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BOOK REVIEW

HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE. By James Q. Whitman (Oxford University Press 2003).

*Frank Gibbard**

As anyone who has read Nietzsche knows, genealogical studies often reach ironic conclusions.¹ Genealogy attempts to posit historically-contingent reasons for social conditions whose reason for being has become lost through time. The ironies arise when the reasons for things turn out to be the opposite of what we would have expected.

James Q. Whitman's new book, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe*,² is a genealogical study of crime and punishment in America and Europe. Whitman begins by asking why modern Western societies, with a common Enlightenment heritage, differ so radically in their approach to punishment of offenders. Specifically, why, since the 1970s, has criminal punishment become much "harsher" in America while continuing to become more "lax" in Continental Europe? Whitman finds the answers deeply rooted in historical and cultural factors. They are not, however, the answers that a superficial understanding of the topic might lead us to expect.

Whitman's work is polemical. As the title of this book makes plain, he believes that the American Justice system has become excessively harsh. He cites many representative examples of this "harshness," touching on our treatment of juvenile offenders, prison conditions, "three strikes" laws, and the tendency to criminalize relatively mild forms of misconduct. Some American readers of this book may wish that Whitman had turned the book on its head, entitled it "Lax Justice," and used it to expose excessive European liberalism and coddling of criminals.³ Fair enough. Even a reader un-

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1. Nietzsche's *On the Genealogy of Morals* attempted to assign a less-than-admirable pedigree to the moral pieties of his day. FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* (Walter Kaufmann, trans., 1992), reprinted in *BASIC WRITINGS OF NIETZSCHE*.

2. JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003).

3. Such readers will find ammunition for their viewpoint in the following incidents described in Whitman's book: (1) when Günter Parche stabbed tennis star Monica Seles, he received only probation from a German court, *id.* at 72; (2) a lively controversy in German penology of the late 1990s concerned whether guards should be required to *knock* on pris-

friendly to Whitman's perspective, however, can benefit from the book by bypassing such ideological considerations and by focusing instead on Whitman's historically-based explanation for the relative differences between the American and European styles of criminal justice.

Perhaps the most celebrated genealogical study in the field of criminology is Michel Foucault's *Discipline and Punish*.⁴ Foucault focused his attention on the historical transition in Europe from punishments that disciplined the body (through torture, violence, and public execution of sentence) to those that disciplined the soul (through incarceration, continuous observation, and work routines). While acknowledging Foucault's approach as a touchstone of his field, Whitman moves beyond Foucault's categories of body vs. soul, and builds a new framework for categorizing punishments: those that degrade the offender vs. those that do not.

Whitman concludes that degradation, which he defines as treatment of others designed to make them feel "inferior, lessened [and] lowered,"⁵ is a key difference between American and European approaches to criminal punishment. Degradation, he concludes, explains much of the difference in harshness between the two systems. Europeans try harder than Americans to avoid degrading criminals in their society, by giving lesser sentences and by according convicts dignity generally compatible to that given other members of society. Americans by contrast, are less concerned with personal dignity as a punishment factor.

Why does this difference exist? Whitman bypasses the usual explanations, which tend to focus on greater American religiosity and the legacy of slavery. He finds that Europeans are scrupulously attached to the dignity of prisoners precisely because European convicts have been treated in more horribly degrading ways over the centuries.⁶ Americans, on the other hand,

oner's cells before entering, *id.* at 84; (3) both German and French prisons have generally done away with uniforms for prisoners on the ground that uniforms erode their dignity, *id.* at 86; and (4) German prisoners who work receive "paid vacations" which they may either use to take time off from their prison jobs, or to shorten their sentences, *id.* at 89.

4. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1978).

5. Whitman, *supra* note 2, at 20.

6. Casanova describes in his memoirs the great indignity a French lady felt during the four-hour public torture and execution of Robert-Francois Damiens, the attempted assassin of Louis XV, in 1757. Her indignation was not at the torture or the screams it brought forth from the wretched man's lips. Rather "Mme. XXX" was furious because a male gentleman of her party took advantage of her fixation on the gory spectacle to take indecent liberties with her. JACQUES CASANOVA DE SEINGALT, *HISTOIRE DE MA VIE* 217-21 (1986). There were, it must be admitted, exceptions to this nonchalant attitude. Voltaire expressed extreme indignation at the breaking on the wheel of the Protestant Calas. See FRANÇOIS AROUET DE VOLTAIRE, *ON TOLERATION IN CONNECTION WITH THE DEATH OF JEAN CALAS* (essay), reprinted in *TOLERATION AND OTHER ESSAYS BY VOLTAIRE* (Joseph McCabe trans., 1912).

sought from the beginning to avoid cruel and unusual punishments⁷ and hence, do not have the same history of barbarous treatment to recoil from.⁸

This undignified and barbarous treatment applied only to the common European convict. With their aristocratic traditions and integration of church and state, Europeans reserved a different punishment regime for two categories of offenders: nobles and the clergy. Nobles, such as Voltaire and the Marquis de Sade, were treated with comparative mildness under the *ancien régime*. The King of France issued *lettres de cachet*, permitting him to incarcerate without trial high-born persons who had behaved scandalously. This imprisonment, however, was often quite mild, full of creature comforts, fine foods, visits from friends, and opportunities to develop one's writing skills. Clergymen, on the other hand, benefited from the right of ecclesiastical punishment; even a priest who had committed murder could avoid the gallows and receive penance instead from his superiors.

The history of modern European penology, Whitman explains, has been the generalization of this "special treatment" to everyone. Since the French Revolution laid bare the privileges accorded to the first two estates of traditional society, Europeans have been loath to grant special privileges based on social rank. Rather than exposing high-born persons to degradation, however, they have moved the treatment of the common criminal upwards, so that he benefits from some of the mildness once reserved for the nobility or clergy. Americans, on the other hand, with our separation of church and state and lacking a formally-recognized nobility, have generally recoiled, officially at least, from treating people differently because of status. This, there is no "trickle-down" movement to improve treatment of criminals here.

Europeans, unlike Americans, also have a tradition of incarcerating political prisoners. Political prisoners have a tendency to obtain their freedom, once the tables have turned. When they do, they frequently write about their experiences in prison. In contrast to most prisoners, political prisoners are not only quite articulate, but they have access to the press. What they write can often spur a movement for reform that benefits even non-political prisoners.⁹

7. A prohibition enshrined, of course in the prohibition on cruel and unusual punishment contained in U. S. CONST. amend. VIII.

8. As Dickens' Mr. Chollop boasted, America had "[n]o dungeons, no blocks, no racks, no scaffolds, no thumbscrews, no pits, no pillories." CHARLES DICKENS, MARTIN CHUZZLEWIT 474 (1944).

9. The closest thing America may have had to a prisoner of this type is Charles Colson, a former Nixon aide who went to prison for his Watergate activities and subsequently founded a prison ministry. The role of religion in Mr. Colson's case cannot be discounted. Whitman himself is ambivalent about the role of religion in prison reform. He believes it has great potential, in fact may the only reformatory force in American society that can accom-

Whitman also draws attention to use of the pardon power, traditionally seen as a royal prerogative in European society. This power was not absent in pre-Revolutionary America. Whitman cites a surprising statistic: Between 1691 and 1776, 51.7 percent of offenders in colonial New York were pardoned after trial.¹⁰ As democratic institutions have developed, however, Americans have gradually become less willing to see offenders pardoned by those in authority. It is precisely because American institutions are more responsive to democratic pressures than European correctional bureaucracies that prisoners here serve longer sentences.

In sum, the great irony of Whitman's work is that it is precisely those features of *ancien régime* Europe that Americans recoil from (torture and degradation, special treatment of nobles and clergy, imprisonment of political prisoners, non-democratic use of the pardon) that have resulted in the movement in Europe for milder treatment of ordinary prisoners in modern times.

If there is a problem with Whitman's thesis, it may be that by focusing exclusively on status and degradation, he loses touch with other, equally-important factors that differentiate American attitudes toward punishment from those in Europe. In particular, Whitman's description of American attitudes toward punishment seems superficial at times, divorced from broader historical factors at work in the American psyche.

To understand American attitudes toward crime and punishment, one must understand John Locke, the British philosopher who influenced America's founding fathers and whose attitudes resonate deeply with Americans to this day, whether they are conscious of them or not.¹¹

Locke's writings are a paradox. At times, he seems to be the prince of individualists, a man who defends the right of each individual to "life, liberty, and the pursuit of property." At other times, he seems to favor a Hobbesian surrender of rights to an all-powerful Commonwealth. These two attitudes in Locke's work can be reconciled if we assume that when Locke argues for natural rights and individualism, he has in mind a certain *class* of persons (though not necessarily a social class in the traditional sense): those

plish prison reform, but he worries that Christianity may present its own type of overreaching in punishment. Whitman, *supra* note 2, at 207.

10. Whitman, *supra* note 2, at 169.

11. Jeremy Rifkin contends that the Lockean doctrine of the natural right to property partly explains American reluctance to experiment with socialism in the fashion of modern European societies. See JEREMY RIFKIN, *THE EUROPEAN DREAM: HOW EUROPE'S VISION OF THE FUTURE IS QUIETLY ECLIPSING THE AMERICAN DREAM* 133-44 (2004). The European willingness to take socialist models of "equality of the citizen" seriously may explain, in turn, the concern in those societies with how persons from the lower economic classes are treated when they run afoul of the law.

who have demonstrated their worthiness through economic achievement and socially-sanctioned behavior. There is a second class, however, from whom Locke wishes to see these virtuous persons protected: the mob, the outsiders, dangerous, value-deficient people who threaten the security and freedom of his productive class. Against these people, a Lockean government bears what Martin Luther called “the sword.”

A Lockean might interpret certain policies of the American government beginning in the 1930's, such as high levels of graduated taxation, social welfare legislation, and psycho-social explanations for crime, as showing unwarranted favor to members of this dangerous “second class” and perhaps even calling into question the entire American enterprise. It could be argued that it was such “Lockeans” who shattered the liberal consensus of the postwar era, beginning with the almost subterranean political shift in the 1960s toward conservatism (just as liberalism seemed to reach an apotheosis), and ultimately forcing a swing of the pendulum back toward Lockean values.¹² One of the tools the Lockeans subsequently employed to protect the virtuous class from society's “second class” was increased criminal punishment, a factor that helps to explain the harshness Whitman describes.

The other related factor that explains this “harshness” is the puritan impulse in American society. American socio-political history includes episodes of extreme fear and revulsion toward groups seen as undermining strict moral values.¹³ The “War on Drugs,” which has resulted in a good deal of the harshness in sentencing that Whitman deplors, can be understood in this light. In my view, Whitman's work on degradation needs further integration with these socio-political and psychological factors in order to fully realize its potential as an explanatory device.

12. Rick Perlstein has carefully studied the history of this phenomenon. See RICK PERLSTEIN, *BEFORE THE STORM: BARRY GOLDWATER AND THE UNMAKING OF THE AMERICAN CONSENSUS* (2001).

13. See, e.g., JAMES A. MORONE, *HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN HISTORY* (2003).

