The Historical and Cultural Roots of Harsh Punishment

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America perceives itself and is perceived by others as part of the liberal West. Yet, at least in the area of punishment, argues James Whitman from the Yale Law School, America no longer belongs in this liberal company. Because of its "tough-on-crime" ideology and practice in the last twenty-five years, America has edged its way into the embarrassing company of countries like Iran, Nigeria, China, and even Nazi Germany. The comparison with Nazism might sound to the reader as exaggerated, yet, argues Whitman, one cannot ignore the analogy between the Nazi turn towards retributivism and the current direction in America. At least with regard to ordinary criminals (unlike political dissidents, Jews etc.), "there was a shade more of a drive toward dignity, and even mildness, in punishment in Nazi Germany, than there is in America today"!

I start with this provocative claim to give the readers a sense of the depth of the divide between America and Europe in their attitudes towards punishment. The difference is expressed not only in the American attitude towards capital punishment, an issue with which everybody is familiar, and in the new "shame sanctions," penalties which would be unthinkable in Europe. Harshness of legal systems can express itself in various forms and on different levels and, on Whitman's view, America's legal system is harsher than Europe's in all respects: America criminalizes a wider variety of conduct than Europe does (especially in the realm of commerce and sex); it subjects more classes of people to potential criminal liability

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(especially minors); the punishments it imposes are far less flexible and less individualized; its punishments are far more severe (American convicts serve sentences roughly five to ten times as long as their French counterparts); America is far less sensitive than Europe to the dignitary needs of inmates (e.g. privacy); and finally, the granting of pardons is much less common in America than in Europe.

To begin the book, Whitman does an excellent job of showing in detail how deep the differences between America and Europe (more accurately, France and Germany) are, thus preempting any possible objection that the differences he is trying to explain are marginal or incidental. In chapters two and three, he demonstrates a consistent move toward greater harshness in almost all aspects of the punitive system in America, compared to a consistent move toward mildness and reform in France and Germany. This divide between countries all belonging to the West and sharing more or less the same values is truly amazing, and Whitman’s main undertaking in Harsh Justice is to offer an explanation for it by exposing its deep historical roots.

The explanation cannot be given in terms of “modernity” alone, a la Durkheim, Foucault or others, because, while both America and France went through a process of modernization in more or less the same period of time, they moved in opposing directions as far as punishment is concerned. To understand this opposition, argues Whitman, we must refer to the different histories of America and Europe, in particular to the different social and political traditions that existed in these two continents in the eighteenth century.

The first and most central difference mentioned by Whitman has to do with the distinction between low- and high-status punishment. In France and Germany, there was a long history of guaranteeing high-status treatment to some convicts, mainly those convicted on political and religious grounds, together with the rich and the noble, while imposing degrading and harsh punishment on all the rest. When egalitarian ideas started to penetrate society and politics in the wake of modernity, they pushed towards the idea of the same punishment for all, and this took the form in Europe of leveling up. The history of punishment in France and Germany is the history of granting more and more privileges, previously afforded only to the higher classes, to all convicts and all criminals. Thus, “the treatment of the tiny minority of high-status prisoners was the germ from which much of twentieth-century punishment practices [in Europe] would eventually spring.”2 By contrast, in America, no such distinction between low- and high-status convicts existed. American prisons mixed all inmates together regardless of their social status or the nature of their

2. Id. at 125.
law-violation, and all inmates received the same treatment. The story of American history is that of the generalization of low-status treatment with all the harshness and indignity involved. Like in Europe, it is a story of leveling, but, unlike Europe, it is a story of leveling down.

And if one asks why America had no high-status punishment, the answer has to do with a fundamental difference in social structure between America and the continent. The American colonies had no aristocrats, and Americans cared far less about questions of status than Europeans did. Hence, America did not come up with any special form of punishment for aristocrats that could later serve as a basis for mild and respectful punishment for all. Note how original and surprising this suggestion is. Intuitively, one would have expected, as Tocqueville indeed did in the nineteenth century, that societies would become less harsh as conditions became more equal. Social inequality connotes injustice and a lack of proper respect for human beings, and all this is connected with the harsher punishment. But, on Whitman's account, as a matter of fact the opposite proved to be true: France and Germany, both strongly hierarchical in the eighteenth century, moved in the direction of mild and dignified punishment for all, while America, a relatively more egalitarian society, moved in the direction of harsh and degrading punishment.

No less original and unexpected is Whitman's second explanation for the divide between America and Europe, which has to do with the power of the state. One might expect that the more powerful the state and the fewer the restraints on its power, the harsher the punishments it would impose. Accordingly, one would guess that American resistance to state power would have led to a reduction of the power in the hands of the government and administration and, hence, to less severe punitive measures. But again, argues Whitman, the opposite holds true. It is precisely because America's power is relatively weak and restrained that punishment is harsh there, while stronger states, like France and Germany, make for mild punishment.

Why so? Firstly, Whitman argues, because of the intimate connection between sovereignty, especially monarchical sovereignty, and the notions of grace, mercy and pardon. To grant mercy or pardon is to give somebody less harsh treatment than would be expected given the circumstances and the individual who can do so is one who has powerful authority over the grantee. Furthermore, the authority—typically of the monarch—to grant pardon or mercy is usually unlimited. Those in the position to pardon can show grace to whomever they wish, just because they so wish. In other words, pardons confirm the absolute power of the monarch. This connection between the power of the state and mildness in
the form of pardon explains the astonishing fact that even the Nazis engaged in a lively pardoning practice with the mildness involved in it.\textsuperscript{3} The fascination of the Nazis with sovereignty could not fail to bring a fascination with grace too. By contrast, America never accepted the idea of a powerful, unlimited ruler, who could express unconditional sovereignty by, \textit{inter alia}, granting mercy and pardon. One can understand, then, why the power to pardon has never had the kind of public acceptability in America that it had, and still has, in Europe.

Being a strong state leads to milder punishment for a second reason, Whitman points out. The power of a state is manifested in the autonomy of its apparatuses, namely, the bureaucracies that steer it, which are to a significant extent insulated from democratic pressures. The stronger and the more independent the bureaucracy, the more restrained and sober its system of punishment. And since “tepid, bureaucratic routinization sets much of the critical tone in German and French punishment,”\textsuperscript{4} the result is the much weaker influence of popular feelings of anger and revenge, and, consequently, a milder policy of punishment. The same point can be made in a different way. The natural tendency of societies is to harbor resentment and seek revenge towards those who don’t play according to the rules and who are responsible for offenses and harms. If the masses have the say in how to take care of criminals through the democratic politics of mass mobilization, the result is toughness in dealing with crime, an attitude of the kind we witness nowadays in America. This result can be prevented only if some countervailing tendency exists, such as a strong and balanced bureaucracy, which is precisely the case in France and Germany. “An intimate nexus” exists, then, “between the politics of mass mobilization, unchecked by bureaucracy, and the making of harshness in criminal punishment.”\textsuperscript{5}

The legal and cultural history told by Whitman is fascinating and is based on scholarship of the kind one rarely finds today. Nevertheless, I am skeptical as to whether this history provides, as Whitman intends it to do, a convincing explanation for the phenomenon under discussion, i.e. the growing gap between Europe and the United States regarding the theory and practice of punishment. Let me start with what seems the most crucial omission in Whitman’s thesis, namely an account of the more recent history of America’s attitude to punishment. Whitman explicitly concedes that in spite of their different histories “the differences in punishment practice between the US and Europe seemed to be vanishing for a long time,” and professionals everywhere in the West—including in

\textsuperscript{3} Id. at 148-49.
\textsuperscript{4} Id. at 200.
\textsuperscript{5} Id. at 15.
the US—believed that individualized punishment “had permanently displaced older ideas of retribution.”6 This reduction in the differences between US and Europe occurred – needless to say -- in spite of their different eighteenth century histories, not because of them, which means that, by the late 1960s, the influence of these histories has faded away. But then what happened “suddenly”7 in the 70s that brought about such a significant transformation in American punitive measures? It can’t be the different histories of social hierarchy, because the effects of these histories had already been on the decline for some time. So even if the history told in the book is accurate, it seems to fail to explain the current divide (of the last twenty-five years) between the US and Europe. And if this explanation does not do the work, the central question of the book remains with no clear answer.

It would be rather presumptuous on my part to offer my own answer here, but maybe less so if I point to possible routes indicated (though underdeveloped) by Whitman himself. The first concerns the level of violence in American society. Whitman acknowledges the well-known fact that rates of violence are higher in the United States than in Europe,8 and the situation is especially bad (and certainly was so in the 70s) in the big cities. Thus, the contemporary widening divide between America and Europe might have to do not so much with their different social and political histories, but with the different challenges they had to face in terms of crime and violence. Maybe if France had to face the same level of violence in its major cities as the United States did, it would have become more open to American-style harsh measures. The current law-and-order movement in France, mentioned by Whitman in a note at the beginning of the book, might provide some support for this hypothesis. The second possible explanation has to do with the feeling, confirmed by empirical research in the 1970s, that rehabilitation simply was not working,9 so that the only way to stop crime was to “get tough.” Why this research came to fruition at that time is the kind of question which is always hard to answer, but there is no need to do so for the sake of the present argument. What is important is to realize the plausibility of a causal connection between this perceived failure of rehabilitation in the 1970s and the trend towards harsher punishment.

Let us turn back to the historical argument. How far can it take us, anyhow? Not as far as the book assumes. In the last pages, Whitman emphasizes that he is not assuming some universal law to the effect that

6. Id. at 193.
7. Id.
8. Id. at 204.
9. Id. at 193.
all societies with sharply defined status hierarchies necessarily evolve into countries with mild punishment practices, but only that traditions of state authority always matter. But if so, then we still need an explanation as to why the particular traditions of Europe and America developed in the way they did. If other states exist with a tradition of relatively weak bureaucracies and with no monarchical legacy and, yet, they maintain a mild punishment system, then a crucial element in the explanation for the situation in America is missing. This element is what Whitman himself refers to as the “something in the American idiom, something in American culture, that is driving us toward harsh punishment.”

What is this something that has been driving America towards retribution and harshness? After all, things could have turned out differently. America has seen moral progress during the last century in so many areas despite a long history of oppression, discrimination, and prejudice. This progress was made possible not only because of external forces and processes, but also because there was something in American culture that made it open to these progressive moves, something which has to do with ideas such as respect for humanity, the centrality of rights and the value of freedom. Why, then, did this progress leave the area of punishment more or less untouched, while, at the same time, the continent was witnessing a consistent move to milder punishment, individualization and respect?

It seems to me that the question cannot be fully answered without reference to the depth of the retributive notion in American culture. The retributive idea that the bad guys must pay for their evil acts, epitomized powerfully in American Westerns, is so deeply rooted in American culture that it might have pushed America to a harsher punishment policy than Europe even if its history of social status had run more closely parallel to that of Europe than it actually did. Thus, the divergence in their histories of social status might have had some causal role to play, but it seems to me a much smaller one than that assumed by Whitman. It definitely does not form the explanation for the divide between Europe and the United States regarding punishment, as Whitman claims.

Similarly, in spite of its originality, explaining the divide between America and Europe in terms of the contrast between leveling-up and leveling-down is unsatisfactory, because in the end we don’t grasp why America chose leveling down (or, more accurately, generalization of low-status) while Europe chose leveling up. Whitman’s explanation is that, in Europe, low-status punishment would trigger collective memories of past status degradation, memories that would discourage the endorsement of such punishment, while in America, no such memories exist that could

10. Id. at 6.
11. Id. at 7.
countervail the demand for retribution.\textsuperscript{12} But this can't be the whole story. As Whitman himself notes,\textsuperscript{13} there is a good reason to expect that American collective memory would also push towards milder and more dignitary punishment, namely, the collective memory of slavery, in particular of slave punishment: "One might expect, or hope, that the memory of the slaveholding South would serve to push American legal culture in the direction of a dignitary evolution like that of Europe."\textsuperscript{14} Whitman tries to overcome this difficulty by suggesting that while most Europeans sympathize on some level with their low-status ancestors because most of them can say, "we were all once at the bottom," most Americans "do not identify with African slaves."\textsuperscript{15} This response does not seem convincing, however. Whether or not they "identify" with African slaves, most (white) Americans regard slavery as a dark chapter in their history. The American collective memory of slavery contains shame, not only about the very practices of enslavement, but also about the cruel sanctions against slaves: flogging, hanging, etc. One would expect that this would influence Americans to be more timid than Europeans in the re-introduction of harsh and degrading punishments, not less timid, as they, in fact, are.

Also, I doubt that the "collective memory" of past low-status punishment which is assumed to discourage the adoption of undignified and harsh punishment is uniquely searing in Europe, in comparison to other Western countries, including the United States. After all, insofar as such memory exists and operates in France and Germany today, it is not a direct one, but a result of reading books (and maybe watching some movies) about old-time, cruel punishment. But these works, literary and historical, are read in the United States too, so it is unclear why Americans did not develop the same kind of collective repulsion to harsh punishment that, on Whitman's view, evolved in Europe. In other words, it is unclear why the European memory of the low-status, harsh practices is so much more traumatic than the American memory so as to lead to such a divide between them in the punishments that are imposed.

The historical story told by Whitman in *Harsh Justice* is a fine achievement of a scholar deeply immersed in numerous fields: law, history, culture, philosophy. I have tried to show that the historical argument has its limitations and falls short of explaining the punitive policies and practices of the last twenty-five years. We might be closer to providing an explanation for the divide as it exists today if Whitman's

\begin{footnotes}
\item[12.] Id. at 196.
\item[13.] Id. at 198.
\item[14.] Id.
\item[15.] Id.
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thesis were augmented by further examination of the deep sense of retributivism in American culture, the high rates of violence in the US, and the publication of studies in the 1970s about the ineffectiveness of rehabilitation. And maybe—who knows—such an explanation could mark the beginning of a change towards a more humane and compassionate society.