good of the community, while retributivism sanctions punishment to implement an abstract notion of justice.

The sense in which Morris's theory is paternalistic needs further explanation. We saw that, in his rejection of a so-called therapeutic model, he alluded to imbalances and advantages brought about by criminal conduct and to punishment as a rectification of such balances. This sounds like a concern with retribution. In its concern with benefits and burdens it also borrows some of the language of utilitarianism. Only in the later essay, A Paternalistic Theory of Punishment, does it become clear that Morris' main focus is on the effects of punishment on the offender and only secondarily on the effects on the system as a whole, the community as a whole. The fundamental demand Morris makes on punishment is that it show "complete respect of the moral

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personality of the wrongdoer."\textsuperscript{29} The goal of punishment is to draw on the wrongdoer's "imaginative capacity to take in the implications for [his] future self of the evil [he] has done." The nature of wrong must be "comprehended in the way remorse implies comprehension of evil caused."\textsuperscript{30} Ultimately, the wrongdoer must appreciate, as Morris says, citing Socrates, "that he has done himself by his wrongdoing . . . a moral evil greater than he has done others."\textsuperscript{31} Repentance, to be significant, must be "freely arrived at and not merely a disposition toward conformity with the norms."\textsuperscript{32}

In summary, then, a paternalistic practice of punishment elicits from the offender empathy and a sense of guilt, and it does so by appealing to her as an autonomous actor and a moral being. While some of the results sought by other accounts of punishment will be achieved by such a practice as well, they are of secondary concern. For example, the wrongdoer will be deterred from further criminal conduct because she will self-monitor her acts in morally sensitive ways. Benefits will be achieved and burdens minimized to the extent that, individual by individual, conformity with rules exists. Other results, however, may not be achieved. It is not clear that Morris' recommendations would achieve general deterrence as efficiently as a regime of fear or that feelings of revenge would be gratified. But his claim is that these latter ends cannot be satisfied by a morally acceptable system of punishment.

Morris readily concedes that the practical, including political and economic, difficulties in implementing his theory are formidable. His analysis is emphatically a theoretical account, an examination of punishment in the light of intuitively plausible moral parameters, and not a concrete proposal. There is little reason to think that his suggestions would be palatable politically. One can only guess at the resources that would be needed to bring about a system with the effects he has in mind. The problem is not merely economic but also methodological. There is hardly agreement among psychologists and other "experts" on behavior about the kinds of conditions and regimens that would generally change wrongdoers into persons guided by moral wisdom.

\textsuperscript{29} Id. at 266.
\textsuperscript{30} Id. at 265.
\textsuperscript{31} Id. at 268.
A second qualification is merely terminological. Critical as he is of the term "therapy" in the context of treatments that annihilate personal responsibility, Morris would have to admit that he himself is proposing punishment that acts as a kind of therapy. Like the rejected kind of therapy, his conception, Morris admits, entails a "forceful intrusion into the lives of people," but one that respects their nature as moral choosers and actors. Intrusions are defensible to the extent that they do not compromise that nature. It seems fair to say that punishment, in Morris' sense, seems to have as its purpose the transformation of moral potential into moral actuality. While the wrongdoer can potentially respect the interests of others (and herself), guilt, shame, and other moral emotions—as ingredients of self-regulation—need to be made effective. The process seems to be a kind of moral therapy.

V. HUMAN NATURE AND MORAL CHANGE

To the extent that Morris can be said to speculate about human nature, he looks at what it is like to be a fully realized moral being and how one becomes a reflective moral being. Moral experience, in his convincing characterization of it, is a matter of acts, emotions, dispositions, feelings, and beliefs inseparably combined. In Morris' writings the issue of realizing one's moral potential—and what the process is like—comes up in at least four different contexts. Adam and Eve gaining knowledge of good and evil, children becoming morally responsible adults, and psychiatric patients coming to take moral responsibility for their actions offer three occasions for Morris to explain significant aspects of moral experience and actions. And all three, as I shall argue, shed light on the fourth context, the assumptions and aims of a paternalistic account of punishment. According to such an account, punishment's principal aim is to catalyze the wrongdoer's potential for moral agency and moral feeling. I shall now consider the ways in which three other contexts of moral development, all discussed by Morris, can be compared with his discussion of the punishment context and perhaps shed light on it.

33. See Morris, A Paternalistic Theory, supra note 18, at 271.
A. Adam and Eve

Morris describes Adam and Eve’s loss of innocence in the following way. “As the fruit manifests its magical powers . . . , Adam and Eve acquire a sense of shame, experience a loss of innocence, and standing before each other, experience shame before each other.”34 With this dawning of shame comes “the acquisition of the knowledge of good and evil, the acquisition of the capacity to apply these concepts appropriately, [which is] something that is an essential component of any case of lost innocence.”35 He explains that

[loss of innocence gives us knowledge, then, not merely of what is right and wrong . . . , but a knowledge of evil and the set of dispositions to act and feel that are connected with this knowledge . . . . The insight to which I have been referring is fused with feeling, not contingently but necessarily so.”36

This experience is “essentially related to painful experiences whether one grasps oneself as the subject or object of evil . . . . [While o]ne’s sense of right and wrong reflects itself principally in indignation and guilt, one’s sense of evil reflects itself in being abashed, appalled, horrified.”37

Morris’ description of the character and experience of lost innocence can easily be transposed to his discussion of a paternalistic form of punishment. His account of the goal of punishment as a process that realizes “the good of one’s moral personality,”38 as one that elicits “one’s general character as a morally autonomous individual attached to the good”39 is similar to his characterization of Adam and Eve after their loss of innocence. This is curious because an alternative description of lost innocence seems at least equally plausible. Why must the dispositions attached to the loss of innocence be those that incline one toward conformity with the good? Why must a sense of good and evil be a matter of feeling horrified and appalled in the face of evil? It is as easy to imagine Adam and Eve morally confused or morally corrupt as morally wise. To be sure, I agree with Morris that loss of innocence necessarily implies more than cognitive capacities, more than the ability

34. See Morris, On Guilt and Innocence, supra note 1, at 140
35. Id. at 151.
36. Id. at 154-55.
37. Id. at 156.
38. See Morris, A Paternalistic Theory, supra note 18, at 268.
39. Id. at 266.
to understand acts in moral terms. It involves feelings of guilt and shame; such feelings make moral knowledge possible. But the range of feelings that Adam and Eve discover for the first time may dispose them to feel and act in many different ways. Along with the knowledge of good and evil may come envy, fear, and mistrust. Along with horror at evil may come the perverse temptation to experience it firsthand.

One must distinguish, therefore, between the potential for moral wisdom and the realization of it. It is gratuitous to assume that Adam and Eve, in losing their innocence, have anything more than the potential, anything more than inchoate feelings and perceptions that may lead to diverse patterns of conduct and rationalization. If Morris' description of lost innocence as the attainment of a kind of moral wisdom is similar to the state of being we might seek to achieve through paternalistic punishment, the description seems more fully justified as a description of the latter than the former.

Anticipating this kind of objection, Morris observes that the story of Adam and Eve telescopes a long process. "[T]he myth of Adam and Eve eating the fruit and thereby acquiring knowledge of good and evil surely collapses into a moment of startling illumination and disorientation what must have been a gradual process in the development of the human race and more to our purpose, so it may be thought, its development within any single individual." He adds that "the tale can mislead if it suggests that the acquisition of the knowledge of good and evil, the acquisition of the capacity to apply these concepts appropriately, something that is an essential component in any case of lost innocence, is an instantaneous achievement." Adam and Eve, therefore, are simplified models of moral development because they lose their innocence and gain moral wisdom (on Morris' account) all at once.

B. Children and wrongdoers

A second context of moral development, one that Morris himself uses to illuminate the goals of paternalistic punishment, is the development of children into adults. In introducing the topic of a paternalistic account of punishment, Morris reminds us of what we know about parents and children. "The child's developing individuality and sense of personal responsibility require that others encourage in it a

40. See MORRIS, ON GUILT AND INNOCENCE, supra note 1, at 150.
41. Id. at 151.
sense of its own power and competence.”42 Later in the article, he discusses this aspect of child rearing at length. “Sometimes, [parental] coercion enters in with respect to matters that are moral . . . . Slowly such values as obedience, respect, loyalty, and a sense of personal responsibility are integrated into the young person’s life.”43 He explains further that sometimes “because of punishment children come to acquire an understanding of the meaning of a limit on conduct . . . . [P]articular punishments that are chosen often communicate to children the peculiar character of the evil caused by their disregard of the limit, the evil to others and the evil to themselves.”44 He adds that this practice of punishing is a “complex communication to the child,”45 one that elicits appropriate feelings of guilt and a commitment to accept rules and limits.

Thus, in an article devoted to a paternalistic account of criminal punishment, Morris gives a much more detailed and nuanced account of parental punishment of children than institutional punishment of adults. He draws an illuminating analogy between the two and argues that they are similar, that we have much to learn from the punishment of children in punishing adult wrongdoers. But the shift from children to adults seems to require very little adjustment of his argument. One might even say that he bases the punishing of wrongdoers on the disciplining and moral education of children.

Thus, he observes that, with adults as with children, punishment aims to “promot[e] the good of one’s moral personality.”46 Since “the evil that he [the wrongdoer] has done himself by his wrongdoing is a moral evil greater than he has done others, [h]is soul is in jeopardy as his victim’s is not.”47 For this reason, punishment must be “a forceful reminder of the evil that is done to others and oneself. Were it not present, and were it imposed in circumstances markedly at odds with criteria for its imposition during the process of moral development, only confusion would result.”48 Accordingly, “the wrongdoer is not viewed as damned by his wrongful conduct to a life forever divorced from others”;49 rather, punishment aims to make wrongdoers “responsible in

42. See Morris, A Paternalistic Theory, supra note 18, at 263.
43. Id. at 266.
44. Id.
45. Id. at 267.
46. See Morris, A Paternalistic Theory, supra note 18, at 268.
47. Id.
48. Id.
49. Id.
the sense that they possess a knowledge of and an attachment to the values embodied in the society’s laws.”\textsuperscript{50} Morris quotes Brandeis’ observation that “government is the potent, the omnipresent teacher.”\textsuperscript{51}

In at least four ways, this assimilation of punishing wrongdoers to punishing children is questionable, if not counterintuitive. First, parents have a direct and immediate responsibility for the nurture of children insofar as they create and manage the context in which dependent beings come to first consciousness and self-consciousness. While good parenting does not insure moral behavior, arguably no one plays a more direct role in shaping the dawning of moral conscience than parents. The state or the courts surely do not have this relationship with wrongdoers. In an attenuated way, society makes up the collection of influences that shape an individual’s way of seeing herself and her conduct. But the nurture of a dependent child has no direct analogue in society’s responsibility for the moral development of adults. Perhaps Morris is arguing that society’s responsibility for wrongdoers must be reconceived in this way.

Second, blame attaches to adults in a way that it does not attach to children. To the extent that children and adolescents are understood to experience rapid and sometimes convulsive change in cognition, emotion, and feeling, blame and responsibility are ascribed to them in an attenuated sense. Of course we blame them and hold them responsible, but we do so with the caveat that they are relatively unformed, that their character has not quite crystallized, and that they are merely on the way to becoming fully responsible adults. Again, perhaps Morris is urging us to see wrongdoers more in the way we see adolescents.

A third question that may be raised about the comparison of child-raising and adult punishment is the assumption that, whatever else may be the case, the wrongdoer is “not damned . . . to a life forever divorced from others.”\textsuperscript{52} No harm is so great, no “soul” so lost, that punishment cannot effect a transition to a life of respect for others and for moral rules. In the context of child raising, this is, for the most part, uncontroversial. To the extent children are in process of being formed, we see them as subject to benign influence. Giving up on a child as unsalvageable runs against deep commitments. Can the same be said of adults? Or, are at least some wrongdoers incorrigible? One does not

\textsuperscript{50} See Morris, \textit{A Paternalistic Theory}, \textit{supra} note 18, at 267.
\textsuperscript{51} \textit{Id.} at 268.
\textsuperscript{52} \textit{Id.} at 267.
have to believe in capital punishment to see long-term separation of the offender from society to be appropriate in some cases, both from the standpoint of deterrence and desert. Perhaps Morris is encouraging us to reconsider this view.

Finally, we come to the conclusion that the wrongdoer does a greater evil to himself than to his victim because his "soul is in jeopardy." I confess a complete inability to measure harm to victims against damage to the soul of the wrongdoer, and I lack any concept of the integrity and robustness of the soul that allows me to entertain such a comparison. In the context of child rearing, damage to the moral potential of a child is very serious because such damage will have consequences for a lifetime. One can make sense of the notion that a child's soul is in jeopardy although one may prefer to speak of the child's potential for empathetic relationships and moral self-control. But with adult wrongdoers, it is arguable that damage is long-standing, that repeated acts of serious harming do little to change the disposition or nature of the actor but do a great deal to curtail the happiness, well-being, and potential of victims.

Morris is committed to the view that wrongdoers are morally and emotionally uncompleted individuals, ones who need and can benefit from "reminders of the evil that they do to others and themselves," ones whose moral personality needs prompting to emerge from its chrysalis. Like Adam and Eve, children serve as models of beings in transition. I have tried to raise some questions about the persuasiveness of the comparison in each case and some misgivings about the underlying theory of human nature.

C. Freud and Human Nature

Incomplete persons in transition are also the subject of psychoanalytic theory. In The Decline of Guilt, Morris refers to Freud's claim (in Civilization and Its Discontents) that "the sense of guilt [is] the most important problem in the development of civilization and... the price we pay for our advance in civilization is a loss of happiness through the heightening of the sense of guilt." Morris concludes, however, that "we may ourselves be in the midst of a transformation—

ironically guilt's slow demise after its slow ascendency." He argues that "[t]hrough a confluence of factors . . . the truth, indeed the rationality, of conceptions undergirding the practice of guilt have been thrown into question." He explains that "[a] person who feels guilt holds to beliefs of a certain kind, feels a certain way, and is disposed to feel and act in certain specific ways . . . . [Such a person] has internalized norms and, as such, is committed to avoiding wrong . . . . [I]n feeling guilt, [such a person] turns on oneself the criticism and hostility that one would have visited upon others had they done wrong."

In Decline of Guilt, Morris concludes that many "factors—increased anxiety, diminished capacity for identification with criminals, alienation, devaluation of law, and devaluation of justice—all put pressure upon guilt and pull us powerfully toward responding to wrongdoing and wrongdoers from the perspective of social efficiency and social control." As a result, "we are witnessing lessened respect for guilt and a lessening of our sense of guilt." In assessing "whether good or evil attend[s] this change," he suggests the latter and comments that Freud fails to understand "the important respects in which guilt and our sense of guilt mark our attachment to others, to values outside ourselves, and how bleak life would be were these absent."

In discussing "nonmoral guilt," in his article of that name, Morris explains that nonmoral guilt, for example guilt over one's thoughts unaccompanied by action or guilt over one's financial status or physical well-being, is evidence or marks of "identificatory ties with others." Although he explores the phenomenon of neurotic, excessive, obsessive guilt, he argues that not all forms of nonmoral guilt are neurotic, irrational, or undesirable.

If the purpose of a paternalistic mode of punishment is to realize the wrongdoer's potential for appropriate guilt and empathy and to turn

55. Id. at 70.
56. Id. at 71.
57. Id. at 66-67.
59. Id. at 75.
60. Id.
61. Id. at 76.
her into an autonomous and responsible person guided by moral consideration, it is hard to distinguish it from the purposes of psychotherapy and similar interventions. Arguably, the pathology or incompleteness Morris attributes to wrongdoers, the condition that makes them appropriate subjects for paternalistic punishment, is comparable to the condition of patients in therapy. Even if one cannot say that Morris bases his understanding of wrongdoers on a Freudian model of neurosis, a common model of human development underlies both.

Consider four similarities. First, when Morris argues that punishment must respect "the moral personality of the wrongdoer,"\(^6\) he has in mind respect for someone who is capable of feeling the pain of others, experiencing guilt, understanding norms, and acting appropriately. That seems the appropriate stance of the psychotherapist toward her patient, the requisite degree of respect. Second, when Morris says that the wrongdoer harms himself more than he harms his victim, that questionable judgment becomes understandable if one sees the wrongdoer as someone whose neurotic patterns of maladaptation inhibit proper function as a morally responsible person. We are interested in neurosis to determine the harm the neurotic does to himself; we only have the same focus of interest with wrongdoers insofar as we attend to them as patients. Third, the aim of a paternalistic mode of punishment is, according to Morris, the return of the wrongdoer to a society in a role of responsibility and moral citizenship. This may seem curiously parochial in its disregard of other aims and interests, unless the psychoanalytic analogy is made central. The aim of the therapist/patient relationship clearly is the well-being and well-functioning of the patient. Finally, an emergent theme in recent writings on psychotherapeutic method is transformation of the patient from someone who disowns her actions to someone who claims authorship and responsibility.\(^6\) The goal of a paternalistic regime of punishment would seem to be the same. The wrongdoer would return to the moral community as someone self-consciously guided by incorporated moral principles, by moral feeling—extending beyond moral guilt to the non-neurotic forms of nonmoral guilt.\(^6\)

\(^6\) See Morris, A Paternalistic Theory, supra note 18, at 266.
\(^6\) See, e.g., ROY SCHAFFER, LANGUAGE AND INSIGHT (1978), and A NEW LANGUAGE FOR PSYCHOANALYSIS (1976).
\(^6\) In Nonmoral Guilt, Morris concludes that guilt over one's thoughts and over such matters as unjust enrichment reflect a moral posture of identifying one's interests with those of others and that such a posture is hardly irrational or neurotic.
D. Blame and The Stranger

I have compared the flourishing of human nature that Morris subsumes under a paternalistic regime of punishment with three other transitions—that of Adam and Eve becoming outcasts, that of a child becoming an adult, and that of a successful psychotherapy. In each case the transition is to what Morris would call "a life of a certain depth and scope, [one characterized by] the capacity to apply [knowledge of good and evil] appropriately, a set of disposition to act and feel." An appropriate sense of guilt, ready empathy, and critical self-understanding all play essential roles in that orientation. My guess is that, of all the iterations of this model of human nature, the psychotherapeutic one is the default commitment that shapes Morris' descriptions of the others.

If this is roughly correct, it prompts a conundrum about Morris' view of criminal law and morality. We saw that Morris' convincing objection to any account of wrongdoing as a form of illness is that it shortchanges or even denies an essential attribution of responsibility and blame, an essential aspect of respect for the wrongdoer as an individual who chooses to act. But the psychotherapeutic model does not carry the implication of blame. The reason is not simply the pragmatic one that blaming a patient can set back the therapy rather than advance it. The reason is rather that the patient, by the very nature of her relationship with the therapist, is in transition. Assuming responsibility is part of the therapeutic process, part of a managed transition. But the blaming inherent in legal/criminal judgment and generally in moral judgment is, by contrast, a branding. It focuses on harm that cannot be taken back, and the future prospects of the actor—what she might do, see, feel, and understand—are irrelevant. Similarly, with Morris' two other examples, Adam and Eve and the transition of child to adult, the process of becoming a morally responsible human being is the point of each example, and blaming serves at most the admonitory function of moving the process along.

Morris' paternalistic account of punishment subsumes an account of human development along a trajectory which culminates in "the

66. See MORRIS, ON GUILT AND INNOCENCE, supra note 1.
67. This observation is about blaming others, not necessarily about blaming oneself or assuming blame. The latter may indeed be an aspect of becoming responsible.
morally autonomous individual attached to the good—an ideal that involves distinctive beliefs, feelings, dispositions, and attachments. The ideal roughly fits our goals in child-raising, our understanding of the goal of psychotherapy, and the plight of Adam and Eve. But the kind of blame inherent in criminal judgment involves a different model, one according to which the actor at the moment of wrongdoing is fully responsible, one according to which any individual trajectory of development is irrelevant.

The strains between these two models of human nature can be illustrated by Albert Camus’ great and influential novel, The Stranger (L’Etranger). There are many ways of looking at the protagonist, Meursault, and I will not strain your patience by offering one. I shall remind you only of a fundamental tension between seeing the novel as a story of transition and entertaining the demands of criminal judgment. Meursault, facing execution, comes to see life as development and possibility. “Try as I might, I couldn’t stomach this brutal certitude.”

“I came to the conclusion that what was wrong about the guillotine was that the condemned man has no chance at all, absolutely none. In fact, the patient’s death had been ordained irrevocably. It was a foregone conclusion.” Those judging him have no patience with transitions, have no inclination or reason to hedge their presuppositions about blameworthiness. However distracted, however dissociated—and Meursault is both when he commits his crime—the eyes of law see him as fully responsible, fully a legal and moral agent. As readers, we see the shallowness, even the irrelevance, of that assumption. If Meursault does not quite present himself as childlike or as a patient for psychotherapy, he is incomplete as a moral agent.

The novel begins with the death and funeral of Meursault’s mother. Meursault seems distracted, almost indifferent, at the funeral. In his trial, the prosecutor uses this fact against him to show hard-heartedness. Is his response to his mother’s death relevant to his legal guilt for homicide? Of course not. But, ironically, I am not sure how to see it from Morris’ perspective. It is surely relevant to an understanding of his moral capacities, his development as a moral person. How, in the end, should such an understanding color our determination of his legal guilt or innocence?

68. See Morris, A Paternalistic Theory, supra note 18, at 266.
70. Id. at 137.
71. Id. at 139.
VI. EMMA ZUNZ REVISITED

Emma Zunz, the protagonist of a short story by Borges,\(^\text{72}\) kills Aaron Loewenthal, who owns the factory in which she is employed and who once framed her father for embezzlement. Imagine that she is tried for homicide under a modern criminal code. The reader is privy to the fact that she constructs a false scenario of rape and self-defense. From the standpoint of the reader's understanding, she is guilty of intentional murder. She presents no obvious defenses, either in mitigation or exculpation of her crime.

How might Emma be punished? Would a paternalistic mode of punishment be appropriate? As I read her story, and I think Morris, in his extraordinary essay on *Emma Zunz*,\(^\text{73}\) would agree, her problem is not that she lacks "a life of a certain depth and scope,"\(^\text{74}\) that she needs to be brought to a full understanding of guilt, shame, and innocence, and that her potential for moral agency needs to be realized. If we look back at Morris' description of "the essential components of moral wisdom,"\(^\text{75}\) she seems to have them in full—she "appreciate[s] that there is evil in the world,"\(^\text{76}\) she "hold[s] to no illusions about it,"\(^\text{77}\) she has "experienced its many manifestations,"\(^\text{78}\) she has seen "as well as evil what allows for its being overcome,"\(^\text{79}\) and she has arguably "seen all that makes for the good and [given] it its due weight."\(^\text{80}\)

Emma's criminality is not explained by lack of moral feeling or moral agency. She commits a crime because the story she tells herself about good and evil and her role as a moral agent is not the story that the law tells in determining culpability. She manipulates the appearance of the situation to conform with law's story, but we who have access to her thoughts know better.

If we generalize the lesson of Emma's criminality, perhaps many wrongdoers do not lack moral agency and moral feeling but rather see themselves as central actors in a moral drama that does not correspond to the way law-abiding citizens see themselves. In his influential book,

\(^{72}\) See Borges, *Labyrinths*, supra note 4.
\(^{73}\) See Morris, *What Emma Knew*, supra note 5.
\(^{74}\) Morris, *On Guilt and Innocence*, supra note 1, at 161.
\(^{75}\) Id.
\(^{76}\) Id.
\(^{77}\) Id.
\(^{78}\) Id.
\(^{79}\) Id.
\(^{80}\) See id.
Seductions of Crime, Jack Katz argues that wrongdoers see themselves as moral agents within complex moral narratives. "Central to all these experiences in deviance is a member of the family of moral emotions: humiliation, righteousness, arrogance, ridicule, cynicism, defilement, and vengeance. In each, the attraction that proves to be most fundamentally compelling is that of overcoming a personal challenge to moral . . . existence."81

We can give two different accounts of the relation of moral experience to wrongdoing. Both are accounts of transition. According to one account, there is a universal trajectory of development towards moral wisdom. Appropriate feelings of guilt and shame, and the actions and reactions to which they give rise, are distinctive characteristics of autonomous and responsible moral actors. Children, neurotics, and wrongdoers are in one sense or another incomplete or arrested in their progress through this trajectory. In particular, wrongdoers are assisted by a paternalistic mode of punishment.

According to the other account, wrongdoers have rich moral lives and are guided by guilt and shame. The feelings and actions that are functions of guilt and shame are not necessarily appropriate or inappropriate, but they do conflict with the norms that society imposes. The stories that wrongdoers tell themselves about their responsibilities and the acts that fit these stories are morally complex. The actors themselves inhabit two worlds at the same time, the world according to their feelings and beliefs and the world that judges them. They are in transition not along a trajectory, but they are buffeted by conflicting moral universes.

According to the first account, blaming wrongdoers is problematic because their moral responsibility is, by hypothesis, incomplete, only partially realized. According to the second account, blame is understandable insofar as they are completely realized moral agents. The dilemma that underlies these accounts is, of course, not about wrongdoing at all but about human experience. The optimist will say that we are on the path to moral wisdom and harmony with others. The pessimist will say we are doomed to participate in conflicting stories about our moral selves and our responsibilities unto death.

In emphasizing the role of guilt as a moral emotion that helps explain self-understanding and our moral relationships with others, Herbert Morris is not transparently an optimist. But I think his

optimism is of a sophisticated kind, one that is mindful of the impossibility of Gardens of Eden and mindful as well of the human realities of self-reflection and guilt, respect for others, and responsibility. He demonstrates how, within those parameters, life is worth living richly. He argues that each of us, wrongdoers no less than others, has a right to such a life.