

## The Aristocratic Way of Punishment\*

Punishment, James Whitman argues in *Harsh Justice*, implies degradation. The act of punishment works by smacking down criminals and putting them in their proper places. It lowers their social status, thus literally de-grading them. Punishment, at least meaningful punishment as opposed to the bald brutality of vengeance, chastises. As a proportional form of degradation aimed at reform, chastisement is an essential element of just punishment, crucial to what Whitman calls the »serene correction« of those who have erred (22).

Yet, measured chastisement has a troubling tendency to bleed into something more perverse. Slipping down the slope from »serene correction« to sadism is, Whitman argues, a »more or less inevitable phenomenon: the phenomenon of the occasional intoxication that can come from lording it over those we punish« (23). While there is a »certain fine style of punishment« that avoids vengeful feelings, there is also the danger that the punishers will turn into avengers (22). Since punishment as chastisement dangerously plays on the status-degradation of criminals and the corollary status-elevation of the punishers, the distance between punishment and excessive degradation is quickly traversed: »Chastisement often degenerates into [less virtuous forms of] *degradation*« (23).

If ever there was evidence of the ugly potential for degradation that lies inherent in chastisement, the United States' occupation of Iraq offers itself as a case in point. The alacrity with which the wholesome young people of the United States' armed forces transformed from wardens to wranglers illustrates the perspicacity of Whitman's central point: punishment trades in

the currency of status, degradation, and – ultimately – dehumanization.

Against the jurisprudential preoccupation with retribution, reform, and deterrence, Whitman challenges us to confront the tragic consequences of degradation, not only for the prisoners degraded, but for those doing the degrading. »[I]t is wrong«, he writes, »to analyze punishment solely by considering its effect on the person punished; acts of punishment can also profoundly affect the person, or the society, doing the punishing« (24). When punishment goes too far it threatens to spread its dehumanizing tendency to the wardens as well as the criminals.

*Harsh Justice* is, on one level, a work of comparative criminal law in which Whitman explores the meaningful differences that have emerged between European and American criminal justice over the last 25 years. While European criminal justice has tended towards milder and more dignified treatment of criminals, the United States have, in the last quarter of a century, moved into the opposite direction. Coincidentally, the book arrived just after the United States were making their way to Baghdad. While Whitman is not writing about criminal punishment in a military context, the atrocities in Abu Ghraid, Afghanistan, and Guantanamo Bay reflect his theme: the increasing severity and primitive nature of American style criminal justice.

What Whitman means by harshness and mildness of punishment encompasses a wide range of actions including humiliating punishments (from flogging to shame-based sanctions), the prosecution of children and white collar

\* JAMES Q. WHITMAN, *Harsh Justice. Criminal Punishment and the Widening Divide between America and Europe*, New York: Oxford U.P. 2003, 336 S., ISBN 0-195-15525-4

criminals, and the willingness to show mercy through pardons or parole. One of the most telling examples for Whitman's characterization of American justice as harsh is the willingness to punish and even kill children for their crimes. While Europeans shrink from punishing children as criminals, the United States is one of only seven countries in the world that admits to allowing capital punishment for juveniles (Whitman notes that the other six are: Congo, Iran, Nigeria, Saudi Arabia, Pakistan and Yemen).

Beyond the question of whom to punish, American criminal justice also punishes more severely than its European counterparts. The average prison time a violent criminal serves in France in 1999 was 8 months, up from 4.3 months in 1975; in the USA, the average time served for violent offenses in 1996 was 53 months in state prisons and 91 months in federal penitentiaries. Whitman concludes, »Whether in Germany or France, the same rule holds: even when Europeans decide to ball their fist and strike, they do not strike with the ferocity of Americans« (71).

Perhaps the most disturbing element of Whitman's comparison involves the relative differences in the respect for prisoners. In the US, the Supreme Court has held that inmates have »no reasonable expectation of privacy«.<sup>1</sup> American prisoners may be kept behind barred doors through which they can be observed; surveillance is omnipresent and inmates are obliged to use toilets in view of guards of the opposite sex. Prisoners must wear homogeneous uniforms and must obey often insensitive regulations on personal grooming; transvestites are denied the right to wear women's clothes and cosmetics. Visitors are often required to be separated from inmates by glass partitions. Inmates eat in common mess halls with no choice of foods. Past and

present American inmates, including the sizable African-American male population that is or once was behind bars, are denied civil rights, including the right to vote. Although these practices are so common in the United States as to be beyond the hint of controversy, none of these restrictions on personal freedoms are regularly imposed in Europe. The norm in Europe is to guarantee inmates the same kind of privacy as enjoyed by other citizens. The German Code of Punishment, for example, contains the *Angleichungsgrundsatz* (»the principle of normalcy«) that requires that »prison life must resemble as closely as possible life in the outside world« (87). Such concern for prisoners' rights is extraordinary from the American perspective.

Whitman makes a strong case that the lack of respect Americans accord their prisoners manifests a cultural »dynamic of degradation« that has taken root in America (7). He is troubled by an American exceptionalism that, he contends, is eerily reminiscent of the German system of justice under the Nazis: he writes, »the resemblance between fascist and contemporary American punishment practices is too close, and too disturbing, not to be discussed« (202). While careful to note the sensitivity of the topic as well as the obvious qualification that American punishment is not overtly racist, Whitman argues that the similarities are at the very least provocative. The point of the comparison is not to say that the US is fascist. Rather it is to hammer home the thesis that the practice of justice in contemporary America is unduly and unusually harsh, relative both to other countries and to historical practices.

Whitman offers two arguments to explain the comparative harshness of criminal justice in America. He rightly gives less attention to his claim that the relative weakness of the American

1 *Hudson v. Palmer* 468 U.S. 517, 526 (1984). For this citation and the following, see chp. 2, esp. 64 ff.

state – the people’s traditional suspicion of governmental power and the state’s dependence upon democratic legitimacy – makes it more difficult to extend mercy or act mildly in dealing with criminals. Although the political weakness may make the justice system susceptible to mass sentiments, it is far from clear that populism leads to harshness. As insightful an observer as Plato, for example, has suggested that populist justice frequently militates in favor of leniency for criminals.<sup>2</sup>

Whitman’s more interesting, novel, and provocative argument for the source of American harshness is its lack of an aristocratic tradition. According to Whitman, the fact that European practices of justice are mild in comparison to American justice is a result of the gradual extension, in Europe, of the aristocratic way of respectful and honorable punishment to all classes of society. American harshness, on the contrary, is the result of the imposition of low status, degrading, and shameful punishments on all criminals regardless of class or social position. European mildness and American harshness are the results of 200 years of differing histories in dealing with questions of status and aristocracy.

The core of Whitman’s historical argument, made most forcefully in his chapter »The Continental Abolition of Degradation«, is that mild punishment in Europe grows out of its aristocratic tradition. In the class-based societies of Europe, »persons of high social standing expected, and received, different punishments from their inferiors« (103). In France, for example, low-status criminals were hung and humiliated in public. Aristocrats, to the contrary, were accorded the honor of private beheadings, witnessed only by the offender’s confessor: »A death, in short, with repentance, but without shame« (111). Similarly, high-status prisoners

throughout Europe were typically confined in a fortress, a form of »honorable custody« in which prisoners lived »in relative comfort, sometimes dining quite well, often at the table of the prison warden, and entitled to regular visits from family and partisans« (107). From Voltaire writing his *Henriade* at his desk in the Bastille to photographs of Adolf Hitler meeting Nazi followers during his confinement in the Fortress at Landsberg in 1923, European criminals have enjoyed a rich history of honorable confinement.

As the demand for equal treatment asserted itself from the 18th through the 20th centuries, Europe responded by granting ever wider segments of its population the same high-status treatment that once was the exclusive prerogative of aristocrats. Europe followed a »pattern of leveling up in status [that] runs from *aristocrats and the like; to political dissenters and debtors; to everybody*« (108). The result has been that »the low-punishments of the eighteenth century were slowly abolished, and the relatively dignified terms of the privileged imprisonment of the mid-eighteenth century slowly became the norm« (108). The revolution in European criminal law, Whitman argues, has been marked by the ever greater »generalization of high-status norms of ›honorable‹ imprisonment« to prisoners of all social classes (107).

The European models of respectful punishment were largely absent in America. In the United States »a relative absence of [status] distinctions within the inmate population become the norm« in 18th century America (174). More importantly, the practice of punishment in America »took on a deliberately *low-status* color, and indeed the color of slavery« (174). Criminals came to be identified with slaves, and were set to work, flogged, and »reduced to a state of humiliation and dis-

2 The Republic, BK. VIII, 558a.

cipline« (176). The history of punishment and crime in America never benefited from the tradition of respectful aristocratic treatment of prisoners. This is one important reason why »America became the prime example of a country that did not abolish low-status punishment« (174).

In focusing his considerable historical and narrative talents on the question of status and degradation in the history of punishment, Whitman has done legal historians, criminologists, and cultural theorists a great service. By exploring the dueling practices of harsh and dignified punishment – both conceptually and historically – Whitman offers a new way of both understanding and thinking about punishment and justice in relation to degradation. For these reasons alone, *Harsh Justice* should quickly establish itself as a must-read book in the world of criminal law and cultural legal studies.

Above and beyond its sociological arguments, Whitman sees one of his principal achievements to be his debunking of »the high-theoretical literature of the sociology of punishment in ›modern‹ society« (5). For Whitman, thinkers of modernity – by which he largely means Foucault – are unable to offer an explanation of how punishment practices can vary between Europe and America. Because modernity theorists write about »punishment in ›modern‹ society in general«, they must be »rejected out of hand« (5).

For Whitman, Foucault's mistake is double. First, 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« (5). Whitman repeatedly returns to this charge, without once citing a supporting passage from Foucault's writing.<sup>3</sup> As Whitman's whipping-boy, Foucault

stands for the simple »story of the decline of the bloody corporal violence of the early modern world and its eventual replacement, in the early nineteenth century, by cellular imprisonment on the American model« (99). Second, since Foucault apparently sees modernity as a unitary move away from harsh bodily punishment, Whitman concludes that Foucault »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« (5). For these reasons, Whitman counsels »lifting our eyes up from our Foucault« (109). No doubt, many scholars could benefit from a respite from Foucault. In this case, however, re-reading our Foucault might have been more helpful. For Foucault both corroborates and illuminates much of Whitman's own thesis.

Foucault's *Discipline and Punish* begins with the claim that the 18th century experienced a reform movement in which punishment shifted from being a means for a sovereign to secure his own power to being a mechanism by which society sought to suppress disorderly illegalities. From this »point of departure«,<sup>4</sup> Foucault traces *two* often opposed developmental arcs of criminal justice. One path of reform, »the gentle way in punishment, makes punishment a school rather than a festival«.<sup>5</sup> It seeks, as Whitman explores in his own history of European punishment, to replace the punishment of the body with the education of the soul. A second path of reform, however, foregoes the education of the soul and focuses instead on the disciplining and ordering of human subjects.<sup>6</sup> This disciplinary approach to criminal justice itself follows two models: the leper and the plague. Either it excludes the criminal as it excludes the leper, and normalizes a community in opposition to what it

3 According to the index, Foucault is discussed in 11 discrete instances interspersed evenly throughout *Harsh Justice*. A check of these 11 discussions found only one citation to a Foucauldian text, describing medieval forms of corporal punishment (104).

4 MICHEL FOUCAULT, *Discipline and Punish*, trans. Alan Sheridan, New York and Harmondsworth 1979, 101.

5 FOUCAULT, *Discipline* (Fn. 4) 111.

6 FOUCAULT, *Discipline* (Fn. 4) 218.

excludes, or it subjects the criminal to ordered surveillance as it would a town infected by the plague. For Foucault, these two modes of discipline eventually come together in the panopticon, that »double mode of discipline« that simultaneously orders and excludes. If the harsh conditions of American prisoners deprived of privacy and subjected to dehumanizing rituals of exclusion resemble anything in Foucault, it is his description of the disciplinary power that turns prisoners into a separate class of delinquents.

From this brief account, a few noteworthy points present themselves. First, Foucault's two paths of reform roughly parallel Whitman's own distinction between European mild and American harsh systems of justice. Second, Whitman's characterization of Foucault addresses itself only to the first »gentle way of punishment«. Third, Foucault clearly argues that the »coercive, corporal, solitary, secret« disciplinary model of punishment replaces or at least undermines the gentle model. Foucault's argument, therefore, is actually quite similar to – albeit admittedly broader than – Whitman's claim about America, insofar as both argue that a harsher and more coercive disciplinary model of punishment has gained ascendancy over an alternative and largely preferable model of gentle punishment. Fourth, far from offering a unitary model of development that ignores the rise of harsh justice, Foucault offers instead a subtle account of two »ways« of modern punishment that work with and against one another. Discipline, he writes, has not replaced all other types of power, but it has infiltrated and undermined them.<sup>7</sup>

Beyond the unacknowledged convergences, there is one way in which Foucault's analysis might resolve one of the contradictions in *Harsh Justice*. Whitman claims that the roots of both

European mildness and American harshness lie in cultural practices dating from the 18th and 19th centuries. As Whitman himself acknowledges, however, »the differences in punishment practice between the United States and Europe seemed to be vanishing for a long time«, especially from the late 19th century up through the 1970s (193). If the difference in punishment is traceable to differences rooted in the 18th century, then why do those differences clearly manifest themselves only in the last 25 years?

One explanation is the European experience with fascism. Whitman raises, but then »downplays« the idea that »continental justice is milder today because the continental countries experienced fascism and nazism« (16). Whether or not he is right, he is compelled to do so by the logic of his rejection of Foucault. Since Foucault sees the disciplinary way of punishment as a necessary corollary of enlightenment freedoms, it is the harshness of American punishment that is »modern« and the mildness of European punishment that seems to beg for an extraordinary explanation – just the kind of explanation the experience of fascism seems to offer. Since Whitman denies currency to arguments from modernity, he must as well insist that contemporary trends of mildness are rooted in deeply held cultural traditions of status and state authority. While Whitman's focus on the traditions of status is fascinating and instructive, there is nevertheless a lingering suspicion, at least in this reader's mind, that the reformist drive for mild punishments that swept both sides of the Atlantic and lives on still in Europe is, at least in part, a product of cultural influences specific to the 20th century.

Not only is there less at stake in the attack on Foucault than Whitman imagines, but the dismissal of Foucault also leads Whitman to

7 FOUCAULT, Discipline (Fn. 4) 216.

forego the opportunity to find support for his thesis in Foucault's rich oeuvre. There is no doubt that Whitman's wonderful history of the practice of mild punishment illuminates Foucault's treatment of the gentle way of punishment – and would be illuminated by it as well. Similarly, Whitman's discussion of the historical roots of American harshness – certainly the thinnest section of his book – would have benefited from an at least cursory engagement with

Foucault's work on prisons and the rise of coercive forms of disciplinary punishment. If Whitman had merely chastised Foucault for ignoring particular cultural differences in his histories, he would have had good grounds. By so virulently degrading Foucault to the point of exclusion and ostracism, however, Whitman, in the end, harms himself as much as his target.

**Roger Berkowitz**

## Traum und Trauma\*

»Weimar« war die am häufigsten gebrauchte Chiffre im Selbstfindungsprozess der Deutschen nach 1945. Dort wollte man wieder »anknüpfen«, aber auch lernen, was vermieden werden sollte. Weimar, das waren Nationalversammlung und Verfassungsgebung, die »goldenen Zwanziger«, die Inflation, die Blockierung der Politik, der »Parteienstaat«, die Koalition der »Systemfeinde«, das war leuchtendes Vorbild, aber auch Chaos und Vorhölle zum NS-Staat. Christoph Gusy hat auf seiner Bielefelder Tagung daraus die Frage formuliert, wie die frühe Bundesrepublik mit Traum und Trauma von »Weimar« umgegangen ist, wie sie die Aneignung von Historie betrieben und in Politik umgesetzt hat. Auf diese Fragen antworten zunächst Wolfram Pyta mit einem souveränen Überblick über den jahrzehntelangen schrittweisen Prozess der Historisierung von Weimar, sodann Elke Seefried über die Grübeleien der Exilpolitiker, was »falsch gelaufen« und künftig zu vermeiden sei – überraschend antiparlamentarische und autoritäre Grübeleien übrigens. Es folgt

ein Porträt von »Theodor Heuss' Wahrnehmung und Deutung der Weimarer Republik« (Ulrich Baumgärtner), ein Gruppenbild der ordoliberalen Ökonomen, die mit ihrer Vorstellung vom starken Staat ziemlich nahe am NS-Staat operierten, die aber auch die Bundesrepublik nicht wirklich beeinflussen konnten, eben weil diese nie ein starker Staat geworden ist (Dieter Haselbach). Wie die Ökonomen rangen auch die durch die Emigration dezimierten Politologen um die Selbstfindung ihres Fachs in ständigem Bezug auf »Weimar« (Roland Lhotta), und die Philosophen schrieben christliche, existentialistische und phänomenologische Philosophien fort oder suchten dann den verlorenen Anschluss an den Westen (Reinhard Mehring). Je offener und pluralistischer die Bundesrepublik wurde, desto mehr rückte man ab von geschlossenen Wertsystemen, favorisierte eher die Verfahren als die Inhalte, etwa in der Diskurstheorie. Das war und ist tatsächlich eine Wiederaufnahme der wertrelativistischen Seite von »Weimar«. Was aber, so fragt Hans Boldt am Ende des Bandes, wenn

\* CHRISTOPH GUSY (Hg.), Weimars lange Schatten – »Weimar« als Argument nach 1945, Baden-Baden: Nomos 2003, 540 S., ISBN 3-8229-0431-X