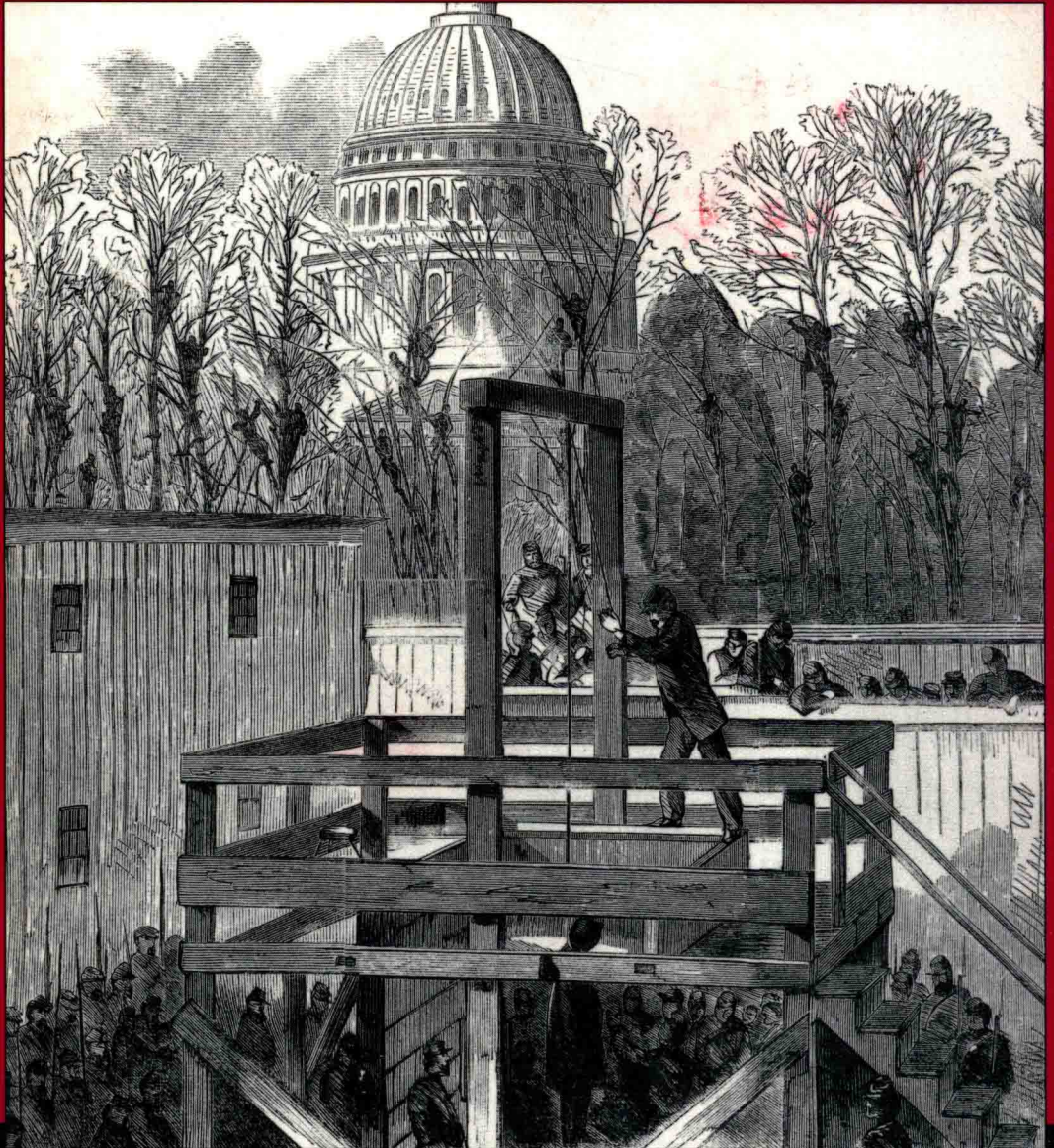


HARSH JUSTICE

*Criminal Punishment and the
Widening Divide between America and Europe*



JAMES Q. WHITMAN

Harsh Justice

Criminal Punishment

and the Widening

Divide between

America and Europe

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In grateful memory of Edward Shils

Note and Acknowledgments

Since I closed the research for this book in 2001, there have been two developments that deserve at least a brief mention. One is the tough-talking law-and-order movement that entered French politics with the election of 2002. This may conceivably bring change to the French system of punishment, and readers familiar with the French scene will certainly think of it as they read this text. The impact of this newest law-and-order movement is something that I will address more directly in the French version of this book. Let me simply observe here that such developments have a long history in France and that they have yet to alter the fundamental drive toward dignity in punishment that is my topic. The other development of 2002 that deserves some mention is the string of American corporate scandals exemplified by Enron. These scandals have brought a considerable intensification of the assault on white-collar offenders that was already underway in our country during the previous decades. They have also been the occasion for some striking journalistic writings on the harsh treatment of imprisoned white-collar offenders, such as J. Senior, "You've Got Jail," at <http://www.newyorkmetro.com/nymetro/news/crimelaw/features/6228/>. An updated version of this book would have to take more account of both developments.

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All translations are my own, unless otherwise noted.

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Harsh Justice

Introduction

At the beginning of the twenty-first century, criminal punishment is harsh in America, and it has been getting harsher. In the year 2000, the incarcerated population reached the extraordinary level of 2 million, roughly quintupling since the mid-1970s.¹ America's per capita incarceration is now the highest in the world, approaching, and in some regions exceeding, ten times the rate in Western Europe. Large-scale incarceration is only part of the story, though. Juveniles have increasingly been tried "as adults"—something that Western Europeans find little less than shocking. New sorts of punishments have been invented over the last twenty-five years, from boot camps to electronic monitoring devices; and old sorts of punishments, from chain gangs to public shaming, have been revived. Some of the new harshness has involved matters almost everybody regards as momentous: in particular the death penalty, reintroduced in the United States at the very moment that it was definitively abolished in Western Europe. At the same time, some of the new harshness has involved almost laughably trivial matters: "quality of life" policing has landed people in jail—if only for a night—for offenses like smoking cigarettes in the New York subway;² and the Supreme Court has declared that police may jail persons for something as minor as driving without a seatbelt.³ All of these developments, whether trivial or momentous, have been surrounded by a jarringly punitive rhetoric in American politics, perhaps best exemplified by the Phoenix sheriff who proudly declares that he runs "a very bad jail."⁴

None of this is news. Everyone who reads the newspapers knows that we have been in the midst of a kind of national get-tough movement, which has lasted for about the last twenty-five years. Still, Americans may not quite grasp how deeply isolated this period has left us in the Western world. Punishment in America is now, as Michael Tonry observes, “vastly harsher than in any other country to which the United States would ordinarily be compared.”⁵ There are certainly some parts of the world that have turned harsher over the last twenty-five years. This is true in particular of some Islamic countries.⁶ But among Western nations, only England has followed our lead—and even England has followed us only up to certain point.⁷ As for the countries of continental Western Europe, the contrast between their practices and ours has become stark indeed. The Western European media regularly runs pieces expressing shock at the extreme severity of American punishment.⁸ Meanwhile, continental justice systems have come to treat America as something close to a rogue state, hesitating to extradite offenders to the United States.

To be sure, this era of American harshness will presumably not go on forever, and it may already have slowed.⁹ Nevertheless, it is the disturbing truth that we now find ourselves in a strange place on the international scene. As a result of the last quarter century of deepening harshness, we are no longer clearly classified in the same categories as the other countries of the liberal West. Instead, by the measure of our punishment practices, we have edged into the company of troubled and violent places like Yemen and Nigeria (both of which, like many jurisdictions in the United States, execute people for crimes committed when they were minors—though Yemen has recently renounced the practice);¹⁰ China and Russia (two societies that come close to rivaling our incarceration rates);¹¹ pre-2001 Afghanistan (where the Taliban, like American judges, reintroduced public shame sanctions);¹² and even Nazi Germany (which, like the contemporary United States, turned sharply toward retributivism and the permanent incapacitation of habitual offenders).¹³

What is going on in our country?

This is the question I want to approach in this book. This is a book about the cultural roots of harsh criminal punishment as it has emerged in contemporary America. Most especially, it is a book about the how harsh criminal punishment can develop in a society that belongs to the Western liberal tradition. America *is*, after all, a country that belongs to something it is fair to call the Western “liberal” tradition, elusive though the concept of liberalism may be. Certainly there are many aspects of American culture that seem manifestly to belong to a humane strain of liberalism. Ours, of all Western countries, is the one that is most consistently suspicious of state authority. Ours is the country with the inveterate attachment to the values of procedural fairness. Ours is the country that—unlike Germany or France—never succumbed to any variety of fascism or nazism. Why, then, is ours not the country with the mildest punishment practices? Certainly, in most respects, Americans define their values by opposition to *illiberal* societies—to the societies of places like China or the Afghanistan of the Taliban or Nazi Germany.

How could our patterns of punishment be bringing us closer to them than to the dominant politics of the contemporary European Union?

The answer this book will offer is drawn from history—a comparative history that reaches back to the eighteenth century, to a time before the French and American revolutions. In particular, it is drawn from a close comparative study of the United States, on the one hand, and the two dominant legal cultures of the European continent, France and Germany, on the other. There are good reasons to choose France and Germany for such a study. Of all the continental countries, these are the two that cry out most for close comparison with our own, in this era of American harshness. They are large and powerful industrial nations that have been strongholds of humane and democratic Western values since 1945. They are countries that have set the tone for all of the continent for many generations, and that continue to set much of the tone for the human rights jurisprudence of the European Union. Not least, they are the countries that we have measured ourselves against since the time of the American Revolution. Indeed, they are countries that, once upon a time, seemed precisely to lack the humane and democratic values that *America* stood for. France and Germany, as they exist today, are the descendants of the “despotic,” state-heavy, hierarchical societies against which we defined ourselves two and half centuries ago. They are also countries that have had recurrent episodes of authoritarian government, from the nineteenth century through the horrific 1930s and 1940s. Yet at the end of the millennium, they are countries that punish far more mildly than ours does. Why?

There is one sort of answer that must be rejected out of hand. This is the sort of answer given by the high-theoretical literature on the sociology of punishment in “modern” society. Sociologists of punishment and “modern” society, from Durkheim to Foucault and beyond, are among the best-known intellectual figures of the day. Their books are widely assigned in college courses, and the sociology of “modernity” is probably the first thing that most educated people think of when the topic is punishment. But theirs is a sociology precisely about punishment in “modern” society in general. The sociology of “modernity” simply does not grapple with the question of how punishment practices can vary—let alone how sharp differences can exist between the “modern” societies of places like the United States, France, or Germany. The sort of “modernity” that Foucault and his followers talk about seems especially beside the point, and especially frustrating to read in the face of recent American developments. Foucault, in his famous *Discipline and Punish*, described modern punishment as the product of an ominous shift from disciplining the body to disciplining the soul. This makes for a dramatic, and sometimes fitting, description of continental punishment; and it also makes for a fitting description of *some* aspects of American punishment. But it tells us nothing about how punishment practices could diverge on the two sides of the Atlantic, with America striking off alone on the road to intensifying harshness. Much the same objection applies even to the most sensitive recent work on “modernity.”¹⁴ Of course large industrial countries share some “modern” features. But what they share can hardly explain how

they have diverged; and these countries *have* diverged. How can any approach that starts by invoking "modernity" explain why?

This book will accordingly avoid talking much about "modernity." We cannot understand American punishment without understanding *America*; and the same goes for the rest of the "modern world." Sensible criminologists have always been ready to acknowledge that different cultures produce different forms of punishment—that, as one pre-Foucault textbook put it, "One learns to react punitively or in some other way just as learns to speak English, German or Japanese."¹⁵ One does indeed. Like other wise scholars, I will accordingly focus on comparative culture:¹⁶ there is something in the American idiom, something in American culture, that is driving us toward harsh punishment.

Of course, "American culture" is a vast topic, and I should emphasize from the outset that there are important aspects of American culture that I am not going to explore with any care. It is clear, for example, that American harshness has something to do with the strength of its religious tradition, and especially its Christian tradition. Part of what makes us harsher than continental Europeans is the presence of some distinctively fierce American Christian beliefs. It is also the case that American harshness has something to do with American racism—though, as we shall see, continental European race relations are not noticeably better than American. While I will touch on both of these issues repeatedly, I will not discuss either in any detail. Perhaps most important, it is clear that the relative harshness of American punishment has a great deal to do with the prevalence of violence in American society—both because Americans have higher rates of violent crime, and because American patterns of violence also make themselves felt in prisons, policing, and elsewhere.¹⁷ The difference in patterns of violence matters immensely, and it certainly deserves attention beyond what I will give it in this book. Nevertheless, American violence is another problem that I leave for another day.

Instead, leaving race, Christianity, and violence to one side, this book will focus on two quite different aspects of American culture: on American patterns of *egalitarian social status* and on American patterns of *resistance to state power*. American society has a deeply rooted tradition of status egalitarianism: a strong dislike for social hierarchy runs throughout through American history. American society also displays a recurrent suspiciousness in the face of state power. These are both features of American life that are integral to the American style of liberalism. They are also features of American life that differentiate us unmistakably from the countries of continental Europe. Countries like France and Germany show much more tolerance for traditions of social hierarchy than we do, and much more tolerance for state power as well. And, as I am going to try to show, these most characteristically "liberal" features of American culture have contributed to making American punishment uniquely harsh in the West.

The bulk of this book will be about the American style of status equality. The notion that the peculiarities of American culture have to do with peculiar

American traditions of status equality is nothing new. Tocqueville, in particular, is famous for arguing that the forms of American culture grew out of our historic lack of social hierarchy—out of our lack of what he called the “aristocratic element.” This has seemed critically important to many observers of American society ever since, from H. G. Wells to Louis Hartz and Seymour Martin Lipset,¹⁸ and this book too is going to treat it as critically important.

But I am going to offer a very different argument from the kind that Tocqueville offered. To Tocqueville, the absence of an “aristocratic element” implied that America would have *mild* criminal punishment. “Societies become milder,” he declared in his *Democracy in America*, “as conditions become more equal”: after all, people who are equal can be expected to have more reciprocal empathy, and therefore to go easy on each another. America, he thus concluded in 1840, being the most egalitarian country, must inevitably have “the most benign criminal justice system.”¹⁹ Nor is Tocqueville the only observer to offer this sort of argument. A kindred idea appeared, a half-century later, in the sociology of Durkheim. To Durkheim, the harshness of punishment in a given society had something to do with its degree of “contractualization.” To the extent that market-oriented, contractlike relations governed societies, Durkheim hypothesized, they would tend to have “restitutive” rather than “penal” regulation—they would tend to rely on civil remedies rather than on harsh criminal punishment. This Durkheimian claim had nothing to do with social status as such. Nevertheless, to the extent we associate market forms of social organization with rejection of status hierarchy, we can see real resemblances between Durkheim’s arguments and those of Tocqueville.²⁰ Certainly Durkheim’s arguments suggest the same conclusion about America as Tocqueville’s: if Durkheim is right, we would expect to observe a link between American styles of market-oriented egalitarianism and mildness in criminal punishment.

Yet, of course, in America there is no such link. Americans display unmistakably deep-rooted patterns of status egalitarianism; Tocqueville was right about that. Yet our punishment is unmistakably harsh. As for market-orientation: it would be hard to point to any society that is more “contractualized,” more market-oriented, than ours. Yet ours is the society of harsh punishment.

The main purpose of this book is to explain why—why the American style of status equality should produce results so thoroughly at odds with what these subtle and thoughtful French observers predicted.

The explanation I will offer involves a comparative legal history that reaches well back into the eighteenth century. The key to understanding how Tocqueville and Durkheim went wrong lies, I am going to argue, in understanding the link between traditions of social hierarchy and the dynamic of *degradation* in punishment. Contemporary American criminal punishment is more *degrading* than punishment in continental Europe. The susceptibility to degradation lies at the core of what makes American punishment harsh. And our susceptibility to degradation has to do precisely with our lack of an “aristocratic element.”

The literal meaning of “to degrade” is to reduce another person in status, to treat another person as *inferior*; and it is that literal meaning that I will take as my point of departure. We all know intuitively that degradation, in this sense, often plays a significant role in punishment: part of what makes punishments effective is their power to degrade—their power to make the person punished feel diminished, lessened, lowered. Within the world of criminal punishment, such degradation is achieved in the widest variety of ways, from beatings to mutilation to day-glo orange prison uniforms.

Now, contemporary France and Germany are countries, I am going to show, with a deep commitment to the proposition that criminal offenders must not be degraded—that they must be accorded *respect* and *dignity*. The differences between continental and American practices can be little short of astonishing. Some of the most provocative examples come from continental prisons. Prison is a relatively rare sanction in continental Europe, by sharp contrast with the United States, and sentences are dramatically shorter. Nevertheless, there are continental prisons, and there are continental prisoners. But those comparatively few continental offenders who do wind up in prison are subjected to a regime markedly less degrading than that that prevails in the United States. Thus continental prisons are characterized by a large variety of practices intended to prevent the symbolic degradation of prison inmates. Prison uniforms have generally been abolished. Rules have been promulgated attempting to guarantee that inmates be addressed respectfully—as “Herr So-and-So” or “Monsieur So-and-So.” Rules have also been promulgated protecting inmate privacy, through such measures as the elimination of barred doors. Most broadly, these measures include what in Germany is called “the principle of approximation” or “the principle of normalcy”: the principle that life in prison should approximate life in the outside world as closely as possible. Like all ideals in the law of punishment, this one is sometimes realized only fitfully: to study norms of dignity in prison is often to study aspirations rather than realities. France in particular lags well behind Germany in implementing these practices, and life in French prisons can be very tough. Nevertheless, the “principle of approximation” does have real meaning, and indeed it has led to some practices that will seem astounding to Americans. German convicts, for example, are supposed to work at jobs that are *real* jobs, like jobs in the outside world. This means that they enjoy far-reaching protection against arbitrary discharge, and even four weeks per year of paid vacation (!). All of this is intended to dramatize a fact about their dignity. The lives of convicts are supposed to be, as far as possible, no different from the lives of ordinary German people. Convicts are not to be thought of as persons of a different and lower status than everybody else. As we shall see, these same ideas also pervade European political debate over prison policy. (These are also the continental ideas that most recently came to the fore in European protests over the treatment of the captured prisoners held in Guantanamo Bay after the American campaign in Afghanistan.)

Prisons are not the only places where this continental commitment to dignity shows itself. There are many examples that take us beyond life within

prison walls. Thus in America we are far less bothered by public exposure for criminal offenders than Europeans are—whether those inmates are being kept behind barred prison doors that expose them to the view of all, or being shown on internet broadcasts, or being subjected to public shame sanctions, or having their records opened for public inspection. There are other examples, involving deprivation of civil and political rights. The oldest legal form of status degradation—automatic deprivation of rights of participation—still survives in America. Convicted American felons are frequently automatically deprived of civic rights—a practice of status degradation that has disenfranchised a substantial proportion of the African-American population in some regions. As we shall see, French and German prison systems, by contrast, have programs that encourage inmates to exercise their (almost always unimpaired) right to vote. On the deepest level, American criminal justice displays a resistance to considering the very personhood of offenders. This is a resistance that shows in the triumph of determinate sentencing in America, and it is a resistance that is absent in Western Europe.

These are differences of profound significance, I am going to argue, differences that take us a long way toward understanding how American punishment culture has come to differ so much from French and German. Cultures that systematically show respect for offenders are also cultures that are likely to punish with a mild hand; conversely, cultures (like our own) that have no commitment to respect for the offender are likely to show harshness. Where do these differences come from?

“Modernity” obviously has no answer to offer.

That does not mean that sociology has no answer to offer. On the contrary, these are differences we can only explain if we are grasp some deeply rooted differences in social values and social structure. But the sociology we need is a historical sociology. The continental commitment to “dignity” and “respect” in punishment is something that has grown very slowly since the eighteenth-century, and it is a commitment that offers striking evidence of a fundamental connection between degradation in punishment and traditions of social status. For at its core, as I want to demonstrate in this book, it is a commitment to *abolishing historically low-status treatment*.

To understand the differences that divide us from the French and the Germans, we must indeed begin in the eighteenth century. France and Germany are countries in which, two centuries or so ago, there were sharp distinctions between high-status people and low-status people. In particular, there were two classes of punishments: high-status punishments, and low-status punishments. Forms of execution are the most familiar example: nobles were traditionally beheaded; commoners were traditionally hanged. There are many other examples, too: low-status offenders were routinely mutilated, branded, flogged, and subjected to forced labor; all while being displayed before a raucous public, both before and after their deaths. High-status offenders were generally spared such treatment. Forms of imprisonment differed by status as well. Two and a half centuries ago, high-status continental convicts—who included such famous eighteenth-century prisoners as Voltaire or Mirabeau—