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Book Review of James Q. Whitman's "Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe"

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James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe*, New York: Oxford University Press, 2003. Pp. 311. \$39.95 cloth (ISBN 0-19-515525-4); \$17.95 paper (ISBN 0-19-518260-X).

Comparative lawyering is a hazardous occupation. As Whitman notes, all that can be offered are relative observations (10). Indeed practitioners of the discipline face the daunting task of making sense of the oft-times contradictory nature of law not only in their own system, but also in another. Most comparativists, even one so prominent as Whitman, are trained in, and travel largely within, a single legal and cultural order. Understanding law requires an appreciation of nuances, which can only be acquired by total emersion. Rather like with respect to language, only the blessed few are truly bilingual, operating with equal facility in another language. Fewer still are, if you will, bi-jural. Yet this obstacle should not deter a thoughtful and cautious scholar like Jim Whitman from producing a fascinating treatment of long-term trends in punishment in western society from "Plato through NATO."

Comparative lawyers usually seek to uncover distinctions in legal systems, and Whitman so endeavors. There is a reasonable argument to be made and it proceeds as follows. Both systems, the American and the continental, proceed from common intellectual roots. The Greeks (Plato) and the early Christian writers believed that the miscreant ought to be chastised rather than treated brutally (though Socrates might beg to differ!). Paternalism, not revenge, should be the guiding principle of punishment. Whether this view actually informed practice cannot be demonstrated, but somewhere in the ceaseless march of time to the present, western society's concept of punishment progressed from the benign to the vengeful. By the twentieth century, however, Europe moved away from harsh and degrading treatment to a mild and respectful regime (chapter 4). America eschewed this progress and remains trapped in brutality (chapter 3). Why?

Why indeed. In our more violent society do we fear the criminal more? Perhaps. But Whitman rightly wants to delve deeper. He seems inclined to focus on a differing political and social heritage. By American independence, continental punishment was based upon social status, with milder penalty accorded to the elite, and harsh and degrading treatment reserved for the plebs. When status distinctions were swept away, the harsher mode disappeared because it was linked to the inferior status that was abolished. America, on the other hand, was an equal opportunity punisher, wreaking vengeance regardless of class. We had no other model, save the two-tiered British one, untenable in a society in which all men were created equal. Having set the course early on, America never wavered (11). A plausible story, but I suspect, though I cannot prove, that distinctions observed between "us" and "them" have been overstated. Like all law in America, treatment in the prison system in America is not uniform. After reading Whitman's detailed analysis of foreign incarceration, I would prefer to join my former governor in the Federal pen in Texas than in much of Europe.

In addition to focusing on this historical divergence in class structure, Whitman considers the present day punishers. In America, punishment is in the hands of the legislatures and judges, who are more responsible to the public will, than are the German and French bureaucrats who administer the continental system. While our

continental friends may share our thirst for blood, the autonomous state apparatus mediates, handing out lesser punishments and administering them in a prison system with *décorum* that exceeds standards that I have observed at most faculty meetings. While this may be a distinction with a difference, one wonders, in light of recent European parliament elections, just how removed the bureaucratic state on the continent can and does remain immune from the popular will.

In his analysis, Whitman eschews the easy answer. Recollections of the horrors of Nazism, when a savage state put to death innocent millions, do not explain the differing approach (16). The separation of the paths precedes the Holocaust. Yet much of the dialogue on punishment in the book does use the language of the European Convention on Human Rights, doubtlessly inspired by the experience of the Second World War. Indeed, Whitman uses its very term to draw the defining distinction between Europe and America: American punishment is calculated to degrade while European punishment must not (24–25). Even in brutal America, nothing calls into question the use of capital punishment more than the possibility that some may be going to the gurney innocent. Hence the current Massachusetts governor's attempt to craft "iron clad" safeguards.

Finally, one wonders where Britain fits in. Although the author clearly limits the book's ambit to France and Germany in the introduction (17), its subtitle is not so modest (and when the word European is employed, it is not clear which countries are included or excluded). Did not Britain also go through some class leveling process, and what sort of system did it produce? Pretty harsh by all accounts, with a popular thirst for blood not strikingly dissimilar to our own, though happily without capital punishment. Britain did not cope with the same twentieth-century ghosts that haunted its continental neighbors, and its bureaucracy is by all accounts less formidable than its continental neighbors. The execution of the innocent seems to have made the gallows there an antique.

Recent events have certainly made Americans reflect upon the capacity for horrendous treatment of those under our power. The images from the prison in Iraq are surely not those of chastisement, and they render Whitman's study even timelier. What is perplexing is how a country, whose treatment of its German prisoners during the Second World War was so decent that many returned to become American citizens and others to visit their prison camps to reminisce fondly, could have made such an about face in a half century. Did that war, or others since, so touch America, or is it something about those imprisoned that accounts for the very different treatment over time?

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Martin J. Wiener, *Men of Blood: Violence, Manliness, and Criminal Justice in Victorian England*, Cambridge: Cambridge University Press, 2004. Pp. xvi + 296. \$70.00 (ISBN 0-521-83198-9).

This important book seeks to complicate our understanding of the ways in which Victorian criminal justice was gendered. The book is organized around a compel-